
Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	<i>Credible Fear</i>
Rev. Date	February 28, 2014
Lesson Description	The purpose of this lesson is to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture using the credible fear standard.
Terminal Performance Objective	The Asylum Officer will be able to correctly make a credible fear determination consistent with the policies, procedures, and regulations that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.
Enabling Performance Objectives	<ol style="list-style-type: none">1. Identify which persons are subject to expedited removal. (ACRR7)(OK4)(ACRR2)(ACRR11)(APT2)2. Examine the function of credible fear screening. (ACRR7)(OK1)(OK2)(OK3)3. Define the standard of proof required to establish a credible fear of persecution. (ACRR7)4. Identify the elements of “torture” as defined in the <i>Convention Against Torture</i> and the regulations that are applicable to a credible fear of torture determination (ACRR7)5. Describe the types of harm that constitute “torture” as defined in the <i>Convention Against Torture</i> and the regulations. (ACRR7)6. Define the standard of proof required to establish a credible fear of torture. (ACRR7)7. Identify the applicability of bars to asylum and withholding of removal in the credible fear context. (ACRR3)(ACRR7)
Instructional Methods	Lecture, practical exercises
Student Materials/References	Lesson Plan; Procedures Manual, Credible Fear Process (Draft, Nov., 2003); INA § 208; INA § 235; 8 C.F.R. §§ 208.16-18; 8 C.F.R. § 208.30; 8 C.F.R. § 235.3. Credible Fear Forms: Form I-860 : Notice and Order of Expedited Removal; Form I-867-A&B : Record of Sworn Statement; Form I-869 : Record of Negative Credible Fear Finding and Request for Review by

Immigration Judge; **Form I-863**: Notice of Referral to Immigration Judge; **Form I-870**: Record of Determination/Credible Fear Worksheet; **Form M-444**: Information about Credible Fear Interview

Method of Evaluation

Written test

Background Reading

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

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

CRITICAL TASKS

Critical Tasks

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

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Presentation

References

I. INTRODUCTION

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

II. BACKGROUND

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

INA § 235(a)(2); § 235(b)(1).

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

INA § 235(a)(1).

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

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

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

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

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

A. Aliens Subject to Expedited Removal

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

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

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

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

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

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

8 C.F.R. § 1.2; see also Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (Nov. 13, 2002).

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

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

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

This category does not include those who were given advance parole as described in Subsection B (7) below.

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

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

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

Customs and Border Protection, *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48877 (Aug. 11, 2004).

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

The following categories of aliens are exempt from expedited removal:

1. Stowaways

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

INA § 235(a)(2).

2. Cubans citizens or nationals

INA § 235(b)(1)(F) (Cubans arriving at a POE by air); Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (Cubans arriving by sea); Customs and Border Protection, *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48877 (Cubans apprehended within 100 air miles of the border and within 14 days of entry without inspection); Customs and Border Protection, *Treatment of Cuban Asylum Seekers at*

3. Persons granted asylum status under INA Section 208 8 C.F.R. § 235.3(b)(5)(iii).
 4. Persons admitted to the United States as refugees under INA Section 207 8 C.F.R. § 235.3(b)(5)(iii).
 5. Persons admitted to the United States as lawful permanent residents 8 C.F.R. § 235.3(b)(5)(ii).
 6. Persons paroled into the United States prior to April 1, 1997
 7. Persons paroled into the United States pursuant to a grant of advance parole that the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States
 8. Persons denied admission on charges other than or in addition to INA Section 212(a)(6)(C) or 212(a)(7) 8 C.F.R. § 235.3(b)(3).
 9. Persons applying for admission under INA Section 217, Visa Waiver Program for Certain Visitors ("VWP") 8 C.F.R. § 235.3(b)(10); *see also Matter of Kanagasundram*, 22 I&N Dec. 963 (BIA 1999); Procedures Manual, Credible Fear Process (Draft, Nov., 2003), sec. IV.L., "Visa Waiver Permanent Program"; and Pearson, Michael A. Executive Associate Commissioner, Office of Field Operations. Visa Waiver Pilot Program (VWPP) Contingency Plan, Wire #2 (Washington DC: April 28, 2000).
- This exemption includes nationals of non-VWP countries who attempt entry by posing as nationals of VWP countries.
- Individuals seeking admission under the Guam and Northern Mariana Islands visa waiver program under INA section 212(l) are not exempt from expedited removal provisions of the INA.

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

8 C.F.R. § 208.30(e)(6).

C. Historical Background

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

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

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

3. In 1996, the INA was amended to allow for the expedited removal of certain inadmissible aliens, who would not be entitled to an immigration hearing or further review unless they were able to establish a credible fear of persecution. At the outset, expedited removal was mandatory for "arriving aliens," and the Attorney General was given the discretion to designate applicability to certain other aliens who have not been admitted or paroled and who have not established to the satisfaction of an immigration officer continuous physical presence in the United States for the two-year period immediately prior to the date of the inadmissibility determination. Initially, expedited removal was only applied to "arriving aliens."

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

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

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

5. Designation of other groups of aliens for expedited removal
 - a. In November 2002, the Department of Justice expanded the application of the expedited removal provisions of the INA to certain aliens who arrived in the United States by sea, who have not been admitted or paroled and who have not been physically present

Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the*

in the United States continuously for the two year-period prior to the inadmissibility determination.

Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).

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

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

6. The expedited removal provisions of the INA require that all aliens subject to expedited removal be detained through the credible fear determination until removal, unless found to have a credible fear of persecution, or a credible fear of torture. However, the governing regulation permits the parole of an individual in expedited removal, in the exercise of discretion, if such parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective. After a positive credible fear determination, Immigration and Customs Enforcement (ICE) may exercise discretion to parole the alien out of detention, and has issued pertinent guidance on consideration of parole for arriving aliens found to have a credible fear. Therefore, the credible fear interview process also provides a mechanism for DHS to gather information that may be used by ICE to make parole determinations.

INA § 235(b)(1)(B)(iii)(IV).

8 C.F.R. § 235.3(b)(2)(iii); see also, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," ICE Directive No. 11002.1 (effective Jan. 4, 2010).

III. FUNCTION OF CREDIBLE FEAR SCREENING

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

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

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

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

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

A. Definition of Credible Fear of Persecution

According to statute, the term credible fear of persecution means that “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208 [of the INA].”

INA § 235(b)(1)(B)(v).

B. Definition of Credible Fear of Torture

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

8 C.F.R. § 208.30(e)(3).

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

A. Burden of Proof / Testimony as Evidence

See RAI0 Training Module, *Evidence*.

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

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

fully develop the record to support a legally sufficient determination.

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

INA § 208(b)(1)(B)(ii).

According to the INA, the applicant's testimony may be sufficient to sustain the applicant's burden of proof if it is "credible, is persuasive, and refers to specific facts." To give effect to the plain meaning of the statute and each of the terms therein, an applicant's testimony must satisfy all three prongs of the "credible, persuasive, and ... specific" test in order to establish his or her burden of proof without corroboration. Therefore, the terms "persuasive" and "specific facts" must have independent meaning above and beyond the first term "credible." An applicant may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. "Specific facts" are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the asylum officer must distinguish between fact and opinion testimony and determine how much weight to assign to each of the two forms of testimony.

INA § 208(b)(1)(B)(ii).

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

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

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

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

8 C.F.R. §§ 208.16(c)(3)(iii), (iv).

B. Credible Fear Standard of Proof: Significant Possibility

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

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

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

In fact, the showing required to meet the “significant possibility” standard is higher than the “not manifestly unfounded” screening standard favored by the Office of the United Nations High Commissioner for Refugees (“UNHCR”) Executive Committee.

A claim that has no possibility, or only a minimal or mere possibility, of success, would not meet the “significant possibility” standard.

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

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

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

See U.S. Committee on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal – Report on Credible Fear Determinations*, pg. 170 (Feb. 2005); UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, pp. 438-40, 6th Ed., June 2011. “Not manifestly unfounded” claims are (1) “not clearly fraudulent” and (2) “not related to the criteria for the granting of refugee status.” 142 CONG. REC. H11071, H11081 (daily ed. Sept. 25, 1996) (statement of Rep. Hyde) (noting that the credible fear standard was “redrafted in the conference document to address fully concerns that the ‘more probable than not’ language in the original House version

was too restrictive”).

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

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

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

Id.

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

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

C. Important Considerations in Interpreting and Applying the Standard

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

For instance, in order to establish a credible fear of torture, an applicant must show a “significant possibility” that he or she could establish eligibility for protection under the Convention Against Torture, i.e. a “significant possibility” that it is “more likely than not” that he or she would be tortured if removed to the proposed country of removal. This is a higher standard to meet than for an applicant

attempting to establish a “significant possibility” that he or she could establish eligibility for asylum based upon a well-founded fear of persecution on account of a protected characteristic, i.e. a “significant possibility” that he or she could establish a “reasonable possibility” of suffering persecution on account of a protected characteristic if returned to his or her home country.

2. Questions as to how the standard is applied should be considered in light of the nature of the standard as a *screening standard* to identify persons who could qualify for asylum or protection under the Convention against Torture.
3. When there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination. The questions at issue can be addressed in a full hearing before an immigration judge.
4. In determining whether the alien has a credible fear of persecution or a credible fear of torture, the asylum officer shall consider whether the applicant’s case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.
5. Similarly, where there is:
 - a. disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; or,
 - b. the claim otherwise raises an unresolved issue of law; **and,**
 - c. there is no DHS or Asylum Division policy or guidance on the issue, then

8 C.F.R. § 208.30(e)(4).

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

D. Identity

1. An applicant must establish his or her identity with a reasonable degree of certainty. Credible testimony alone can establish identity.

See RAIO Training Module,
Refugee Definition

2. In many cases, an applicant will not have documentary proof of identity or nationality. The officer must elicit information in order to establish that there is a significant possibility that the applicant will be able to credibly establish his or her identity in a full asylum or withholding of removal hearing. Documents such as birth certificates and passports are accepted into evidence if available. The officer may also consider information provided by ICE or Customs and Border Protection (CBP).
3. After the credible fear interview, the information obtained by the asylum officer may be used by other DHS officials in determining whether to parole a detained alien. Immigration officials in charge of detaining the alien must be satisfied that identity is established before granting parole.

See "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," ICE Directive No. I1002.1 (effective Jan. 4, 2010).

VI. CREDIBILITY

A. Credibility Standard

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

INA § 235 (b)(1)(B)(v).

To meet the credible fear standard, an applicant must establish that there is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing. This means that there is "a substantial and realistic possibility" that the applicant will be found credible in a full hearing.

B. Evaluating Credibility in a Credible Fear Interview

1. General Considerations
 - a. Because the credible fear determination is a screening process, the asylum officer does not make the final determination as to whether the applicant is credible. The immigration judge makes that determination in the full hearing on the merits of the claim.
 - b. The asylum officer must gather sufficient information to determine whether the alien has a credible fear of persecution or torture. The applicant's credibility

See RAIO Training Module, Credibility.

should be evaluated (1) only after all information relevant to the claim is elicited and (2) in light of “the totality of the circumstances, and all relevant factors.”

INA § 208(b)(1)(B)(iii).

- c. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The purpose of evaluating the credibility of an applicant is solely to determine eligibility for a full asylum or withholding hearing. The asylum officer’s personal opinions or moral views regarding an applicant should not affect the officer’s decision.
- d. As long as there is a significant possibility that the applicant could establish in a full hearing that the claim is credible, unresolved questions regarding an applicant’s credibility should not be the basis of a negative credible fear determination.

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

See RAIO Training Module, *Credibility*.

a. *Identifying Credibility Concerns*

Section 208 of the Act provides a non-exhaustive list of factors that may be used in a credibility determination in the asylum context. These include: internal consistency, external consistency, plausibility, demeanor, candor, and responsiveness.

INA § 208(b)(1)(B)(iii); See also, RAIO Training Module, *Credibility*, for a more detailed discussion of these factors.

An adjudicator may base a negative credible fear determination on lack of credibility. A general lack of detail is another commonly accepted basis for an adverse credibility determination in the asylum context, though the limited scope of the credible fear screening interview may make such a finding less prevalent in the credible fear process.

While demeanor, candor, and responsiveness may be taken into account in the asylum context, they may be of limited reliability in the credible fear context because of cross-cultural factors, effects of trauma, and the nature of non-adversarial interviews. The nature of expedited removal and the credible fear interview process—including detention, relatively brief and often telephonic interviews, etc.—further limits the reliability of and ability to evaluate these three factors in the credible fear context. Therefore,

demeanor, candor, and responsiveness will normally not be significant factors in credible fear determinations.

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

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

C. Assessing Credibility in Credible Fear

1. In assessing credibility, the officer must evaluate whether there is a significant possibility that the applicant's testimony could be found credible in a full hearing before an immigration judge. The officer must consider the totality of the circumstances and all relevant factors when evaluating credibility.
2. When considering the totality of the circumstances in determining whether there is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing, the following factors must be considered as they may impact an applicant's ability to present his or her claim:

- (i) trauma the applicant has endured;
- (ii) passage of a significant amount of time since the described events occurred;
- (iii) certain cultural factors, and the challenges inherent in cross-cultural communication;
- (iv) detention of the applicant;
- (v) problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other difference that may affect

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

Asylum officers must ensure that persons with potential biases against applicants on the grounds of race, religion, nationality, membership in a

- the objectivity of the interpreter or the applicant's comfort level; and
- (vi) unfamiliarity with speakerphone technology, the use of an interpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.

particular social group, or political opinion are not used as interpreters. *See International Religious Freedom Act of 1998, 22 U.S.C. § 6473(a);* RAIO Training Module, *IRFA (International Religious Freedom Act)*.

3. The asylum officer must have followed up on all credibility concerns during the interview by making the applicant aware of each concern, and the reasons the applicant's testimony is in question. The applicant must have been given an opportunity to address and explain all such concerns during the credible fear interview.
4. Trivial or minor inconsistencies will not be sufficient to find an applicant not credible in the credible fear context. These inconsistencies can be explored by the immigration judge in the full asylum and withholding hearing. Material or significant inconsistencies that have not been adequately resolved by the applicant during the credible fear interview may be sufficient to support a negative credible fear determination.
5. Inconsistencies between the applicant's initial statement to the CBP or ICE official and his or her testimony before the asylum officer must be probed during the interview. Such inconsistencies may provide support for a negative credibility finding if, taking into account an explanation offered by the applicant, there is not a significant possibility that the applicant could establish in a full hearing that the claim is credible.

See 8 C.F.R. § 235.3(b)(4) (stating that if an applicant indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the "examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern," and should then refer the alien for a credible fear interview).

The sworn statement completed by CBP (Form I-867A/B) is not intended, however, to record detailed information about any fear of persecution or torture. The interview statement is intended to record whether or not the individual has a fear, not the nature or details surrounding that fear. However, in some cases, the asylum officer may find that the CBP officer did, in fact, gather additional information from the applicant regarding the nature of his or her claim. In such cases, the applicant's prior statements can inform the asylum officer's line of questioning in the credible fear interview, and any inconsistencies between these prior statements and the statements being made during the credible fear interview should be probed and

assessed.

A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien's statement to an inspector is taken when considering whether an applicant's later testimony is consistent with the earlier statement. Factors to keep in mind include: 1) whether the questions posed at the port of entry or place of apprehension were designed to elicit the details of an asylum claim, and whether the immigration officer asked relevant follow-up questions; 2) whether the alien was reluctant or afraid to reveal information during the first meeting with U.S. officials because of past abuse; and 3) whether the interview was conducted in a language other than the applicant's native language.

See Balasubramaniam v. INS, 143 F.3d 157 (3d Cir. 1998); *cf. Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) (discussing in detail the limitations inherent in the initial interview process, and holding that the BIA was entitled to rely on fundamental inconsistencies between the applicant's airport interview statements and his hearing testimony where the applicant was provided with an interpreter, and given ample opportunity to explain his fear of persecution in a careful and non-coercive interview).

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

If, after providing the applicant with an opportunity to explain or resolve any inconsistencies, the officer finds that there is a significant possibility the applicant could establish in a full hearing that there is a reasonable explanation for the inconsistencies, a positive credibility determination will generally be appropriate.

If, however, the applicant fails to provide an explanation for a substantial or material inconsistency, or the officer finds that there is not a significant possibility that the applicant could establish a reasonable explanation for the inconsistencies in a full hearing, a negative credible fear determination will generally be appropriate.

D. Documenting a Credibility Determination

1. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.
2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony found not credible, including the specific

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

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

VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION

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

A. General Considerations in Credible Fear

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

8 C.F.R. § 208.30(e)(2).

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

3. When an applicant does not claim to have suffered any past harm or where the evidence is insufficient to establish a significant possibility of past persecution under section

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

B. Past Persecution

See RAIO Training Module, Persecution.

1. Severity of Harm: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the harm the applicant experienced was sufficiently serious to amount to persecution.
 - a. There is no requirement that an individual suffer serious injuries to be found to have suffered persecution. However, the presence or absence of physical harm is relevant in determining whether the harm suffered by the applicant rises to the level of persecution.
 - b. Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.
 - c. Violations of “core” or “fundamental” human rights, prohibited by international law, may constitute harm amounting to persecution.
 - d. While less preferential treatment and other forms of discrimination and harassment generally are not considered persecution, discrimination or harassment may amount to persecution if the adverse practices accumulate or increase in severity to the extent that it leads to consequences of a substantially prejudicial nature. Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted, taking into account the individual circumstances of each case.
 - e. Generally, a brief detention, for legitimate law enforcement reasons, without mistreatment, will not constitute persecution. *Prolonged detention* is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Evidence of mistreatment during detention also may establish persecution.
 - f. To rise to the level of persecution, economic harm must be deliberately imposed and severe.

- g. Psychological harm alone may rise to the level of persecution. Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.
- h. Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.
- i. Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm is serious enough to amount to persecution, and also where the persecutor's motivation in harming the third party is to act against the applicant.

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

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

a. Nexus analysis requires officers to determine: (1) whether the applicant possesses or is perceived to possess a protected characteristic; and (2) whether the persecution or feared persecution is on account of that protected characteristic.

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

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

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

- d. Although the applicant bears the burden of proof to establish a nexus between the harm and the protected ground, asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Evidence of motive can be either direct or circumstantial. Reasonable inferences regarding the motivations of persecutors should be made, taking into consideration the culture and patterns of persecution within the applicant's country of origin and any relevant country of origin information, especially if the applicant is having difficulty answering questions regarding motivation.
- e. There is no requirement that the persecutor be motivated only by the protected belief or characteristic of the applicant. As long as there is a significant possibility that at least one central reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic, the applicant may establish the harm is "on account of" a protected characteristic in the credible fear context.
- f. Particular Social Groups: The area of law surrounding particular social groups is evolving rapidly, and it is important for asylum officers to be informed about current DHS and Asylum Division guidance, as well as current case law and regulatory changes.

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

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

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

- (i) First, the group must comprise individuals who share a common, immutable characteristic, which is either a characteristic that members cannot change or is a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it.
- (ii) Second, the group must be defined with particularity; it "must be defined by characteristics that provide a clear benchmark for

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

determining who falls within the group.”

- (iii) Third, the group must be socially distinct within the society in question. Social distinction involves examining whether “those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” Social distinction relates to society’s, not the persecutor’s, perception, though the persecutor’s perceptions may be relevant to social distinction

Id. at 238.

Id. at 242.

Certain circuit courts have rejected the Board’s application of a social distinction requirement in cases before them on petition for review. *See Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). Those decisions, however, question the way the Board applied social visibility in those cases and do not preclude the interpretation of precedent as imposing a social distinction requirement.

3. Persecutor: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the entity that harmed the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.
- a. Evidence that the government is unwilling or unable to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.
- b. No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. A determination of whether a government is unable to

See RAI0 Training Module, *Persecution*.

control the entity that harmed the applicant requires evaluation of country of origin information and the applicant's circumstances. A government in the midst of a civil war or one that is unable to exercise its authority over portions of the country may be unable to control the persecutor in areas of the country where its influence does not extend. In order to establish a significant possibility of past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis. The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

- c. To demonstrate that the government is unable or unwilling to protect an applicant, the applicant must show that he or she sought the protection of the government, or provide a reasonable explanation as to why he or she did not seek that protection. Reasonable explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations or that the applicant would have increased his or her risk by affirmatively seeking protection. In determining whether an applicant's failure to seek protection is reasonable, asylum officers should consult and consider country of origin information, in addition to the applicant's testimony.

C. Well-founded Fear of Persecution

See RAIO Training Module, Well Founded Fear.

- 1. When an applicant does not claim to have suffered any past harm or where the evidence is insufficient to establish a significant possibility of past persecution on account of a protected characteristic under section 101(a)(42)(A) of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution under section 208 of the Act.
- 2. To establish a well-founded fear of persecution on account of a protected characteristic, an applicant must show that he or she has: 1) a subjective fear of persecution; and 2) that the fear has an objective basis.
 - a. The applicant satisfies the subjective element if he or

See RAIO Training Module,

she credibly articulates a genuine fear of return. Fear has been defined as an apprehension or awareness of danger.

Well-Founded Fear.

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

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

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

- a. *Possession* (or imputed possession of a protected characteristic)
 - (i) The applicant must possess, or be believed to possess, a protected characteristic that the persecutor seeks to overcome. The BIA later modified this definition and explicitly recognized that a “punitive” or “malignant” intent is not required for harm to constitute persecution. The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.
 - (ii) This analysis requires officers to determine: (1) whether the applicant possesses or is perceived to possess a protected characteristic; and (2) whether the persecution or feared persecution is on account of that protected characteristic.
 - (iii) For cases where no nexus to a protected ground is immediately apparent, the asylum officer in credible fear interviews must ask questions related to all five grounds to ensure that no nexus issues are overlooked.

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

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- (iv) Asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Officers should make reasonable inferences, keeping in mind the difficulty, in many cases, of establishing with precision a persecutor's motives.
 - (v) To determine whether the applicant belongs to a viable particular social group where there are no precedent decisions on point, asylum officers must analyze the facts using the BIA test for evaluating whether a group meets the definition of a particular social group.
- b. *Awareness* (the persecutor is aware or could become aware the applicant possesses the characteristic)
- (i) Relevant lines of inquiry include: how someone would know or recognize that the applicant had the protected characteristic and how the persecutor would know that the applicant had returned to his or her country.
 - (ii) The applicant is not required to hide his or her possession of a protected characteristic in order to avoid awareness.
- c. *Capability* (the persecutor has the capability to persecute the applicant)
- (i) If the persecutor is a governmental entity, asylum officers should consider the extent of the government's power or authority and whether the applicant can seek protection from another government entity within the country.
 - (ii) If the persecutor is a non-governmental entity, relevant factors include: the extent to which the government is able or willing to control the entity, whether the government is able to or would want to protect the applicant; whether the applicant reported the non-governmental actor to the police; and whether the police or government could or would offer any protection to the applicant.
 - (iii) The extent to which the persecutor has the ability

to enforce his or her will throughout the country is also relevant when evaluating whether the persecutor is capable of persecuting the applicant.

- d. *Inclination* (the persecutor has the inclination to persecute the applicant)
- (i) Factors to consider when evaluating inclination include: any previous threats or harm from the persecutor, the persecutor's treatment of individuals similarly situated to the applicant who have remained in the home country or who have returned to the home country, and any time passed between the last threats received and flight from his or her home country.
 - (ii) For both capability and inclination, if the applicant is unable to answer questions regarding whether the persecutor is capable or inclined to persecute him or her, the asylum officer may use country of origin information to help determine the persecutor's capability and inclination to persecute the applicant.

4. Pattern or Practice

- a. The applicant need not show that he or she will be singled out individually for persecution, if the applicant shows a significant possibility that he or she could establish:
- (i) There is a pattern or practice of persecution on account of any of the protected grounds of a group of persons similarly situated to the applicant.
 - (ii) The applicant is included in and is identified with the persecuted group, such that a reasonable person in the applicant's position would fear persecution.

See RAIO Training Module,
Well Founded Fear.

8 C.F.R. § 208.13(b)(2)(iii).

5. Persecution of Individuals Closely Related to the Applicant

The persecution of family members or other individuals closely associated with the applicant may provide objective evidence that the applicant's fear of future persecution is well-founded, even if there is no

pattern or practice of persecution of such individuals. On the other hand, continued safety of individuals similarly situated to the applicant may, in some cases, be evidence that the applicant's fear is not well-founded. Furthermore, the applicant must establish some connection between such persecution and the persecution the applicant fears.

6. Threats without Harm

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

7. Applicant Remains in Country after Threats or Harm

- a. A significant lapse of time between the occurrence of incidents that form the basis of the claim and an applicant's departure from the country may be evidence that the applicant's fear is not well-founded. The lapse of time may indicate that the applicant does not possess a genuine fear of harm or the persecutor does not possess the ability or the inclination to harm the applicant.
- b. However, there may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or being harmed, including: lack of funds to arrange for departure from the country and time to arrange for the safety of family members, belief that the situation would improve, promotion of a cause within the home country, and temporary disinclination by the persecutor to harm the applicant.

8. Return to Country of Persecution

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

does not necessarily defeat an applicant's claim.

9. Internal Relocation

- a. In cases in which the feared persecutor is a government or is government-sponsored, there is a presumption that there is no reasonable internal relocation option. This presumption may be overcome if a preponderance of the evidence shows that, under all the circumstances, the applicant could avoid future persecution by relocating to another part of the applicant's country and that it would be reasonable to expect the applicant to relocate. 8 C.F.R. § 208.13(b)(2)(ii); 8 C.F.R. § 208.13(b)(3)(ii).
- b. If the persecutor is a non-governmental entity, there must be a significant possibility that the applicant can demonstrate that there is no reasonable internal relocation option.
- c. In assessing an applicant's well-founded fear and internal relocation, apply the following two-step approach:
- (i) Determine if an applicant could avoid future persecution by relocating to another part of the applicant's home country. If the applicant will not be persecuted in another part of the country, then:
 - (ii) Determine if an applicant's relocation, *under all the circumstances*, would be reasonable.
- d. In determining the reasonableness of internal relocation in relation to a well-founded fear claim, asylum officers should consider the following factors:
- (i) Whether the applicant would face other serious harm that may not be inflicted on account of one of the five protected grounds in the refugee definition, but is so serious that it equals the severity of persecution;
 - (ii) Any ongoing civil strife such as a civil war occurring in parts of the country;
 - (iii) Administrative, economic, or judicial infrastructure that may make it very difficult for an individual to live in another part of the country;
 - (iv) Geographical limitations that could present

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- barriers to accessing a safe part of a country or where an individual would have difficulty surviving due to the geography;
- (v) Social and cultural constraints such as age, gender, health, and social and familial ties or whether the applicant possess a characteristic, such as a particular language or a unique physical appearance, that would readily distinguish the applicant from the general population and affect his or her safety in the new location; and
 - (vi) any other factors specific to the case that would make it unreasonable for the applicant to relocate should be considered.

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

D. Multiple Citizenship

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

See RAI0 Training Module, Refugee Definition, for more detailed information about determining an applicant's nationality, dual nationality, and statelessness.

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

In addition, if the applicant demonstrates a credible fear with respect to another country, aside from the country of citizenship or nationality, in which the applicant was firmly resettled prior to arriving in the United States, the applicant should be referred to the Immigration Judge for a full proceeding, since he or she may be removed to that country as well.

E. Statelessness/Last Habitual Residence

The asylum officer does not need to make a determination as to whether an applicant is stateless or what the applicant's country of last habitual residence is. The asylum officer should determine whether the applicant has a credible fear of persecution in any country to which the applicant might be returned.

If the applicant demonstrates a credible fear with respect to any country of proposed removal, regardless of citizenship or habitual residence, the applicant should be referred to the Immigration Judge for a full proceeding since he or she may be eligible for withholding of removal with respect to that country.

VIII. ESTABLISHING A CREDIBLE FEAR OF TORTURE

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

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

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

A. Definition of Torture

8 C.F.R. § 208.18(a) defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining

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

from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

Determinations.

B. General Considerations

1. U.S. regulations require that several elements be met before an act is found to constitute torture. Because credible fear of torture interviews are employed as “screening mechanisms to quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch,” parts of the torture definition that require complex legal and factual analyses may be more appropriately considered in a full hearing before an immigration judge.

8 C.F.R. §§ 208.18(a)(1-8).

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

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

See section VI., *Credibility*, above, regarding significant possibility of establishing credibility.

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

8 C.F.R. §§ 208.18(a)(5).

b. the harm constitutes severe pain or suffering;

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

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

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

8 C.F.R. §§ 208.18(a)(6).

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

8 C.F.R. §§ 208.18(a)(3).

C. Specific Intent

-
1. For an act to constitute torture, the applicant must establish that it is more likely than not that the act is specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain and suffering is not torture under the Convention definition. 8 C.F.R. §§ 208.18(a)(1), (5).
 2. The specific intent requirement is met when the evidence shows that an applicant may be specifically targeted for punishment or intentionally singled out for harsh treatment that may rise to the level of torture.
 3. The Convention Against Torture does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

D. Degree of Harm

1. For harm to constitute torture, the applicant must establish that it is more likely than not that the harm rises to the level of severity of torture.
2. Torture requires severe pain or suffering, whether physical or mental. "Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. Therefore, certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture. 8 C.F.R. § 208.18(a)(1); 8 C.F.R. § 208.18(a)(2).
3. Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. Whether harm constitutes torture often depends on the severity and cumulative effect.
4. For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:
 - a. The intentional infliction or threatened infliction of severe physical pain or suffering; 8 C.F.R. § 208.18(a)(4).
 - b. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt

profoundly the senses or the personality;

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

E. Identity of the Torturer

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

8 C.F.R. § 208.18(a)(1).

- 2. Harm by a Public Official

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

- a. Generally, in the credible fear context, if there is a significant possibility the applicant can establish that it is more likely than not that he or she was or would be harmed by a public official, the applicant has met the public official requirement for a credible fear of torture.
- b. The term “public official” is broader than the “government” or “police” and can include any person acting in an official capacity or under color of law. A public official can include any person acting on behalf of a national or local authority.

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

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

- d. A public official is acting in an official capacity when “he misuses power possessed by virtue of law and

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

made possible only because he was clothed with the authority of law.” To establish whether a public official is acting in under the color of law, the applicant must establish a nexus between the public official’s authority and the harmful conduct inflicted on the applicant by the public official. Such an inquiry is fact intensive and includes considerations like “whether the officers are on duty and in uniform, the motivation behind the officer’s actions and whether the officers had access to the victim because of their positions, among others.” The Fifth Circuit also addressed “acting in an official capacity” by positing “[w]e have recognized on numerous occasions that acts motivated by an officer’s personal objectives are ‘under color of law’ when the officer uses his official capacity to further those objectives.”

Id. at 901.

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

3. Acquiescence

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

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

8 C.F.R. § 208.18(a)(7).

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

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

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

- c. There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture. 8 C.F.R. § 208.18(a)(7).
- d. In the context of government consent or acquiescence, the court in *Ramirez-Peyro v. Holder* reiterated its prior holding that “use of official authority by low level officials, such a[s] police officers, can work to place actions under the color of law even when they act without state sanction.” Therefore, even if country conditions show that a national government is fighting against corruption, that fact will not necessarily preclude a finding of consent/acquiescence by a local public official. *Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009).
- e. Evidence that private actors have general support in some sectors of the government, without more, may be insufficient to establish that the officials would acquiesce to torture by the private actors. *See Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002).
4. Consent or Acquiescence vs. Unable or Unwilling to Control
- a. The public official requirement under CAT is distinct from the inquiry into a government’s ability or willingness to control standard applied under the refugee definition.
- b. A finding that a government is unable to control a particular person(s) is not dispositive of whether a public official would instigate, consent or acquiesce to the feared torture. *Reyes-Sanchez v. U.S. Atty. Gen.*, 369 F.3d 1239 (11th Cir. 2004) (“That the police did not catch the culprits does not mean that they acquiesced in the harm.”)
- c. A more relevant query is whether or not a public official who has a legal duty to intervene would be unwilling to do so. In these circumstances, the public official would also have to be aware or deliberately avoid being aware of the harm in order for the action or inaction to qualify as acquiescence under CAT.
- d. The willingness in certain levels of a government to combat harm is not necessarily responsive to the question of whether torture would be inflicted with the consent or acquiescence of a public official. In *De La Rosa v. Holder*, the Second Circuit stated, “[i]n short, it is not clear to this Court why the preventative efforts

of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’”

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

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

F. Past Harm

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

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

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

G. Internal Relocation

1. Regulations require immigration judges to consider evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured, in assessing whether the applicant is eligible for withholding or deferral of removal under the Convention

8 C.F.R. § 208.16(c)(3)(ii).

Against Torture. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in credible fear of torture determinations.

2. Under the Convention Against Torture, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of relocation. Therefore, as the Ninth Circuit wrote in *Hasan v. Ashcroft*, “in the CAT context, unlike asylum, the petitioners have the burden of presenting evidence to show that internal relocation is not a possibility.” In contrast, “in the asylum context, once the petitioner has established past persecution on account of an enumerated ground, the burden is on the government to prove that the applicant could avoid persecution by relocating to another part of the country and that it would be reasonable to expect her to do so.”
3. Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the credible fear context.
4. Unlike the persecution context, the regulations implementing CAT do not explicitly reference the need to evaluate the reasonableness of internal relocation. Nonetheless, the regulations provide that “all evidence of relevant to the possibility of future torture shall be considered...” Therefore, asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

8 C.F.R. § 208.16(c)(3)(ii).

Hasan v. Ashcroft,
380 F.3d 1114, 1123 (9th
Cir. 2004).

Id. at 1122.; 8 C.F.R. §
208.13(b)(3)(ii).

See e.g., Comollari v.
Ashcroft, 378 F.3d 694, 697-
8 (7th Cir. 2004).

8 C.F.R. § 208.16(c)(3)(iv).

8 C.F.R. § 208.13(b)(3);
See RAI0 Training Module,
Well Founded Fear.

IX. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

Please consult the appropriate RAI0 Training Module for a full discussion on mandatory bars.

A. No Bars Apply

8 C.F.R. § 208.30(e)(5).

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

B. Asylum Officer Must Elicit Testimony

INA § 208(b)(2); INA §

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

241(b)(3).

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

8 C.F.R. § 208.17(a).

Information should be elicited about whether the applicant:

1. participated in the persecution of others;
2. has been convicted by a final judgment of a particularly serious crime (including an aggravated felony), and constitutes a danger to the community of the US;
3. is a danger to the security of the US;
4. is subject to the inadmissibility or deportability grounds relating to terrorist activity as identified in INA section 208(b)(2)(A)(v);
5. has committed a serious nonpolitical crime;
6. is a dual or multiple national who can avail himself or herself of the protection of a third state; and,
7. was firmly resettled in another country prior to arriving in the United States.

INA § 208(b)(2)(B)(i).

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

C. Flagging Potential Bars

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

Procedures Manual, Credible Fear Process (Draft, Nov., 2003); Joseph E. Langlois, Asylum Division, Refugee, Asylum and International Operations Directorate. *Revised Credible Fear Quality Assurance Review Categories and Procedures*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 December 2008).

may use their discretion to forward the case to HQ for review.

X. OTHER ISSUES

A. Treatment of Dependents

8 C.F.R. § 208.30(b)

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

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

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

B. Attorneys and Consultants

8 C.F.R. § 208.30(d)(4)

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. Asylum officers should determine whether or not an applicant wishes to have a consultant present at the credible fear interview.

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

8 C.F.R. § 208.30(d)(4);
Procedures Manual, Credible
Fear Process (Draft, Nov.,
2003).

addressed in a full hearing before an immigration judge. Similarly, the asylum officer shall consider whether the applicant's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

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

D. Credibility

To meet the credible fear standard, an applicant must establish that there is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing.

E. Establishing a Credible Fear of Persecution

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

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

F. Establishing a Credible Fear of Torture

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

eligibility for asylum. .

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

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

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

G. Other Issues

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

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

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. A consultant

may be a relative, friend, clergy person, attorney, or representative.

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



U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

TRAINING MODULE

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

**DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON
PAST PERSECUTION**

Training Module

MODULE DESCRIPTION

This module discusses the definition of persecution and the determination as to whether an act constitutes persecution.

TERMINAL PERFORMANCE OBJECTIVE(S)

When adjudicating a request for asylum or refugee resettlement, you will correctly apply the law to determine eligibility for asylum in the United States or resettlement in the United States as a refugee.

ENABLING PERFORMANCE OBJECTIVES

1. Distinguish between government and non-government agents of persecution.
2. Explain factors to consider in determining whether an act(s) is sufficiently serious to constitute persecution.
3. Explain factors to consider when deciding whether an applicant is eligible for asylum or refugee status based on past persecution alone.

INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Group and individual practical exercises

METHOD(S) OF EVALUATION

- Multiple-choice exam

REQUIRED READING

- 1.
- 2.

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. UNHCR Handbook
2. Matter of Chen, 20 I&N Dec. 16 (BIA 1989)
3. Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (en banc)
4. Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).
5. Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007)
6. Stanojkova v. Holder, 645 F.3d 943 (7th Cir. 2011)
7. Haider v. Holder, 595 F.3d 276, 288 (6th Cir. 2010).

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR6	Knowledge of U.S. case law that impacts RAIO (4)
ILR19	Knowledge of criteria for past persecution (4)
ILR20	Knowledge of the criteria for refugee classification (4)
ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF)(4)
ILR23	Knowledge of bars to immigration benefits (4)

DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence (5)
DM3	Skill in applying eligibility requirements to information and evidence (5)
DM5	Skill in analyzing complex issues to identify appropriate responses or decisions (5)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
1/20/14	Throughout document	Fixed links, added recent case law examples	RAIO Training

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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.

I INTRODUCTION

This is one in a series of modules on eligibility for asylum and refugee status. This module provides an overview of the definition of persecution and eligibility based on past persecution.

Other RAIO Training modules on asylum and refugee eligibility discuss:

- the basic elements of the refugee definition (*Refugee Definition*)
- eligibility based on fear of future persecution (*Well-Founded Fear*)
- the motive of the persecutor and the five protected grounds in the refugee definition (*Nexus and the Five Protected Grounds; Nexus: Particular Social Group*)
- the burden of proof and evidence (*Evidence*)
- the role of discretion (*Discretion*)
- participation in the persecution of others on account of a protected ground (*Analyzing the Persecutor Bar*)
- entry into and permanent status in a third country (*Firm Resettlement*)

In addition, for asylum adjudications, one of the Asylum Lesson Plans discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO Training module, *Grounds of Inadmissibility* discusses reasons an applicant may be inadmissible to the United States and the availability of waivers. The RAD *Access* module discusses available means to access the U.S. Refugee Admissions Program.

2 PAST PERSECUTION

An applicant may establish that he or she is a refugee based on either past persecution or a well-founded fear of future persecution.¹

The regulations implementing USCIS's discretionary authority to grant asylum, generally require a well-founded fear of persecution. If an applicant establishes past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.² Well-founded fear is presumed unless the officer establishes that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality.³ If the persecutor is the government or is government-sponsored or the applicant has been persecuted in the past, there is a rebuttable presumption that internal relocation is not reasonable, unless you establish by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.⁴ Asylum applicants who suffered past persecution but who no longer have a well-founded fear of future persecution may be granted asylum based on being unable or unwilling to return to the country due to the severity of the past persecution or if there is a reasonable possibility that the applicant will face other serious harm upon return.⁵

In the overseas refugee processing context, there is no equivalent regulatory guidance on past persecution at 8 C.F.R. § 207. In the absence of such regulatory guidance, a plain language interpretation of the term refugee as defined in INA § 101(a)(42) is followed in overseas refugee processing. If an applicant credibly establishes that the harm he or she suffered in the past rose to the level of persecution on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility. A rebuttable presumption is neither created nor necessary. Nonetheless, as a matter of policy, refugee officers will always assess an applicant's well-founded fear of future persecution regardless of whether or not he or she has established past persecution.⁶

¹ INA § 101(a)(42).

² INA § 208; INA § 101(a)(42); 8 C.F.R. § 208.13(b)(1).

³ For additional information, see Eligibility Based on Past Persecution, below, and RAIO Training module, *Discretion*.

⁴ 8 C.F.R. § 208.13(b)(3)(ii).

⁵ 8 C.F.R. § 208.13(b)(1)(iii); For additional information on granting asylum in the absence of a Well-Founded Fear, see RAIO module, *Discretion*.

⁶ See Refugee Affairs Division (RAD), Refugee Application Assessment: Standard Operating Procedures (SOP) (requiring officers to elicit testimony and assess well-founded fear even where applicants have demonstrated past persecution).

In contrast, the UN refugee definition focuses primarily on well-founded fear, rather than past persecution. The cessation clauses of the 1951 Convention, however, do provide that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.⁷

3 PERSECUTION

3.1 General Elements

Severity of Harm

To establish persecution, an applicant must show that the harm that the applicant experienced or fears is sufficiently serious to amount to persecution. The degree of harm must be addressed before you may find that the harm that the applicant suffered or fears can be considered “persecution.”

Motivation

An applicant also must prove that the persecutor’s motivation in harming, or seeking to harm him or her, is on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.⁸ Proving motivation is discussed in more detail in RAIO Training module, *Nexus and the Five Protected Grounds*. You should separate the analysis of motivation from the evaluation of whether the harm rises to the level of persecution, in order to make the basis of your decision as clear as possible.

Persecutor

The applicant must show that the entity that harmed, or is threatening, the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.⁹

Location

Only harm suffered in the country of nationality or, if stateless, the country of last habitual residence, may be considered in a finding of past persecution, for the purpose of establishing eligibility. Harm suffered in the United States or a third country may be considered as evidence of a well-founded fear if the applicant can establish a connection between the persecutor and his or her country of origin.¹⁰

⁷ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Article 1C, paras. (5) and (6), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

⁸ For additional information, see RAIO Training module, *Nexus and the Five Protected Grounds*.

⁹ For additional information, see section, *Identifying a Persecutor*.

¹⁰ See 8 C.F.R. § 208.13(b)(1); *Costa v. Holder*, 733 F.3d 13, 15 (1st Cir. 2013).

Example

Applicant testifies to being the victim of domestic violence while living in the United States. Because applicant has filed a complaint against her spouse, the spouse has been removed to his country of nationality and now the applicant claims to fear additional harm from her spouse if returned to the same country as her spouse. In such a situation the applicant would not be considered to have suffered past persecution, but you would consider the violence suffered in the United States as evidence in your analysis of well-founded fear.

3.2 Whether the Harm Amounts to Persecution**3.2.1 Board of Immigration Appeals (BIA) Decisions**

In an often-cited BIA decision, the BIA defined persecution as harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the persecutor seeks to overcome.¹¹

The BIA later modified this definition and explicitly recognized that a “punitive” or “malignant” intent is not required for harm to constitute persecution.¹² The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.¹³

Additionally, the BIA has found that the term “persecution” encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution.¹⁴ Non-physical harm may include “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”¹⁵

3.2.2 Guidance from the Department of Justice

In a proposed rule providing guidance on the definition of persecution, the Department of Justice indicated its approval of the conclusion in *Kasinga* that the existence of persecution does not require a malignant or punitive intent.¹⁶ The Department also

¹¹ *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), modified by *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

¹² *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

¹³ *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); for additional information, see RAI0 Training module, *Nexus and the Five Protected Grounds*.

¹⁴ *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007).

¹⁵ *Matter of T-Z-*, 24 I&N Dec. at 171, citing *Laipenienks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

¹⁶ U.S. Department of Justice, *Asylum and Withholding Definitions*, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. This proposed rule did not become a regulation but indicates the agency’s view on the topic.

emphasized that the victim must experience the treatment as harm in order for persecution to exist. Thus, under this reasoning, in a case involving female genital mutilation, whether the applicant at hand would experience or has experienced the procedure as serious harm, not whether the perpetrator intends it as harm, is a key inquiry.

3.2.3 Federal Court Decisions

Persecution encompasses more than just physical harm. The Supreme Court has held that persecution is a broader concept than threats to “life or freedom.”¹⁷

The U.S. Court of Appeals for the Ninth Circuit has defined “persecution” as “infliction of suffering or harm upon those who differ . . . in a way regarded as offensive” and “oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.”¹⁸ Such harm could include severe economic deprivation.¹⁹

Similarly, the Seventh Circuit described persecution as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.”²⁰ The term “persecution” includes actions less severe than threats to life or freedom. Non-life threatening violence and physical abuse also fall within the definition of persecution.²¹ However, “actions must rise above the level of mere ‘harassment’ to constitute persecution.”²² More recently, the Seventh Circuit has faulted the BIA for failing to distinguish “...among three forms of oppressive behavior” that an applicant might experience: discrimination, harassment, and persecution.²³ The court offered the following definitions, in the absence of an agency definition:

- Discrimination “refers to unequal treatment, and is illustrated historically by India’s caste system and the Jim Crow laws in the southern U.S. states.”²⁴
- Harassment “involves targeting members of a specified group for adverse treatment, but without the application of significant physical force.”²⁵
- Persecution is “the use of significant physical force against a person’s body, or the infliction of comparable physical harm without direct application of force (locking a

¹⁷ *INS v. Stevic*, 467 U.S. 407, 428 fn. 22 (1984).

¹⁸ *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985).

¹⁹ *Kovac*, 407 F.2d at 107.

²⁰ *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000).

²¹ *Id.*

²² *Id.*

²³ *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011).

²⁴ *Id.* at 947-48.

²⁵ *Id.* at 948.

person in a cell and starving him would be an example), or nonphysical harm of equal gravity,” such as refusing to allow a person to practice his religion or pointing a gun at a person’s head.²⁶

The court then went on to distinguish between harassment and persecution as being the difference “between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country.”²⁷

The First Circuit has described persecution as an experience that “must rise above unpleasantness, harassment and even basic suffering.”²⁸ There is no requirement that an individual suffer “serious injuries” to be found to have suffered persecution.²⁹ However, the presence or absence of physical harm is relevant in determining whether the harm suffered by the applicant rises to the level of persecution.³⁰

Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.³¹ Under some circumstances, a threat may be sufficiently serious and immediate to constitute persecution even if it is not explicit.³² Consider the following issues to explore when evaluating whether a threat is serious enough to rise to the level of persecution:

- Has the persecutor attempted to act on the threat?³³
- Is the nature of the threat itself indicative of its seriousness?³⁴
- Has the persecutor harmed or attempted to harm the applicant in other ways?³⁵
- Has the persecutor attacked, harassed, or threatened the applicant’s family?³⁶

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000).

²⁹ *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998); *Mihaley v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004); *Sanchez-Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223 (11th Cir. 2007).

³⁰ *Ruiz v. Mukasey*, 526 F.3d 31, 37 (1st Cir. 2008).

³¹ *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by *Salazar-Paucar v. INS*, 290 F.3d 964 (9th Cir. 2002).

³² *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014).

³³ *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (death threats alone may constitute persecution).

³⁴ *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998) (three letters within three months containing death threats constituted persecution).

³⁵ *Mejia v. U.S. Att’y Gen.*, 498 F.3d 1253, 1257-58 (11th Cir. 2007).

- Has the persecutor carried out threats issued to others similarly situated to the applicant?³⁷
- Did the applicant suffer emotional or psychological harm as a result of the threat(s)?³⁸

The federal courts, as well as the BIA, have held that cumulative instances of harm, considered in totality, may constitute persecution on account of a protected characteristic, so long as the discrete instances of harm were each inflicted on account of a protected characteristic.³⁹

You should evaluate the entire scope of harm experienced and feared by the applicant to determine if he or she was persecuted and fears persecution.

3.2.4 Guidance from the UNHCR Handbook

The UNHCR Handbook explains the following:⁴⁰

- A threat to life or freedom, or other serious violation of human rights on account of any of the protected grounds is always persecution.
- Other, less serious harm may constitute persecution depending on the circumstances.
- Acts that do not amount to persecution when considered separately can amount to persecution when considered cumulatively.

3.2.5 General Considerations

Individual Circumstances

It is important to take into account the individual circumstances of each case and to consider the feelings, opinions, age, and physical and psychological characteristics of the applicant in determining whether the harm suffered or feared rises to the level of persecution.⁴¹ For example, one may hold passionate political or religious convictions, the hindrance of which would cause great suffering; while another may not have such strong convictions.⁴²

³⁶ *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Sanchez Jimenez v. U.S. Atty. Gen.* 492 F.3d 1223, 1233 (11th Cir. 2007).

³⁷ *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998).

³⁸ For additional information, see section on *Psychological Harm*.

³⁹ *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998); cf. *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9th Cir. 2004).

⁴⁰ *UNHCR Handbook*, paras. 51-55.

⁴¹ *Id.* at para. 52.

⁴² *Id.* at para. 40.

Age

In assessing whether harm rises to the level of persecution, you should determine the age of the applicant at the time the harm occurred and determine if age is a factor that should be considered.⁴³ For example, the effect of similar circumstances might be more severe on a child or an elderly person than they may be on others. Harm that may not rise to the level of persecution for an adult may be persecution if the harm is inflicted on a child. In considering whether past harm suffered by a child rises to the level of persecution, it is important to take into account a child's young age and dependence on family and community.⁴⁴

No Set Number of Incidents Required

There is no minimum number of acts or incidents that must occur in order to establish persecution.⁴⁵ One serious incident or threat may constitute persecution, or there may be several incidents or acts, which considered together, constitute persecution.

3.3 Human Rights Violations

Violations of "core" or "fundamental" human rights, prohibited by international law, may constitute harm amounting to persecution. These rights include freedom from:⁴⁶

- arbitrary deprivation of life
- genocide
- slavery
- torture and other cruel, inhuman, or degrading treatment
- prolonged detention without notice of and an opportunity to contest the grounds for detention
- rape and other severe forms of sexual violence

Torture can take a wide variety of forms. It can include severe physical pain by beating or kicking, or pain inflicted with the help of objects such as canes, knives, cigarettes, or metal objects that transmit electric shock. Torture also includes the deliberate infliction of

⁴³ *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Ordonez-Quino v. Holder*, 760 F.3d 80, 93 (1st Cir. 2014).

⁴⁴ For additional information, see RAIO Training module, *Children's Claims*.

⁴⁵ See, e.g., *Vadiva v. INS*, 131 F.3d 689, 690 (7th Cir. 1997); and *Lumaj v. Gonzales*, 462 F.3d 574, 577 (6th Cir. 2006).

⁴⁶ See Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998), pp.68-9; and James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1992), p. 109.

severe mental suffering.⁴⁷ Torture will always rise to the level of persecution. Keep in mind, however, that for purposes of asylum or refugee status, as opposed to protection under the Convention Against Torture, torture must have been inflicted on account of one of the five protected grounds. Convention Against Torture protection is available in immigration court removal proceedings, see Asylum Lesson Plans on Credible Fear and Reasonable Fear.

Other fundamental rights are also protected by customary international law, such as the right to recognition as a person in the law, and the right to freedom of thought, conscience, and religion or belief.⁴⁸ Deprivation of these rights may also constitute persecution.⁴⁹

Examples

- The BIA has found that the enforcement of coercive family planning policy through forced abortion or sterilization is a violation of fundamental human rights. Forced abortion or sterilization deprives the individual of the right to make individual or conjugal decisions regarding reproductive rights.⁵⁰
- The Third Circuit has stated that compelling an individual to engage in conduct that is abhorrent to that individual's deepest beliefs may constitute persecution.⁵¹
- UNHCR guidelines on religious-based refugee claims indicate that forced compliance could constitute persecution "if it becomes an intolerable interference with the individual's own religious belief, identity, or way of life and/or if noncompliance would result in disproportionate punishment."⁵²

3.4 Discrimination and Harassment

⁴⁷ J. Herman Burgers & Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), pp. 117-18. For additional information, see RAIIO 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 RAIIO Training module, *The International Religious Freedom Act (IRFA) and Religious Persecution Claims*.

⁵⁰ See *Matter of S-L-L*, 24 I&N Dec. 1, 5-7 (BIA 2006), (en banc), overruled on other grounds by *Matter of J-S*, 24 I&N Dec. 520 (AG 2008); *Matter of Y-T-L*, 23 I&N Dec. 601, 607 (BIA 2003); UNHCR, *UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Geneva: Aug. 2005).

⁵¹ *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

⁵² UNHRC, *Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (HCR/GIP/04/06, 28 April 2004), para. 21.

Less preferential treatment and other forms of discrimination and harassment generally are not considered persecution.⁵³ Where discriminatory practices or instances of harassment accumulate or increase in severity to the extent that they lead to consequences of a substantially prejudicial nature, adverse actions that would themselves constitute only discrimination or harassment may, cumulatively, rise to the level of persecution.⁵⁴

The Second Circuit Court of Appeals has indicated that differentiating between harassment and persecution can be a matter of degree and that adjudicators must consider the context in which mistreatment occurs.⁵⁵ A minor beating may constitute only harassment when inflicted by a non-governmental entity. In the context of an arrest or detention by a government official, however, a minor beating, if inflicted on account of a protected characteristic, may rise to the level of persecution.

The fact that a non-citizen does not enjoy all of the same rights as citizens in the country of last habitual residence is generally, by itself, not harm sufficient to rise to the level of persecution.⁵⁶

Examples

- Discrimination did not rise to the level of persecution against an Armenian living in Russia when it included merely harassment and pushing by Russian officers because of ethnicity and being denied a job because “there were no jobs for Armenians.”⁵⁷
- An Egyptian Coptic Christian claimed that his career as a medical doctor would suffer because of discrimination against Christians. The Ninth Circuit found that this level of discrimination was insufficient to amount to persecution.⁵⁸ In contrast, the inability to practice medicine through the invalidation of a medical degree does amount to persecution when it is on account of the applicant’s ethnicity.⁵⁹

General Factors to Consider

Some relevant questions to consider in determining whether the discrimination and harassment of the applicant amount to persecution are:

⁵³ See UNHCR Handbook, paras. 54-55; Stanojkova v. Holder, 645 F.3d 943, 947-948 (7th Cir. 2011); Matter of A-E-M-, 21 I&N Dec. 1157, 1159 (BIA 1998); Matter of V-F-D-, 23 I&N Dec. 859, 863 (BIA 2006); Baka v. INS, 963 F.2d 1376, 1379 (10th Cir. 1992); Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998).

⁵⁴ Ivanishvili v. USDOJ, 433 F.3d 332, 342 (2d Cir. 2006).

⁵⁵ Beskovic v. Gonzales, 467 F. 3d 223, 226 (2d Cir. 2006).

⁵⁶ Ahmed v. Ashcroft, 341 F.3d 214, 217 (3d Cir. 2003); Najjar v. Ashcroft, 257 F.3d 1262, 1291 (11th Cir. 2001); Faddoul v. INS, 37 F.3d 185, 189 (5th Cir. 1994).

⁵⁷ Avetova-Elisseva v. INS, 213 F.3d 1192 (9th Cir. 2000).

⁵⁸ Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir.1995); cf. Mansour v. Ashcroft, 390 F.3d 667 (9th Cir. 2004).

⁵⁹ Sterba v. Holder, 646 F.3d 964, 976 (6th Cir. 2011).

- Was the harm actually persecution, not merely discrimination or harassment?
- How long has the discrimination or harassment lasted?
- Which human rights were affected?
- How has the discrimination or harassment affected the particular applicant?
- How many types of discriminatory practices or how much harassment has been imposed on the applicant, cumulatively?
- Has there been any escalation over time in the frequency or seriousness of the discrimination or harassment or has it remained at the same level over time?

Some significant factors to consider in determining whether discrimination and harassment amount to persecution include:

- serious restrictions on the right to earn a livelihood⁶⁰
- serious restrictions on the access to normally available educational facilities
- arbitrary interference with a person's privacy, family, home, or correspondence
- relegation to substandard dwellings
- exclusions from institutions of higher learning
- enforced social or civil inactivity
- passport denial
- constant surveillance
- pressure to become an informer
- confiscation of property
- the accumulation and type of discriminatory practices or harassment that have been imposed on the applicant

Generally none of these factors, by themselves, would be considered to rise to the level of severity necessary to constitute persecution, but may, on a case by case basis, be deemed to rise to the level of persecution. Each case must be judged individually based on the unique facts of that claim.

⁶⁰ See, e.g., *Gormley v. Ashcroft*, 364 F.3d 1172, 1179 (9th Cir. 2004) (in rejecting claim, court relied on fact that South African government provided unemployment compensation to couple laid off pursuant to affirmative action).

3.5 Arrests and Detention

In evaluating whether a detention is persecution, consider:

- length of the detention
- legitimacy of the government action
- mistreatment during the detention
- judicial processes or due process rights accorded⁶¹

Generally, a brief detention without mistreatment will not constitute persecution. Prolonged detention is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Similarly, multiple brief detentions may, considered cumulatively, amount to persecution. Evidence of mistreatment during detention also may establish persecution.⁶²

Examples

- A Chinese Christian was arrested during an underground religious service, detained for seven days, and repeatedly beaten. On one occasion, he was chained to an iron bar outside in the rain for several hours, causing him to become ill. The Eleventh Circuit Court of Appeals held that the evidence compelled the conclusion that the harm the applicant suffered rose to the level of persecution.⁶³
- A Kosovar Albanian was interrogated on three occasions by Serbian police. One time, during a 24-hour detention, he suffered an injury to his hands caused by the police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.⁶⁴
- A 16-year old Chinese girl was detained for two days by police, during which time she was pushed and her hair was pulled, she was expelled from school, and her home was ransacked by police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.⁶⁵

⁶¹ For additional information, see RAIO Training module, *Nexus and the Five Protected Grounds*.

⁶² *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998)(the court instructed the BIA on remand to apply the correct persecution standard and questioned the BIA, using the incorrect standard applied, “If having two teeth knocked out and being deprived of sufficient food and water are not ‘serious injuries’ or ‘physical harm,’ what is?”)

⁶³ *Shi v. U.S. Att’y Gen.*, 707 F.3d 1231, 1237-1239 (11th Cir. 2013).

⁶⁴ *Prela v. Ashcroft*, 394 F.3d 515, 518 (7th Cir. 2005).

⁶⁵ *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).

- A Chinese national was detained at a police station for three days, during which time he was interrogated for two hours and hit on his back with a rod approximately ten times, causing him pain and temporary red marks, but not requiring any medical treatment. The Ninth Circuit found that the facts did not compel a finding of past persecution.⁶⁶
- A Bulgarian Christian was detained by police twice, each for two days, and on a third occasion was beaten by police in her home, resulting in a miscarriage of her pregnancy. The Seventh Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.⁶⁷
- A Bulgarian of Roma descent was detained by police for ten days, during which time he was beaten daily with sandbags and forced to perform heavy labor. The applicant suffered no significant bodily injury. The Ninth Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.⁶⁸

3.6 Economic Harm

To rise to the level of persecution, economic harm must be deliberately imposed and severe.⁶⁹ Severe economic harm must be harm “above and beyond [the economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts.”⁷⁰

In *Matter of T-Z-*, the Board held that adjudicators should apply the following test in determining whether economic harm amounts to persecution: whether the applicant suffered or faces a “deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”⁷¹ An applicant, however, need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution.⁷²

In this decision, the BIA highlighted some factors to consider in assessing whether the fines and job loss at issue amounted to persecution,⁷³ including

⁶⁶ *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006).

⁶⁷ *Vladimirova v. Ashcroft*, 377 F.3d 690, 693 (7th Cir. 2004).

⁶⁸ *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004).

⁶⁹ See *Mimwalla v. INS*, 706 F.2d 831, 835 (8th Cir. 1983); *Ambati v. Reno*, 233 F.3d 1054, 1060 (7th Cir. 2000); *Guan Shan Liao v. INS*, 293 F.3d 61, 69-70 (2d Cir. 2002).

⁷⁰ *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007).

⁷¹ *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007). See also *Vicente-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008) (adopting *Matter of T-Z-* standard on economic persecution); *Borca v. INS*, 77 F.3d 210 (7th Cir. 1996) (holding that total economic deprivation is not required to establish persecution).

⁷² *Matter of T-Z-*, 24 I&N Dec. at 173.

⁷³ *Id.* at 173-75.

Applying the BIA's standard in *Matter of T-Z-*, the Eighth Circuit has held that being relegated to low-level jobs despite advanced schooling did not amount to severe economic deprivation. Because private employment remained available, the economic discrimination was not sufficiently harsh so as to constitute persecution.⁷⁸

An applicant's loss of employment as a result of a government-sponsored employment program instituted to correct past discrimination is not sufficient to support a finding of past persecution on account of a protected characteristic where the government provided considerable unemployment compensation to the applicant, and other similarly situated individuals were able to maintain or regain employment.⁷⁹ On the other hand, a program of state-sponsored economic discrimination against a disfavored group within the society that could lead to extreme economic harm may amount to past persecution.⁸⁰

3.7 Psychological Harm

3.7.1 Psychological Harm Alone May Be Sufficient to Constitute Persecution

You should always consider evidence, including the applicant's testimony, that the events he or she experienced caused psychological harm.⁸¹ Psychological harm alone may rise to the level of persecution.⁸² Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.

3.7.2 Under The Convention Against Torture, Severe Mental Harm Alone May Be Sufficient to Constitute Torture

Under the Convention Against Torture, severe mental suffering may constitute torture under certain circumstances.⁸³ Some examples of mental suffering that fall within this definition of torture, and thus would be considered serious enough to rise to the level of persecution, include:

⁷⁸ *Beck v. Mukasey*, 527 F.3d 737, 741 (8th Cir. 2008).

⁷⁹ *Gormley v. Ashcroft*, 364 F.3d 1172 (9th Cir. 2004).

⁸⁰ *Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (finding that Palestinian applicants were members of a persecuted minority who, due to Kuwaiti state-sponsored economic discrimination, would be subject to denial of right to work, attend school, and to obtain drinking water if returned to Kuwait).

⁸¹ For additional information, see RAIO Training module, *Interviewing Survivors of Torture*.

⁸² *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir. 2006) ("a finding of past persecution might rest on a showing of psychological harm"); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) ("Persecution may be emotional or psychological, as well as physical."). The Fourth Circuit held that in withholding of removal cases only, which are not at issue in asylum or refugee adjudications, psychological harm alone cannot amount to persecution. *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007).

⁸³ See 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465; and 8 C.F.R. § 208.18.

- mental harm caused by the intentional infliction or threatened infliction of severe physical pain or suffering
- administration or threatened administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality
- threat of imminent death
- threat that another person will imminently be subjected to death or severe physical pain or suffering

3.7.3 Other Forms of Mental Harm May Be Sufficient to Constitute Persecution

Other forms of mental harm that amount to persecution, but may not amount to torture include:

- receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear
- being forced to witness the harm of others⁸⁴
- forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

For example, the Ninth Circuit found in *Mashiri v. Ashcroft* that the emotional trauma suffered by a native of Afghanistan living in Germany was sufficiently severe to amount to persecution. The cumulative harm resulted from watching as a foreign-owned store in her neighborhood was burned, finding her home vandalized and ransacked, running from a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the results of beatings of her husband and children.⁸⁵

The U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that are deeply abhorrent to a person's beliefs may constitute persecution. For example, being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.⁸⁶

3.8 Sexual Harm

3.8.1 Rape and Other Sexual Abuse

⁸⁴ See *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004). But see *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (upholding a finding that the emotional harm suffered did not rise to the level of persecution).

⁸⁵ *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004).

⁸⁶ *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993).

Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.⁸⁷ Rape is regarded as a “form of aggression constituting an egregious violation of humanity,” which can constitute torture.⁸⁸

You should also consider less severe sexual harm when determining whether harm amounts to persecution.⁸⁹ You must examine the entire circumstances of the case before you, including any resulting psychological harm, the social or cultural perceptions of the applicant as a victim of the sexual harm, and other effects on the applicant resulting from the harm.

Example

The applicant was stopped by the police several times and three times was stripped and twice threatened with sodomy by a gun barrel. In overturning the IJ’s decision, the court stated, “[m]ost egregiously, the IJ failed to consider the significance of the sexual humiliation that occurred on three occasions. This court has previously noted that abuse of this nature can make all the difference.”⁹⁰

3.8.2 Female Genital Mutilation or Female Genital Cutting

The practice of female genital mutilation (FGM), also known as female genital cutting (FGC), is objectively a sufficiently serious form of harm to constitute persecution.⁹¹ Generally, in determining whether FGM is persecution to the applicant, you should consider whether the applicant experienced or would experience the procedure as serious harm.⁹² The BIA in *Matter of S-A-K- & H-A-H-* recognized that FGM imposed on a young child constituted past persecution.⁹³ The BIA held that she and her mother had suffered an atrocious form of persecution that resulted in continuing physical pain and discomfort and that they merited humanitarian asylum based on the severity of their harm.⁹⁴

⁸⁷ See Memorandum from Phyllis Coven, INS Office of International Affairs, to INS Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, (26 May 1995), p.9.

⁸⁸ See UNHCR, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), para. 9; *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9th Cir. 2000); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996); and *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003).

⁸⁹ See, e.g., *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997).

⁹⁰ *Haider v. Holder*, 595 F.3d 276, 288 (6th Cir. 2010).

⁹¹ See *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)

⁹² U.S. Department of Justice, *Asylum and Withholding Definitions*, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. The proposed rule did not become a regulation but represents the agency’s view on the topic.

⁹³ *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008)

⁹⁴ *Id.* at. 465-66.

Even in countries that have prohibited the practice of FGM, the government may condone, tolerate, or be unable to protect against the practice. The fact that a state has enacted a law prohibiting FGM does not necessarily indicate that the government is willing and able to protect an applicant.⁹⁵

3.9 Harm to Family Members or Other Third Parties

Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm the applicant suffers is serious enough to amount to persecution and where the persecutor's motivation in harming the third party is to harm the applicant.⁹⁶ The BIA has held that emotional harm may rise to the level of persecution where a person "persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself."⁹⁷ For example, the wife of a political dissident may be abducted and killed as a way of teaching her husband a political lesson.

An applicant may suffer severe psychological harm from the knowledge that another individual has been harmed in an effort to persecute the applicant.⁹⁸ The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm the family member or if the applicant witnessed the harm to the family member.⁹⁹ The witnessing of harm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to cause harm to the applicant, the applicant's family, or all members of a group to which the applicant belongs on account of a protected characteristic.¹⁰⁰ Furthermore, as explained above, harm that would constitute torture will always rise to the level of persecution, and the definition of torture under U.S. law includes threats that another person would be imminently subjected to death or severe physical pain or suffering.¹⁰¹

⁹⁵ For additional information, see section, *Entity the Government is Unable or Unwilling to Control*.

⁹⁶ See Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

⁹⁷ *Matter of A-K-*, 24 I&N Dec 275 (BIA 2007); see also *Sumolang v. Holder*, 723 F.3d 1080, 1084 (9th Cir. 2013) (finding that the emotional harm an applicant suffered from the death of her child constituted persecution where doctors had denied the child medical treatment because of the mother's race and the parents' religion).

⁹⁸ For additional information, see RAIO Training module, *Interviewing - Survivors of Torture*.

⁹⁹ See Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

¹⁰⁰ See *N.L.A. v. Holder*, 744 F.3d 425, 432-433 (7th Cir. 2014) (holding that a direct threat to an applicant's family member may cause suffering that constitutes persecution of an applicant where the threat is intended to target the entire family); *Panoto v. Holder*, 770 F.3d 43, 47 (1st Cir. 2014) (finding that the harm an Indonesian Christian applicant suffered when a bomb was planted at her church and, within six months, she witnessed a fellow Christian passenger being brutally murdered during a ferry highjacking by an anti-Christian group could constitute persecution of the applicant on account of her religion).

¹⁰¹ 8 C.F.R. § 208.18(a)(4)(iv); see also Section 3.3, Human Rights Violations.

For example, if a persecutor severely assaults an applicant's spouse and indicates that the harm was motivated by the applicant's political activity, the applicant may be able to establish that he was persecuted on account of his political opinion. However, psychological harm suffered by an applicant based on the harm to a family member would not constitute persecution if the family member was targeted solely because of the family member's own protected characteristic rather than the protected characteristic(s) of the applicant. In the latter case, the harm was not directed at the applicant.

4 IDENTIFYING A PERSECUTOR

Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the government of the country where the applicant fears persecution, or by a person or group that the government is unable or unwilling to control.¹⁰²

The UNHCR Handbook, para. 65 provides context:

Persecution is normally related to the action taken by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizable fractions of the population do not respect the religious beliefs of their neighbors. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

4.1 The Government

In cases in which the applicant was harmed or fears harm by the government, the applicant must establish the following:

- the harm or feared harm was on account of a protected characteristic
- the harm or feared harm is sufficiently serious to rise to the level of persecution
- the persecutor or feared persecutor is an agent or agents of the government

The Court of Appeals for the Ninth Circuit has stated that where a government agent is responsible for the persecution, it is unnecessary to consider whether the applicant sought protection from the police or other government entity.¹⁰³

¹⁰² See *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996); and *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (en banc).

¹⁰³ *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004).

4.2 Entity the Government Is Unable or Unwilling to Control

4.2.1 General Principles

An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.¹⁰⁴ The applicant is not required to show direct government involvement or complicity with the non-government actor.

In determining whether a government is unable or unwilling to control the entity that harmed or seeks to harm the applicant, you should address whether:

- there were reasonably sufficient governmental controls and restraints on the entity[ies] that harmed the applicant
- the government had the ability and will to enforce those controls and restraints with respect to the entity that harmed the applicant
- the applicant had access to those controls and constraints
- the applicant attempted to obtain protection from the government and the government's response, or failure to respond, to those attempts¹⁰⁵

4.2.2 Guidance from Federal Courts

In determining whether a government is unable or unwilling to protect, the Ninth Circuit Court of Appeals looks at both general country conditions and the applicant's specific circumstances:

While the acts of persecution were not perpetrated directly by government officials, the widespread nature of the persecution of ethnic Armenians documented by the State Department Country Report, combined with the police officer's response when Mr. Andriasian turned to him for help, clearly establishes that the government of Azerbaijan either could not or would not control Azeris who sought to threaten and harm ethnic Armenians living in their country.¹⁰⁶

A number of courts have explained that the requisite connection to government action or inaction may be shown in one of the following three ways:

- evidence that government actors committed or instigated the acts

¹⁰⁴ See *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007).

¹⁰⁵ *Surita v. INS*, 95 F.3d 814, 819-20 (9th Cir. 1996); *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007).

¹⁰⁶ *Andriasian v. INS*, 180 F.3d 1033, 1042-43 (9th Cir. 1999).

- evidence the government actors condoned the acts
- evidence of an inability on the part of the government to prevent the acts¹⁰⁷

The First Circuit has further explained that the applicant must demonstrate more than “a general difficulty preventing the occurrence of particular future crimes” and that “where a government is making every effort to combat violence by private actors, and its inability to stop the problem is not distinguishable from any other government’s struggles, the private violence has no government nexus and does not constitute persecution.”¹⁰⁸

4.2.3 Efforts to Gain Government Protection or an Explanation of Risk or Futility

To demonstrate that the government is unable or unwilling to protect a refugee or asylum applicant, the applicant must show that he or she sought the protection of the government, or provide a reasonable explanation as to why he or she did not seek that protection.¹⁰⁹

Reasonable explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations, that the applicant would have increased his or her risk by affirmatively seeking protection, or that the applicant was so young that he or she would not have been able to seek government protection.¹¹⁰

In determining whether an applicant’s failure to seek protection is reasonable, you should consult and consider country of origin information, in addition to the applicant’s testimony.

Examples

- An Indian Muslim applicant was shot by Hindu extremists during the 2002 riots in Gujarat. While he was in the hospital, a police officer visited him and advised him not to tell anyone the truth about what had happened. The applicant remained in India for four years without ever formally reporting the incident to the police or seeking help from state or federal authorities. He explained that based on what the police officer had told him, he believed that reporting would be futile. Considering country conditions evidence indicating that the Indian government was making significant and often successful efforts to apprehend perpetrators of anti-Muslim violence in Gujarat, the

¹⁰⁷ *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000) (citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)); *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1st Cir. 2005); *Shehu v. Gonzales*, 443 F.3d 435, 437-38 (5th Cir. 2006).

¹⁰⁸ *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007); *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (citing *Burbiene v. Holder*, 568 F.3d 251, 255-56 (1st Cir. 2009)).

¹⁰⁹ *Roman v. INS*, 233 F.3d 1027, 1035 (7th Cir. 2000).

¹¹⁰ See *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006); and cf. *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005).

Seventh Circuit held that substantial evidence supported the conclusion that the Indian government was not unwilling or unable to protect him at the time.¹¹¹

- A Colombian applicant who was threatened and attacked several times by the Revolutionary Armed Forces of Colombia (FARC) because of her political activity did not report any of the incidents to the police. The BIA concluded that she had not established that the Colombian government was unwilling or unable to protect her because she did not seek protection from law enforcement. The Eleventh Circuit Court of Appeals held that the BIA erred in its decision because it failed to address the applicant's argument that her testimony and country conditions evidence established that reporting the attacks to law enforcement would have been futile.¹¹²

4.2.4 Unwilling to Control

There may be situations in which the government is unwilling to control the persecutor for reasons enumerated in the refugee definition (the government shares, or does not wish to oppose, the persecutor's opinion about the applicant's protected characteristic).¹¹³ However, there is no requirement that the government's unwillingness to protect the applicant be motivated by any protected characteristic.¹¹⁴

A government may be unwilling to intervene in what are perceived to be domestic disputes within a family, or in disputes between tribes, or in a dispute that involves societal customs.¹¹⁵ You may need to evaluate country conditions information concerning relevant laws and the enforcement of those laws, as well as the applicant's testimony, to determine if the government is unwilling to control the persecutor.

Evidence that the government is unwilling to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.¹¹⁶

4.2.5 Unable to Control

¹¹¹ *Vahora v. Holder*, 707 F.3d 904, 908-909 (7th Cir. 2013).

¹¹² *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2010).

¹¹³ UNHCR Handbook, para. 65.

¹¹⁴ *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013).

¹¹⁵ UNHCR, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), paras. 9, 15 and 19.

¹¹⁶ *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004).

No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. In order for you to find that the government was “unable to control” a non-governmental persecutor when the applicant was harmed, the applicant “must show more than just a difficulty controlling private behavior. Rather, the applicant must show that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims.”¹¹⁷ Where the state has made reasonable efforts to control the persecutor or protect the applicant, the harm the applicant suffered does not constitute persecution.¹¹⁸ However, generalized evidence that the government has attempted to control a private persecutor does not preclude you from finding, based on the applicant’s testimony and the record as a whole, that the government was unable or unwilling to control the persecutor in an applicant’s individual case.¹¹⁹ In most cases, the determination of whether a government is unable to control the entity that harmed the applicant requires careful evaluation of the most current country of origin information available, as well as an evaluation of the applicant’s circumstances.

Examples

- A Pakistani applicant received death threats from the Taliban after he urged people in his community to oppose them, and his house was attacked with a grenade. He reported the incidents to the police, and they investigated and took statements from witnesses, but they did not apprehend the perpetrators. The First Circuit upheld the BIA’s determination that the applicant had not demonstrated the Pakistani government’s inability to control the persecutors because law enforcement officials had made reasonable efforts to protect him and, according to country conditions evidence, had had some success in combating the Taliban in his area; although the government had not “eradicated” the threat the Taliban posed, a reasonable factfinder could conclude that it was willing and able to control them.¹²⁰
- A Mexican applicant was kidnapped and beaten by the Los Zetas drug cartel because of his own activities opposing Los Zetas while in the Mexican armed forces. The Ninth Circuit held that the BIA’s determination that the Mexican government was willing and able to control the persecutors was in error because it failed to consider significant evidence in the record that the Mexican government’s efforts to control the persecutor had been

¹¹⁷ *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732-733 (8th Cir. 2013) (citations omitted); *see also Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005) (holding that the state must provide “protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct”).

¹¹⁸ *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013).

¹¹⁹ *See N.L.A. v. Holder*, 744 F.3d 425, 441-442 (7th Cir. 2014) (holding that the BIA erred in relying solely on country conditions reports indicating that some parts of the Colombian government have recently engaged in efforts to control the FARC and ignoring applicants’ testimony that the police were not willing to help them in their particular situation).

¹²⁰ *Khan*, 727 F.3d at 7.

unsuccessful; instead, it had focused solely on the government's willingness.¹²¹

A government in the midst of a civil war, or one that is unable to exercise its authority over portions of the country may be unable to control the persecutor in areas of the country where its influence does not extend.¹²² An evaluation of how people similarly situated to the applicant are treated, even in portions of the country where the government does exercise its authority, is relevant to the determination of whether the government is unable to control the entity that persecuted the applicant.

In order to establish that he or she is a refugee based on past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis.¹²³ The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

5 ELIGIBILITY BASED ON PAST PERSECUTION

5.1 In the Refugee Context: Past Persecution is Sufficient

Overseas, if an applicant for classification as a refugee credibly establishes that the harm he or she suffered in the past rose to the level of persecution, and that the harm was on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility for refugee status. However, officers must still elicit testimony on and assess whether or not an applicant has a well-founded fear of persecution on account of any of the five protected grounds.¹²⁴

5.2 In the Asylum Context: Presumption of Well-Founded Fear

In the asylum context, if an applicant has established past persecution on account of a protected characteristic, the applicant is not required to separately establish that his or her fear of future persecution is well-founded.¹²⁵ It is presumed that the applicant's fear of future persecution, on the basis of the original claim, is well-founded, and the burden of proof shifts to USCIS to establish by a preponderance of the evidence that,

¹²¹ *Madrigal v. Holder*, 716 F.3d 499, 506-507 (9th Cir. 2013).

¹²² *Matter of H-*, 21 I&N Dec. 337, 345 (BIA 1996).

¹²³ *Mashiri v. Ashcroft*, 383 F.3d 1121, 1122 (9th Cir. 2004).

¹²⁴ See RAD Refugee Application Assessment SOP. RAD requires assessment of both past persecution and well-founded fear for several reasons, including situations of split credibility, where the applicant is found not credible on past persecution, but demonstrates a credible, well-founded fear of future persecution. See RAIO Lesson Plan, *Credibility*.

¹²⁵ 8 C.F.R. § 208.13(b)(1); see *Matter of A-T-*, 24 I&N Dec. 617 (AG 2008)

- due to a fundamental change in circumstances, the fear is no longer well-founded
- or
- the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.¹²⁶

If USCIS does not meet this burden, the applicant's fear is well-founded. A well-founded fear of persecution on the basis of the original claim means fear of persecution on account of the protected characteristic on which the applicant was found to have suffered past persecution. If USCIS is able to rebut the presumption of well-founded fear, the applicant may still be granted asylum, in the exercise of discretion, based on severe past persecution, or other serious harm. For more information, *see* **IASM Supplement 1**

6 CONCLUSION

An applicant must meet all the elements of the refugee definition in order to establish eligibility for protection as a refugee or asylee. Unlike the international definition, the definition of refugee in the INA allows an applicant to establish eligibility by a showing of past persecution, without having to establish a well-founded fear of persecution in the future. In order to show past persecution the applicant must establish that he or she has suffered harm in the past that rises to the level of severity necessary to constitute persecution, that the harm was inflicted on account of a protected characteristic, and that the agent of harm was either a part of the government, or an entity that the government was unable or unwilling to control.

7 SUMMARY

7.1 Persecution

To establish persecution, an applicant must prove that the harm he or she experienced was inflicted by the government or an entity the government was unable or unwilling to control.

To establish persecution, the level and type of harm experienced by the applicant must be sufficiently serious to constitute persecution.

¹²⁶ For further information refer to RAIO Training module, *Well-Founded Fear and Matter of A-T*, 24 I&N Dec. 617 (AG 2008).

There is no single definition of persecution. Guidance may be found in precedent decisions, the UNHCR Handbook, and international human rights law. The determination of whether an act or acts constitute persecution must be decided on a case-by-case basis, taking into account all the circumstances of the case including the physical and psychological characteristics of the applicant.

Serious violations of core or fundamental human rights that are prohibited by customary international law almost always constitute persecution. Less severe human rights violations may also be considered persecution. Discrimination, harassment, and economic harm may be considered persecution, depending on the severity and duration of the harm. The harm may be psychological, such as the threat of imminent death, the threat of infliction of severe physical pain or suffering, or the threat that another person will imminently be subjected to death or severe physical pain or suffering.

Acts that in themselves do not amount to persecution may, when considered cumulatively, constitute persecution.

7.2 Eligibility Based on Past Persecution

In the overseas refugee context, an applicant is eligible for refugee status if he or she establishes past persecution on account of one of the five protected grounds. There is no requirement that the applicant have an on-going fear of future persecution. Also, if the past harm is found to have risen to the level of persecution, there is no additional requirement that the harm be particularly severe and compelling in order to grant status on past persecution alone.

In the asylum context, after an applicant has established eligibility through past persecution, you must still consider whether there is a well-founded fear. In this inquiry the burden of proof is on the government to show by a preponderance of the evidence that a well-founded fear no longer exists. If you can show that the applicant no longer has a well-founded fear, the application should be denied or referred as a matter of discretion unless the applicant can show that there are compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or that there is a reasonable possibility they would face other serious harm if returned.

PRACTICAL EXERCISESPractical Exercise # 1

- **Title:** *Persecution Exercise*
- **Student Materials:**

Fact Pattern:

You are the parent of a sixteen year old girl. She attends the local public high school and is a member of the marching band. She is also involved with several extra-curricular activities. She has a 3.8 grade point average and has already been accepted to several distinguished universities.

One activity that she participates in is a student club known as Students for Civic Responsibility, and she is one of the main organizers. Another is Students for Social Change, and she is the Secretary of this club. These clubs have been very active in holding information fairs on a wide range of issues, such as police violence, spouse abuse, corruption in local government, and environmental concerns. These clubs are regularly contributing articles and letters to the local paper, have their own websites, and produce their own monthly newsletters.

One winter day you returned home from work, and your daughter did not come home from band practice at the normal time that she usually arrives home. After a delay of about 40 minutes, you begin to call a few of her friends. They tell you that band practice was cancelled due to the band director's illness, and that there were no after-school activities. The last person you talk to tells you that he saw your daughter talking to some police officers at the parking lot of the school, but his bus pulled away before he could see what happened. You call the school, but at this late hour, there is no answer.

You then call the local police station to find out if there was some problem involving your daughter, and if they know where she is. The duty officer at the station tells you that he does not have any record of any incident involving your daughter, and that there was no incident at the school that day. When you explain that your daughter was last seen talking to police officers at the school, the duty officer tells you that he has no record of the police being at the school that day. You then request to make a missing persons report, but are advised that you must wait 48 hours after the disappearance before they will take a report.

You call all of the other area police departments, but you are told the same thing. You call every person that you can think of that might know of your daughter's

whereabouts, explaining the situation, and asking them for more leads. All of your leads turn up dry.

It is now about 10:00 PM. You get in your car and begin driving throughout the neighborhood, starting with the high school, and working your way out. You drive until 2:00 AM, and then return home. No one is at home and there are no messages on your answering machine. You call out from work the next morning, and repeat the whole process. You finally get the police to accept a missing persons report early. You contact the local television news station and ask for help. They tell you to call them the next day, just in case she shows up.

On the third day you call out from work again and continue to look for your daughter. Once again, there is no luck.

The same on the fourth day. But on the fourth night you get a telephone call at 1:00 AM and you hear your daughter crying and begging you in a shaken voice to pick her up outside the Municipal Building. You speed to the building and find your daughter huddled in a phone booth. You make sure that she is not physically injured, and take her home.

After calming her, you are able to talk to her about what happened. She tells you that the police came to the school and stopped her when she came out of the school. Once they verified her identity, they told her that there was a family emergency, and that she must accompany them to the station. Once at the station, she was 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:

1. Would you conclude that your daughter was a victim of persecution? If so,

why? If not, why not?

Practical Exercise # 2

- **Title:** *Matter of H- - Past Persecution*
- **Student Materials:**

Fact Pattern:

The applicant is a native of Somalia and an undisputed member of the Darood clan and the Marehan subclan, an entity which is identifiable by kinship ties and vocal inflection or accent. For 21 years Somalia had been ruled by Mohammed Siad Barre, a member of the Marehan subclan, which constitutes less than 1 percent of the population of Somalia. In December of 1990, an uprising was instituted by members of the other clans, which ultimately caused Mohammed Siad Barre to relinquish his power and to flee the capital city of Mogadishu on January 21, 1991.

As a result of favoritism that had been shown to members of the Marehan subclan during the course of Mohammed Siad Barre's often brutal regime, the clans which rebelled against this regime sought to retaliate against those who had benefited from the regime. The applicant's father, a businessman who had greatly benefited from his membership in the Marehan subclan, was murdered at his place of business in Mogadishu on January 12, 1991, by members of the opposition United Somali Congress, composed mostly of members of the Hawiye clan. The applicant's family home, located in the Marehan section of the city, was targeted 2 days later by the same group. During the course of that attack, the applicant's brother was shot. He was later murdered at the hospital to which he had been brought for the treatment of his injury.

On January 13, 1991, 1 day after the attack on the applicant's home, he fled Mogadishu with his step-mother and younger siblings to a smaller town, Kismayu, which was a stronghold of the Darood clan. Approximately 1 month later, that town was attacked by the United Somali Congress. As a result, the applicant, who was not with his family at the time, was rounded up and detained without charges along with many other Darood clan members. During the course of his 5-day detention, the applicant was badly beaten on his head, back, and forearm with a rifle butt and a bayonet, resulting in scars to his body which remain to the present. A maternal uncle of the applicant, who was a member of the United Somali Congress, recognized him and assisted in his escape, driving him approximately 40 kilometers in the direction of Kenya.

Discussion:

1. Is the applicant unwilling or unable to return to his/her country due to past harm or mistreatment? Yes No
2. If no, go to Question 3. If yes, identify the perpetrator(s) of, and describe, harm or mistreatment.

Perpetrators:
3. Harm/Mistreatment:
4. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain. Yes No

Practical Exercise # 3

- **Title:** *Applicant Testimony and Interview Notes – Past Persecution*
- **Student Materials:**

Fact Pattern:

The Applicant testified that before fleeing his country, he resided with his son and his Russian wife in the Ukrainian city of Kharkiv. On February 12, 1992, he attended a political rally at which he gave a short speech promoting democracy and unification with Russia. Immediately after he finished his speech, someone grabbed him and began to beat him. He recognized the insignia on the clothing of his attacker as a symbol of “Rukh,” a nationalistic, pro-Ukrainian independence movement. The Applicant required stitches on his lip and eyebrow from the beating. That evening, he discovered a leaflet from Rukh in his pocket, with the message “Kikes, get away from Ukraine.” He testified that he began to receive similar anti-Semitic leaflets at home in his mailbox or slipped under the door. The record contains one of the leaflets he received in 1993.

In March 1992, a month after the attack at the rally, the Applicant’s apartment was vandalized. The door had been broken down, furniture was ripped open, some of his possessions were stolen, others were smashed, and a half dozen leaflets from Rukh were left at the scene. The leaflets warned that “kikes” and “Moskali,” a derogatory term for Russian nationals living in Ukraine, should leave Ukraine to the Ukrainians.

On January 3, 1993, the Applicant was attacked on his way home from work. He heard a voice saying, “Sasha, we’ve been waiting for you for quite some time.” He

was thrown to the ground and kicked. During the beating, the attackers repeatedly warned him to take his “Moskal” wife and “mixed” son out of Ukraine. He sustained a rib injury from the attack.

On July 3, 1993, the Applicant and his son were physically assaulted at a bus stop near their home by four men who were calling them derogatory names and making anti-Semitic remarks. The Applicant was pushed to the ground, and when his son tried to come to his aid, the assailants picked him up and dropped him on the pavement. The beating left bruises on the Applicant’s torso, and his son sustained an injury to his right knee, which required surgery.

The Applicant also recounted the abuse his son endured at school on account of his Jewish background. In 1991, his class was required to read nationalist literature promulgated by Rukh. In December of that year, he was dragged into a corner by some classmates who made anti-Semitic comments and beat him. Also, in December 1993, he was cornered in the men’s room by his classmates and forced to remove his pants to show that he had been circumcised. He did not return to school after this incident.

The Applicant testified that he reported the burglary as well as the January 1993 and July 1993 assaults to the police. He testified that the police promised to “take care of [it]” on each occasion, but that no action was ever taken.

Practical Exercise #4

- **Title:** *Eligibility – Discussion of Discrimination or Harassment Persecution*
- **Student Materials:**

Fact Pattern 2-a:

Applicant is a 50-year-old male native and citizen of Egypt who entered the United States in 1990, and was admitted as a visitor.

Applicant credibly testified that he is a Coptic Christian. Applicant was a successful accountant in Cairo and owned his own business. He was the only Christian business owner in a building with approximately 15 businesses. Because of Applicant’s social standing, fundamentalist Muslims tried to force him to convert to Islam; they felt that it would be a great success if a successful businessman converted to Islam. Fundamentalist Muslim religious leaders visited Applicant several times at his office and to tell him how much he could benefit by becoming Muslim. Applicant expressed his Christian beliefs and asked the religious leaders to leave him alone. He accused them of being fanatics. The Muslim religious leaders

then organized a Muslim boycott of Applicant's business. As a result, Applicant lost approximately 40% of his clientele. Other business owners in the building began to pray in front of Applicant's door making it difficult for clients to come and go. Whenever they encountered Applicant, the other business owners would degrade Applicant's religion. One day Applicant found that the sign for his business had been smashed. Applicant learned from a friend that the Muslims who smashed the sign arranged with the police to accuse Applicant of defaming Islam if he reported the incident. Therefore, Applicant was afraid to report the incident to the police. Applicant was also afraid to hang another sign identifying his business. Shortly after this, Applicant's car was vandalized.

Applicant used to attend Church regularly. However, because of the harassment he and other congregants experienced, Applicant began to attend church less frequently. Stones and feces were thrown at his church. Muslims standing outside would call out pejorative names and degrade the Christian religion. As a result, Applicant and his family no longer felt it was safe to go to church.

Because of the decrease in business, Applicant found it more difficult to support his family. He also worried about his children who were often taunted at school because of their religion. He feared the situation for Christians would only deteriorate. Therefore, he brought his family to the United States and applied for asylum.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution.
2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.
3. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-b:

Applicant is a 31-year-old female citizen of Belarus. Applicant credibly testified that she was often humiliated at school because of her Pentecostal religion. As an adult, Applicant continued to be harassed because of her religion. Applicant and her husband often held prayer meetings in their home. Their neighbors, who accused them of participating in a cult and practicing magic, would throw trash and waste in front of Applicant's door and would threaten to call the police, which they often did. When the police arrived, they would push people around and threaten to exile Applicant and her husband if they did not stop praying. On one occasion when a neighbor called the police in 1989, the police roughly pushed the congregants and destroyed some of Applicant's property. Applicant was eight months pregnant at

the time. The police told the congregants that if they did not stop praying, they would be detained.

Applicant had difficulty finding and retaining employment. Her employers dismissed her after learning that the police were often summoned to her home because she held prayer meetings there.

Applicant received inadequate medical care when she was once hospitalized for removal of a tumor. One of the nurses knew Applicant was Pentecostal. She told the other nurses, who then neglected to care for Applicant. Applicant was often left waiting for long periods of time before nurses would respond to her calls for assistance to get to the bathroom, and several times Applicant was not brought meals when other patients were fed. Two times, nurses neglected to give her pain killers at the prescribed time.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Also consider the individual characteristics of Applicant (would it make a difference whether or not she were pregnant when pushed?)
2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-c:

Applicant is a 28-year old male from Russia. Applicant credibility testified that he is Jewish, though he has never practiced his religion and does not believe in any one religion. Because he is Jewish, he experienced discrimination in Russia. For example, he was not admitted to a university and could not pursue his dream to study Russian literature. He was admitted to a technical school for machinery and technology, where he learned the trade of machinist. Applicant stated that he had difficulty obtaining employment as a machinist and eventually found work as a cashier. Applicant was never given any raises and was generally harassed at work. For example, his supervisor would tell him that he was not correctly doing his work, even though Applicant followed all the instructions his supervisor gave him. Applicant came to the United States to visit an aunt. He now wants to remain in the United States where he can pursue his life-long dream of studying Russian literature.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past

amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Consider also individual characteristics of Applicant.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-d:

Applicant is a 25-year old citizen of Russia. When Applicant was in primary school, she was the only Jew in her class. The teacher often hit Applicant's hands with a wooden pointer without giving her a reason. She was too young to understand at the time, but she now believes she was treated this way because she is Jewish. None of the other children were treated the same way. Applicant's parents moved her to another school, where she had problems with other students. They made fun of her and taunted her, making pejorative nicknames out of her last names, because she is Jewish. Applicant was moved to a different school. Applicant had difficulties with her feet and received a note from a physician explaining that she should not participate in physical exercises and competition. Her teacher did not believe that she had problems with her feet and said the note was only an excuse from a Jewish doctor. Applicant was forced to participate in a physical competition and, as a result, was hospitalized for several months as doctors tried to heal her feet.

Applicant did not receive good grades at the university, even though she prepared better than other students. Because she did not receive good grades, Applicant was not entitled to a stipend. She believes she was given poor grades, because she is Jewish. Since she could not obtain a stipend, she was forced to attend night school so that she could earn money during the day. She was not able to pass one class, even though she prepared for it. The professor explained that she would not pass the Applicant, because Applicant is Jewish. In 1987, Applicant was expelled from school, because she complained about receiving a lower grade than a student who was not as prepared as she was. When the faculty later changed, Applicant was readmitted. As a result of these set-backs, it took Applicant seven years to graduate from university, even though the average time for completion was four years.

From 1986 to 1988, Applicant worked as an assistant teacher. She felt that other teachers isolated her and made it difficult for her to work with the children by speaking poorly to her in front of the children. Applicant told a teacher that her grandfather was on the ritual committee at the main Moscow synagogue. This exacerbated the poor treatment she had been receiving. Because Applicant felt she could not do her job in that atmosphere, she quit her job. She then worked as a teacher at a different school until she left Russia.

One evening as Applicant was returning home from a friend's house, she was stopped by three men. They pushed her and made pejorative comments such as

"You Jews should get out of Russia." They spoke in general about Jews and also said, "Pamiat will show you," indicating that they were associated with the anti-Semitic group, Pamiat. A man walked near-by, and his presence frightened the three men. They ran away, leaving Applicant frightened, but unharmed.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.
2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-e:

Applicant is a 48-year old male citizen from Belarus. Applicant credibly testified that he was born and raised in Minsk, where he attended the Polytechnic Institute. After graduation, he was certified as an electrical engineer. Applicant interviewed for a position as an electrical engineer at the Enterprise of Refrigeration and was told to report to personnel to complete an application. At the personnel office, Applicant's internal passport was checked. He was then told that there was no position available. Applicant believes he was told this because his internal passport revealed that he is Jewish. Applicant took another job as an electrician and continued to work as an electrician for approximately twenty years until he came to the United States in 1991. Applicant's job required him to travel quite a bit. At one time, he was required to spend two months to the Gomel Region, where radiation from Chernobyl was still very high. When Applicant asked why he, as opposed to other employees, was sent to that region, he was told, "Go to Israel, there is no radiation there. You should be thankful that with your passport, you are able to keep this job."

Applicant's wife worked as an accountant. After Applicant's wife married Applicant, she stopped receiving the promotions she had been receiving every year prior to the marriage.

In the last three or four years that the Applicant lived in Minsk, his family received threatening letters in the mail box once or twice a month. The letters said, "Dirty Jews, go to Israel."

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into

account severity and duration of discriminatory actions and/or harassment.

2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 2-f:

Applicant is a 38-year old male citizen of Romania. Applicant credibly testified that he is a woodcarver and had his own studio and business in Romania. In 1986, Applicant organized the people in his town to strike to protest the building of a chemical plant near the town. Applicant publicly spoke out against the government -- accusing the local politicians of corruption and failure to represent the people's interest. Applicant began receiving anonymous letters stating that if he did not stop speaking out against the government, his home and studio would be burned. Applicant's wife was fired from her government job. Undercover government agents began to watch Applicant and would go to his studio about two or three times a week. When the undercover agents went to Applicant's studio, they would linger inside, asking him questions about what he did and how much money he made, and would watch the people who entered his studio. Sometimes, the agents would remain at the studio all day, making it difficult for Applicant to work. Customers, who feared the agents, stopped coming to Applicant's studio. This continued for several months before Applicant left Romania.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.
2. What additional information could be elicited to better evaluate the claim?

Practical Exercise #5

- **Title:** *Eligibility – Discussion of Past Persecution*
- **Student Materials:**

Fact Pattern 3-a:

Applicant is a 40 year old female native and citizen of India. Applicant credibly testified that she is Muslim, but lived in a predominantly Hindu neighborhood. During Muslim-Hindu riots that erupted after the destruction of a mosque by

fundamentalist Hindus, Applicant remained hidden in her bedroom, praying for protection of her son, who had been out in the street when the rioting erupted. The riots occurred during the month of Ramadan and Applicant was fasting, as prescribed by her religious beliefs. As Applicant prayed, a Hindu mob burst into the house and pulled Applicant out into the streets. They removed from Applicant's head the scarf that she wore over her head whenever in the company of men and began making obscene gestures at her. Several men then dragged a beaten teenager and threw him at her feet. She recognized the teenager as her son. The leader of the mob thrust a piece of cooked pork into Applicant's hand and ordered her to eat it. At first Applicant refused, because she was prohibited by her religious beliefs from eating pork and she was also prohibited from eating prior to sundown during the month of Ramadan. The leader struck Applicant's son with a bamboo stick, then threatened to beat her son even more if she did not eat the pork. Despite the religious prohibition, Applicant ate the pork to save her son from further abuse. Satisfied, the leader of the mob led the mob on to find their next victim.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect.
2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 3-b:

Mr. Z is a citizen of Poland. From 1974 to February 1982, he worked as a manager of a livestock farm owned by the Polish government. At the end of 1981, he refused to sign an oath of loyalty to party officials. Soon after this refusal, the police arrested and interrogated Mr. Z three times. He was not physically mistreated on any of these occasions. In February of 1982, he was dismissed from his job. He was not given a reason. He then started his own business, a fox farm. He was again arrested in April of 1982 and interrogated about his association with Mr. M, a Solidarity member to whom he had loaned money. Although Mr. Z had loaned Mr. M money, he was not himself involved in the activities of Solidarity. Beginning in June of 1982 and continuing until December of 1984, the police would summon Mr. Z every two to three months and interrogate him over a period of three to five hours, primarily about his relationship to Mr. M, but also about his own activities. He was not physically harmed during any of these detentions. Mr. Z's final detention occurred in 1984, while he was in Warsaw selling fox furs. He was detained for 36 hours but released once the police determined that his papers were in order. Although the police spoke harshly to the applicant, he was not physically harmed during this detention. When Mr. Z returned home after this detention, he found that his apartment had been searched and some money and foxes confiscated. He left Poland shortly thereafter and entered the United States on a tourist visa.

Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect.
2. What additional information could be elicited to better evaluate the claim?

Fact Pattern 3-c:

Applicant is a 42-year-old male native and citizen of Peru. Applicant credibly testified that he lived in the city of Lima, where he worked at a bank. He owned and his wife managed a small dairy farm outside the city. In early 1988, he attended a public rally for the Democratic Action (AD) party at the invitation of his uncle, a political activist. At the rally, Applicant was challenged by a police officer who demanded his identification and questioned him about his supposed membership in *Sendero Luminoso* (SL). Applicant denied membership in SL. Applicant's wife testified that her husband may have been questioned because his uncle has a history of political activism for the opposition AD party and had often been harassed by the police.

In the weeks following the rally, Applicant was questioned repeatedly at his home and work by police officers concerning his supposed affiliation with SL. On three occasions he was taken from home by the police for further interrogation at the police station. The interrogation sessions at the police station lasted from 3 to 5 hours. During these interrogations, Applicant was initially pressured by slaps in the face with a wet cloth, and then the abuse progressed to blows with closed fists. At the bank where Applicant worked, police officers periodically appeared and kept watch on him while he worked, causing consternation among his co-workers and his supervisor. Applicant insisted that he had no relation to SL and the police were unable to come up with any evidence to link him to the terrorist group.

On May 15, 1988, two men attempted to abduct Applicant's son as he was leaving school. They were deterred by alarms which Applicant's wife and other parents raised. Applicant's wife believes the abductors were policemen. This incident caused Applicant to take precautionary measures. He sent his wife and son to live with his grandparents in another city and began planning the family's departure from Peru.

Applicant testified further that the employees of his dairy farm learned that he was under suspicion as an SL member. Some of the employees were SL members or sympathizers. They took advantage of the situation to invite him to join SL. He said he wanted nothing to do with the SL because he opposed their Communist ideology. Shortly after his departure from Peru in September of 1988, Applicant's dairy was burned by a mob shouting "Long Live *Sendero Luminoso*!"

Discussion

1. Does the harm Applicant suffered from the police amount to persecution?
2. Does the harm Applicant suffered from the SL amount to persecution? Discuss which rights have been violated and the degree of harm Applicant suffered from each event and cumulatively.
3. What additional information could be elicited to better evaluate the claim?

Practical Exercise #6

- **Title:** *Eligibility – Discussion of Persecution*
- **Student Materials:**

Fact Pattern 4-a:

Vladimir is a 43-year old native of Lviv, Ukraine, where he owns a small bookstore. He started the bookstore because no one would hire him for employment because his father is ethnic Turkmen. Vladimir's name and distinct facial features make him stand out among Ukrainians and reveal his ethnicity.

Starting five years ago, policemen came to his store demanding that he pay them approximately \$100.00 monthly to make sure that "nothing would happen" to his store. Although the amount represented a severe hardship to him, he paid it because he was afraid what might happen if he did not.

Five months ago, the policemen told him that his mandatory monthly donation was increased to \$500.00. He told them that he was barely able to pay \$100.00. They warned him to consider the consequences. He had no money to pay the demanded amount. The policemen returned after one week, and severely beat him with sticks, and kicked him with their steel-toed boots. They left him alone, bleeding and unconscious in the back of his store. Luckily, he was found by an off-duty employee, who returned to the store having forgotten her keys.

Vladimir returned to the store after a month of recuperation. After he returned to work, he re-arranged the window display to feature a book critical about the Ukrainian role in the Nazi holocaust during World War II. The book had been discussed at the Orthodox Church he attends.

The following morning, before Vladimir opened the store, a large crowd gathered outside and chanted, "No more Jews." A few minutes later, several men in the crowd broke the storefront glass and destroyed all the books in the new display.

They then proceeded to set the business on fire, which completely destroyed the building.

When Vladimir arrived, he was stunned by the chaotic scene. A policeman passing through the area observed the commotion and quickly came to the scene. When the policeman inquired as to the cause of the trouble, the people in the crowd told him that it was because of the displayed books. The policeman observed the activity for a few minutes and then hit Vladimir on the head several times with his nightstick. Vladimir lost consciousness. "That should do it," the policeman said before returning to his vehicle and driving away.

Vladimir was hospitalized for 2 days to recover from the beating. After he was released, he went to visit the site of his store, and he saw the store had been totally destroyed by fire. On its site was a huge sign, stating "Ukrainians yes, Jews no."

Discussion

1. Discuss whether the harm Vladimir experienced in the past amounts to past persecution.
2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory action and/or harassment.
3. What additional information could be elicited to better evaluate the claim?

Fact Pattern 4-b:

The applicant, Laurita Tong, is a 24-year old Chinese ethnic female native of Indonesia. She has lived her entire life in Jakarta. Three years ago, she completed her university studies with a bachelor's degree in Travel and Tourism. Her family owns a successful travel agency in Jakarta, where she works.

Laurita is Catholic by birth and attends church whenever she can – usually twice a month and on most holy days.

On April 14, 2004, she was walking to work when a native Indonesian man, who was sitting on the steps of his house, stared at her as she walked by. Each day thereafter, he stared at her as she walked to work. Laurita was convinced that he was giving her the "evil eye," and that horrible things would happen to her. The windows of his house were covered with pictures of Muslim religious leaders.

On May 2, 2004, a group of native Indonesians blew up the church that Laurita attends. These people often harassed the churchgoers on Sundays and told them that they would be cursed unless they converted to Islam. Laurita became afraid to attend church after that happened.

On May 12, 2004, Indonesian natives raped Laurita's best friend, Melanie. The men told her that she should "go back to China."

On May 27, 2004, Laurita was leaving a shoe store when a native Indonesian man grabbed her roughly and yelled, "I hate you rich Chinese. Give me all your money, or I'll kill you now." Laurita handed over her purse, and the man ran away.

After these events, Laurita suffered from severe anxiety and depression. She was afraid to leave her house because she was worried what would happen to her. She did not leave her house until June 2, 2004, when she left Indonesia. Her father gave her an airplane ticket for Seattle, where she arrived the same day.

Discussion

1. Discuss whether the harm experienced by Laurita in the past amounts to persecution.
2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of each act.

Fact Pattern 4-c:

Applicant, Lin Xiang, is a 25-year old female native and citizen of China. For two years, she has worked as a bookkeeper at the Fujian Electronics Cooperative, a private business, which has received subsidies from the Chinese government. During the last three months, Lin and most of the other 314 workers have not received any pay because of unexpected financial shortages.

Lin became increasingly outraged. She wrote and printed a pamphlet explaining that the owners of the business had recently bought new homes, luxury vehicles, and even enjoyed vacations in Monte Carlo. She included a photo of one of the owner's homes in her pamphlet. Because of her position at the company, she had personal knowledge of the financial circumstances of the business.

Lin went out late one night in February to distribute the pamphlets into random mailboxes in several apartment buildings. She distributed the pamphlets in a similar manner each night for ten nights. On the tenth night, she was walking in a different neighborhood with about 75 pamphlets in her backpack when a policeman asked her what she was doing out on the street at 1:10 a.m. She replied that she came outside to walk because she could not sleep. He inquired as to what she carried in her backpack, and she told him she had documents from her work. He insisted on inspecting the documents, and after he did so, he angrily chastised her for lying and for disturbing the public social order. He then handcuffed her and brought her to the local Public Security Bureau.

Upon arrival at the Public Security Bureau, Lin was required to identify herself,

and to explain what she had been doing. She explained that she had not been paid since December, and that she did not have enough food to feed her little girl. The police asked Lin who employed her and who put her up to distributing the pamphlets. Lin told the police that she does not get paid for her work and that everything she does is accomplished on her own.

The investigator angrily stated, "I don't believe you. I want you to examine yourself, and understand the damage you have done," he said. Then, he grabbed her and struck her on her back with an electric baton. She was released without conditions after 24 hours without further harm. However, as a result of the electric shock, she suffered a miscarriage in her third month of pregnancy.

After her release, she received notice that she was terminated from her employment. She sought other employment, but was unable to find any job because of her "bad record."

She became despondent, and realized that she could no longer live in China.

Discussion

1. Does the harm experienced by the applicant constitute persecution?
2. What facts support your conclusion?
3. What additional information, if any, would help evaluate this claim?

Practical Exercise #7

Alternative Exercise For Any of the PEs Above With Multiple Fact Patterns

- **Title:** *House of Commons Debate*

- **Introduction**

The participants of the face-to-face session are challenged in the *House of Commons* debate to react to stimulating positions. A panel chairman facilitates the debate and a jury is responsible for the judgment concerning the content of the arguments. The nature of the positions and the role of the panel chairman guarantee a lively discussion, in which "pro's" and "con's" surface very quickly. Per round you need approximately 45 minutes.

- **Output**

The output of the *House of Commons* debate is an overview of all possible arguments pro and con of the position. Because of the competitive element in the debate all participants are stimulated to actively contribute and take turns.

- **Method**

Preparation

The debate will be based on any of the fact patterns from the practical exercises above, seeking subject matter that will be stimulating, controversial and interesting for all participants. The group will be split into three teams and for each fact pattern used, one team will be assigned the role of supporter of the applicant's claim, one group will be assigned to oppose the applicant's claim, and the third group will act as a jury. This will not take more than 5 minutes.

Tasks

Every group prepares, in separate rooms, for the coming debate. In approximately 10 minutes, each group collects arguments for the defense of the group's stand in the debate. The participants prepare themselves both on the content of the arguments and on the presentation of the arguments.

Organization

The debate will be facilitated by a panel chairman. Next to this, there is the jury group, who will observe and judge the debate and the debaters.

OTHER MATERIALS

There are no Other Materials for this module.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

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

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

<p style="text-align: center;"><u>RAD Supplement</u> Module Section Subheading</p>
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SUPPLEMENT B – ASYLUM DIVISION

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

REQUIRED READING

1. 8 C.F.R. § 208.13(b)

ADDITIONAL RESOURCES

1. 1. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors and Deputy Directors, Change in Instruction Concerning One Year Filing Deadline and Past Persecution, (15 March 2001) (HQ/IAO 120/16.13).
2. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Persecution of Family Members, (30 June 1997).
3. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (21 Oct. 1996) (HQCOU 120/11.33-P).
4. Memorandum from David A. Martin, INS Office of General Counsel, to Asylum Division, Legal Opinion: Palestinian Asylum Applicants, (27 Oct. 1995) (Genco Opinion 95-14).
5. Memorandum from David A. Martin, INS Office of General Counsel, to John Cummings, Acting Assistant Commissioner, CORAP, Legal Opinion: Application of the Lautenberg Amendment to Asylum Applications Under INA Section 208, (6 Oct. 1995) (Genco Opinion 95-17).
6. Memorandum from Rosemary Melville, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Follow Up on Gender Guidelines Training, (7 July 1995) (208.9.9).

7. Memorandum from Phyllis Coven, INS Office of International Affairs, to Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, (26 May 1995).
8. T. Alexander Aleinikoff. "The Meaning of 'Persecution' in United States Asylum Law," *International Journal of Refugee Law* 3, no. 1 (1991): 411-434.
9. UNHCR, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005).

SUPPLEMENTS

ASM Supplement – 1

Exercise of Discretion to Grant Based on Past Persecution, No Well-Founded Fear

If past persecution on account of a protected characteristic is established, then the applicant meets the statutory definition of refugee. Regulation and case law provide guidelines on the exercise of discretion to grant asylum to a refugee who has been persecuted in the past, but who no longer has a well-founded fear of persecution.¹²⁷

• **Granting Asylum in the Absence of a Well-Founded Fear**

Regulations direct that the adjudicator's discretion should be exercised to deny asylum to an applicant whose fear of future persecution is no longer well founded,¹²⁸ unless either of the following occurs:

- "The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution."¹²⁹
- "The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."¹³⁰

• **Severity of Past Persecution**

When evaluating when to exercise discretion to grant asylum based on past

¹³³ INA 101(a)(42)

¹²⁸ 8 C.F.R. § 208.13(b)(1)(iii)

¹²⁹ 8 C.F.R. § 208.13(b)(1)(iii)(A)

¹³⁰ 8 C.F.R. § 208.13(b)(1)(iii)(B)

persecution alone, the factors you should consider include:

- duration of persecution
- intensity of persecution
- age at the time of persecution
- persecution of family members
- conditions under which persecution was inflicted
- whether it would be unduly frightening or painful for the applicant to return to the country of persecution
- whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted
- any other relevant factor

• **BIA Precedent Decisions**

Several BIA decisions provide guidance on the circumstances in which persecution has been so severe as to provide compelling reasons to grant asylum in the absence of a well-founded fear.

Matter of Chen

In *Matter of Chen*, the BIA held that discretion should be exercised to grant asylum to an applicant for whom there was little likelihood of future persecution. The applicant in that case related a long history of persecution suffered by both himself and his family during the Cultural Revolution in China. As a young boy (beginning when he was eight years old) the applicant was held under house arrest for six months and deprived of an opportunity to go to school and later abused by teachers and classmates in school. The applicant was forced to endure two years of re-education, during which time he was physically abused, resulting in hearing loss, anxiety, and suicidal inclinations. In finding that the applicant was eligible for asylum based on the past persecution alone, the BIA considered the fact that the applicant no longer had family in China and that though there was no longer an objective fear of persecution, the applicant subjectively feared future harm.¹³¹

Matter of Chen is a leading administrative opinion on asylum eligibility based on past persecution alone; however, the case does not establish a threshold of severity of harm required for a discretionary grant of asylum. In other words, the harm does not have to reach the severity of the harm in *Matter of Chen* for asylum to be granted based on past persecution alone. However, if the harm described is comparable to the harm suffered by Chen, an exercise of discretion to grant asylum

¹³¹ *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

may be warranted.

Matter of H-

In *Matter of H-*, the BIA did not decide the issue of whether the applicant should be granted asylum in the absence of a well-founded fear, but remanded the case to the IJ to decide whether a grant of asylum was warranted. The BIA held that “[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past.”¹³²

Matter of B-

In *Matter of B-*, the BIA found that an Afghani who had suffered persecution under the previous Communist regime was no longer at reasonable risk of persecution. Nevertheless, the BIA held that discretion should be exercised to grant asylum based on the severity of the persecution the applicant had suffered in the past – a 13- month detention, during which time the applicant endured frequent physical (sleep deprivation, beatings, electric shocks) and mental (not knowing the fate of his father who was also detained and separation from his family) torture, inadequate diet and medical care, and integration with the criminal population – and the on-going civil strife in Afghanistan at the time of decision.¹³³

Matter of N-M-A-

In *Matter of N-M-A-* the BIA found that a grant of asylum in the absence of a well-founded fear was not warranted where the applicant’s father was kidnapped, the applicant’s home was searched twice, and the applicant was detained for one month (during which time he was beaten periodically and deprived of food for three days). In reaching that conclusion, the BIA noted that the harm was not of a great degree, suffered over a great period of time, and did not result in severe psychological trauma such that a grant in the absence of a well-founded fear was warranted.¹³⁴

Matter of S-A-K- and H-A-H-

In *Matter of S-A-K- and H-A-H-*, the BIA held that discretion should be exercised to grant asylum to a mother and daughter who had been involuntarily subjected to FGM based on the severity of the persecution they suffered. Some of the factors the Board considered in finding that the persecution was severe were: the applicant’s daughter was subjected to FGM at an early age and was not anesthetized for the procedure; the mother nearly died from an infection she developed after the procedure; both mother and daughter had to have their vaginal opening reopened

¹³² *Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996).

¹³³ *Matter of B-*, 21 I&N Dec. 66 (BIA 1995).

¹³⁴ *Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998).

later on in their lives, in the case of the mother about five times; mother and daughter continued to experience medical problems related to the procedure (e.g., the mother experienced great pain and the daughter had difficulty urinating and cannot menstruate); and the mother was beaten because she opposed having her daughters subjected to FGM.¹³⁵

- **Federal Court Decisions**

A comparison of the decisions above with the federal cases below will help you understand the application of this standard.

Eighth Circuit – Reyes-Morales v. Gonzales

The court upheld the BIA's the denial of asylum finding that the applicant did not establish that the past persecution he suffered was sufficiently serious to warrant a discretionary grant of asylum in the absence of a well-founded fear.¹³⁶ In this case, members of the Salvadoran military beat the applicant to unconsciousness, resulting in a physical deformity and several scars.¹³⁷ The applicant's friend was killed during the same incident. On review, a federal court cannot disturb a discretionary ruling by the BIA unless it is arbitrary or capricious.

Third Circuit – Lukwago v. Ashcroft

The court held that although forcible conscription of a child by a guerrilla group may constitute persecution, it was not on account of a protected ground. The severity of past harm cannot provide the basis for a grant of asylum in the absence of a well-founded fear if the applicant has not established that the harm was inflicted on account of a protected ground.¹³⁸

- **"Other Serious Harm"**

Even where the past persecution suffered by an applicant does not rise to the higher level of severe persecution, a grant in the absence of a well-founded fear may be justified where there is a reasonable possibility that an applicant who suffered past persecution may face other serious harm upon return.¹³⁹

¹³⁵ *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008).

¹³⁶ For additional federal cases, see *Lal v. INS*, 255 F.3d 998, 1009–10, as amended by *Lal v. INS*, 268 F.3d 1148 (9th Cir. 2001); and *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999).

¹³⁷ *Reyes-Morales v. Gonzales*, 435 F.3d 937, 942 (8th Cir. 2006).

¹³⁸ *Lukwago v. Ashcroft*, 329 F.3d 157, 173-74 (3d Cir. 2003).

¹³⁹ 8 C.F.R. 208.13(b)(1)(iii)(B)

By “other serious harm,” the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution.¹⁴⁰

In considering whether there is a reasonable possibility of other serious harm, you should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer.¹⁴¹ Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as “other serious harm.”

Two federal courts that have considered this regulation have noted that the following circumstances might qualify as “other serious harm:”

- harm resulting from the unavailability of necessary medical care¹⁴²
- debilitation and homelessness due to unavailability of specific medications¹⁴³

In *Matter of T-Z-* the BIA found that to rise to the level of persecution and, thus, be considered “serious” economic disadvantage, the harm must be not just substantial but “severe,” and deliberately imposed.¹⁴⁴ When analyzing whether economic disadvantage constitutes “other serious harm,” you need to determine if the harm is “serious.” In making that determination, you need to focus your analysis on whether the economic disadvantage feared is “severe” as required by *Matter of T-Z-*, but you do not need to find that the economic harm will be deliberately imposed. The deliberate imposition requirement of *Matter of T-Z-* is not required in the context of analyzing “other serious harm” because in that context the harm feared does not necessarily have to be volitionally imposed by a persecutor on account of a protected characteristic but can be the result as well from non-volitional situations and events such as, for example, natural disasters.

• **Additional Humanitarian Factors**

To the extent that the revised regulations changed the parameters governing the exercise of discretion to grant asylum in the absence of a well-founded fear, the current regulations supersede discussions of discretion contained in precedent decisions rendered prior to December 6, 2000.

For example, in *Matter of H-*, the BIA indicated that on remand the Immigration

¹⁴⁰ 65 FR 76121 at 76127; *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

¹⁴¹ *Matter of L-S-*, 25 I. & N. Dec. 705 (BIA 2012).

¹⁴² *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011).

¹⁴³ *Kholvyvskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008).

¹⁴⁴ For additional information, see section on Economic Harm.

Judge could consider humanitarian factors independent of the applicant's past persecution, such as age, health, or family ties, when exercising discretion to grant asylum.¹⁴⁵ However, in the supplemental information to the final rule, the Department of Justice specifically stated that it did not intend for adjudicators to consider additional humanitarian factors unrelated to the severity of past persecution or other serious harm in exercising discretion to grant asylum in the absence of a well-founded fear.¹⁴⁶ Thus, under the current rules, humanitarian factors such as those that the BIA referenced in *Matter of H-* are considered in the exercise of discretion analysis only if they have a connection to either the severity of past persecution or to other serious harm that the applicant may suffer.

¹⁴⁵ *Matter of H*, 21 I&N Dec. 337, 347 (BIA 1996).

¹⁴⁶ 65 FR 76121 at 76127.

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

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

REQUIRED READING

- 1.

ADDITIONAL RESOURCES

- 1.

SUPPLEMENTS

<p style="text-align: center;"><u>IO Supplement</u></p> <p style="text-align: center;">Module Section Subheading</p>
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**U.S. Citizenship
and Immigration
Services**

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

WELL-FOUNDED FEAR

TRAINING MODULE

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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).

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
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)
RII	Skill in identifying issues of claim (4)

SCHEDULE OF REVISIONS

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

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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 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 PROOF²

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 [ASM 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 Asylum 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 ASM 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 ASM 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 ASM 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 *Smolnikova 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 *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

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 information²² 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 *Kotas 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 *Kotas* 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

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. Keister*, 505 F.3d 50, 55 (1st Cir. 2007) (noting that the disfavored group analysis 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

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).

- 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 ASM 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. RAD Supplement – Return to Country of Feared Persecution. For additional information, see RAI0 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 RAI0 Training module, *Refugee Definition and Past Persecution*. 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.

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 v. Ashcroft*, 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 situation⁴⁴
- 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

⁴⁴See *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 Zwar 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).

- 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?)

Examples

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 reasonable⁵⁰

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 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 INFORMATION⁵²

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 RAO 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:

OTHER MATERIALS

There are no Other Materials for this module.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

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

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

RAD Supplement – 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.

Also, if there are multiple cross-referenced cases with this issue being denied on credibility issue, the credibility issue should be referenced on each, in case they are reviewed separately by someone doing RFRs. You can always say, "see SY-xxxxx for credibility analysis" to alert a future reviewer that this person was part of a family unit and more information is available. This would be useful for the x-refed cases SY-107144-147, in which an entire family was denied, although the major reasons for the denial are in the mother's case. If any of the adult children's cases was reviewed without the mother's case on hand, the reviewer might be inclined to send the case for reinterview. However, when looked at as a family unit, there would be much less of this tendency since the mother's denial is described most fully

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 – 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 resides⁵⁵
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 persecution⁵⁶

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

Relevant considerations that may be used to determine whether there has been a

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. 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); *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. 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-* 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-* 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 (3d Cir. 2008) (affirmed *Matter of C-C-* regarding the Aird affidavit).

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.

ASM 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 (2007).

⁶⁰ For additional information, see RAIO Training module, *Refugee Definition and Past Persecution*.

ASM 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 so⁶¹

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. 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

⁶¹ 8 C.F.R. § 208.13(b)(1). For additional information, see RAIO Training module, *Evidence Assessment*.

⁶² The Asylum 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 XLD., Fundamental Changes Must Affect Applicant's Situation, below.

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

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); see *Hasalla v. Ashcroft*, 367 F.3d 799, 804 (8th Cir. 2004).

⁶⁴ 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, 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 *Matter of N-M-A-*, 22 I. & N. Dec. 312 (BIA 1998).

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

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

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.” *Mohammed v. Gonzalez*, at 801. 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.⁷⁴ This issue was addressed by the BIA in *Matter of S-A-K- and H-A-H-*.⁷⁵

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 8 C.F.R. 208.13(b)(1)(iii).

⁷⁵ *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, *Refugee Definition and Past Persecution*.

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

<p style="text-align: center;"><u>IO Supplement</u></p> <p style="text-align: center;">Module Section Subheading</p>
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VOICES AND ASYLUM

ADOTIP

March 2017

March 2017

GOALS

- ⦿ Review TVPRA Initial Jurisdiction
- ⦿ Analyze UAC Determinations
- ⦿ Improve child-sensitive interview skills
- ⦿ Minor Adjudication Procedures
- ⦿ Practical exercise

MINOR APPLICANTS

Question:

Why do children immigrate to the US?

MINOR APPLICANTS

Answer:

- Economic/financial hardship
- Reunite with family
- Fear of harm in home country
- Common cases involve non-state actors
 - Intra-familial abuse/domestic violence/child abuse/trafficking
 - FGM and Forced marriage
 - Gang recruitment/gang violence
 - Sexual orientation
 - Religion

MINOR APPLICANTS

Question:

Why are children unaccompanied in the US?

MINOR APPLICANTS

Answer:

- Parents arranged for their travel to US for their safety/security/education and planned for them to live with another relative or family friend
- Children were sent to the US unaccompanied in order to reunite with a parent
- Children came to the US on their own

MINOR APPLICANTS

Question:

What situations do we typically see?

MINOR APPLICANTS

Children who...

- ⦿ Came to the US to reunite with their parents and are living in the US with one or more parents
- ⦿ Living in the US with a family friend or alternative adult family member (adult sibling/aunt/uncle)
- ⦿ Whose parents arranged for their journey to the US
- ⦿ Whose parents accompanied them to the US and then returned to home country
- ⦿ Whose parents have their own immigration court proceedings
- ⦿ Are in school and well-cared for

MINOR APPLICANTS

Children who...

- ⦿ Living with their boyfriends/girlfriends, adult spouses
- ⦿ Fled their country on their own/living in unstable housing
- ⦿ Living in homeless shelters
- ⦿ Are working full-time
- ⦿ Were impregnated by adults
- ⦿ Were impregnated through rape
- ⦿ Were working in the sex industry in their home country

MINOR STATISTICS

⦿ Thousands of unaccompanied children are apprehended each year after crossing the border into the United States.

- FY 2016: 59,692
- FY 2015: 44,927
- FY 2014: 73,471
- FY 2013: 41,908
- FY 2012: 27,053
- FY 2011: 17,786

⦿ Many of the UACs we see in ORR custody are from Guatemala, El Salvador, Honduras, and Mexico.

TERMINOLOGY

Minor?

UAC?

PRL?

MINOR APPLICANTS

- ◉ Minor Principal
- ◉ UACs
- ◉ PRL
- ◉ Dependents
- ◉ Minors in APSO
- ◉ Special considerations may apply to adult applicants who experienced harm as a child

A MINOR



PRL

CASE STATUS (CSTA)
PRINCIPAL

NUNC PRO TUNC: PRINCIPAL
DAINY NOLBERTO (M)

REVIEW SCHEDULED DOB: 1/1/1950

SPEC GRP: PRL CLK DA

AO: 7/17/11 BASIS OF CLAIM:

APSS: IN: N USVISIT: V

TIME: 15:15 ATTY: SFR01

PREP:

DA

TERMINOLOGY

- ◎ “Unaccompanied alien child” (UAC) is a *narrow* term that specifically refers to the TVPRA provisions.
 - Only includes those with no lawful immigration status.

- ◎ “Unaccompanied minors” is a *broader* term used by the asylum division.
 - Includes both those with and without lawful immigration status.

TVPRA

- ⦿ Signed into law on December 23, 2008. 8 U.S.C.A. § 1232
- ⦿ Became effective on March 23, 2009

- ⦿ Allows children in Removal Proceedings to begin the asylum process in a non-adversarial setting
 - “Initial Jurisdiction”
 - Applies to UACs as of 12/23/08 who had a pending case and asylum claim was not previously adjudicated

- ⦿ Takes into account the specialized needs of unaccompanied alien children.

- ⦿ UACs are not subject to the one-year filing deadline

BACKGROUND

- ⊙ CBP and ICE determine whether a minor is a UAC upon apprehension
- ⊙ They issue UACs NTAs and place in removal proceedings
- ⊙ UACs who wish to apply for asylum are given a UAC Instruction Sheet & I-589 by ICE Trial Attorneys

THE UAC DETERMINATION

(effective June 10, 2013)

- ◎ USCIS adopts the previous CBP or ICE determination that an applicant is a UAC and takes jurisdiction.
- ◎ USCIS accepts the previous UAC determination even if the applicant turned 18 or reunited with a parent after being deemed a UAC.

WHERE TO FIND A PREVIOUS UAC DETERMINATION ?



1. Form I-213: Record of Deportable Alien
2. Form 93: CBP UAC Screening Form
3. ORR UAC Initial Placement Referral
4. ORR Verification of Release Form
5. EARM: Encounters Tab
6. This is not an exhaustive list...

*The ICE UAC Instruction Sheet is NOT by itself
evidence of a prior UAC determination*

1) FORM I-213: RECORD OF DEPORTABLE ALIEN

UNACCOMPANIED JUVENILE:

.....
[REDACTED]

(b)(7)(c)

FUNDS IN POSSESSION:

.....

Mexican Peso 20.00

[REDACTED]

(b)(7)(c)

RECORDS CHECKED:

.....

CIS Negative

CLAIM Negative

IAPIS

[REDACTED]

(b)(7)(c)

NARRATIVE:

.....

NOTE:

Subject is an unaccompanied juvenile.

ENCOUNTER/ALIENAGE:

Subject, [REDACTED] (A# [REDACTED]), DOB: [REDACTED], was encountered by McAllen Border Patrol Agents on December 4, 2010, near Hidalgo, Texas. Subject was

1) FORM I-213: RECORD OF DEPORTABLE ALIEN

TRAVEL INFORMATION:

[REDACTED] stated that she traveled from her home in El Salvador to Chiapas, Mexico then to Altar, Sonora, Mexico by bus. She then crossed the U.S./Mexico International Boundary illegally on foot.

DISPOSITION:

[REDACTED] is being served with a Warrant of Arrest/Notice to Appear, and placed in removal proceedings, per Section 212(a)(6)(A)(i) of the INA. She is an unaccompanied juvenile.

2) FORM 93: CBP UAC SCREENING

DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection

UNACCOMPANIED ALIEN CHILD SCREENING ADDENDUM

Trafficking Victim Protection Act (8 U.S.C. 1232)

Alien's Name:

A NUMBER (if any)

A

Credible Fear Determination

Why did you leave your home country or country of last residence?

Do you have any fear or concern about being returned to your home country or being removed from the United States?

Would you be harmed if you were returned to your home country or country of last residence?

Do you have any questions or is there anything else you would like to add?

Human Trafficking

Definition: Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such an act is under 18; or the recruitment, harboring, transporting, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion, for the purpose of subjecting that person to involuntary servitude, peonage, debt bondage, or slavery.

Below are examples of trafficking indicators. If one or more of these indicators is present, the interviewer should pursue age appropriate questions that will help identify the key elements of a trafficking scenario. If required, ensure that follow up questions are asked based on the answers given. Answers from these questions will assist an interviewer in determining if the Unaccompanied Alien Child may be a victim of trafficking. In all cases, use your training and experiences to be alert for

3) ORR UAC INITIAL PLACEMENT REFERRAL FORM

UAC Initial Placement Referral Form

See Footer for Instructions - Updated, 3/25/08

Processing Officer's Name	Email Address	Desk Phone	Cell Phone

UAC Information

First Name	Middle Name	Last Name	DOB

Additional Names Used:				
Gender	Country of Birth	Immigration Status	A#	FINS #
	EL SALVADOR	NTA Issued		

Entry and Apprehension Information

	City and/or Location Code	ST	Date	Time	Type
Entry	SASABE	AZ	12/17/2010	10:00 AM	Entered Without Inspection
Apprehension	SASABE	AZ	12/18/2010	3:00 PM	N/A
Current Location	TUCSON	AZ	N/A	N/A	Processing Center

UAC apprehended with: (Choose more than one if applicable)	Please provide the following for all relatives apprehended with the AUC, if more space is needed, use the <i>Referral Notes</i> section at the bottom of the page.		
	Name	A#	Relationship to UAC
<input type="checkbox"/> Parent(s)			
<input type="checkbox"/> Other Related Adult(s)			
<input type="checkbox"/> Related Minor(s)			
<input type="checkbox"/> Smuggler(s)			
<input type="checkbox"/> Non-Related Individual(s)			
<input checked="" type="checkbox"/> Alone			

4) ORR VERIFICATION OF RELEASE FORM



US Department of Health and Human Services

Office of Refugee Resettlement
Verification of Release Form

OFFICE OF REFUGEE RESETTLEMENT Division of Unaccompanied Children's Services

Name of Minor:

Aliases (if any):

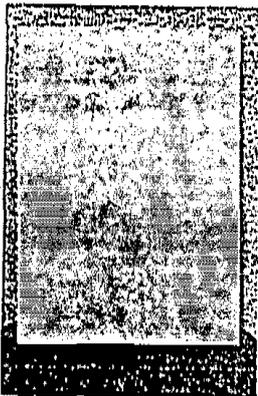
Minor's Date of Birth:

Minor's A

FINS#:

Pursuant to Section 462 of the Homeland Security Act, the Office of Refugee Resettlement (ORR) has released from its custody the above-named minor into the care and custody of:

Acknowledgement of Conditions of Release



- I hereby acknowledge that I have read, or had explained to me in the Spanish language, and I understand the conditions of my release as specified in the Sponsor's Agreement to Conditions of Release, which include among others the following conditions:
- I agree to appear at all future proceedings before the Department of Homeland Security (DHS)/Immigration and Customs Enforcement (ICE) and the Executive Office for Immigration Review (EOIR).
- I agree to report to the DHS/ICE office if so ordered.
- I agree to notify DHS/ICE if I decide to depart from the United States. I will do this at least 5 days before I actually depart the United States.
- I agree to notify DHS/ICE and EOIR within 5 days of a change of address.

5) EARM: ENCOUNTERS TAB

[Person](#)
[Encounters](#)
[Supporting Info](#)
[Case Summary](#)
[Actions/Decisions](#)
[ATD](#)
[Bonds](#)
[Comments](#)
[Scheduling](#)
[Print](#)

[Encounter Details](#)
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Subject Information

FINS:	Criminal Type: NA	Role:
A-Number:	Agg Felon: N - Not an Aggravated Felon	Role Comment: NA
Control Name:	Primary Citizenship: GUATEMALA	Processing Disposition: Warrant of Arrest/Notice to Appear
First Name:	Hair: BLK	INS Status: Inadmissable Alien
Middle Name: N/A	Eyes: BRO	POE: HIDALGO, TX
Maiden: N/A	Complexion: MED	Entry Date: 12/04/2010
Nickname: N/A	Race: W	Entry Class: PWA Mexico
Living?: N/A	Origin: NA	Apprehension Date: 2010-12-04 05:40:00.0
Sex: M	Date of Birth:	Apprehension Location: HIDALGO, TX
Marital Status: Single	Age: 20	
SSN: N/A	Age at Encounter: 17	
Juvenile Verified: Y	Height: 64	
Occupation: CHILD	Weight: 130	

I-213 Narrative NOTE: Subject is an unaccompanied juvenile. Subject made contact with [REDACTED] via phone [REDACTED] ENCOUNTER/ALIENAGE: Subject, [REDACTED] DOB: [REDACTED] was encountered by McAllen Border Patrol Agents on December 4, 2010, near Hidalgo, Texas. Subject was determined to be a citizen and national of Guatemala with no immigration documents. Subject entered the United States at a place not designated as a port of entry by the Attorney General of the United States and/or the Secretary of Homeland Security, the successor, thus subject was not admitted, inspected, or paroled.

CASE EXAMPLE

◎ Claudia was apprehended by CBP and placed in removal proceedings. While preparing, the AO finds Form I-213, which states, “*subject is an unaccompanied juvenile*” and an ORR Initial Placement Referral Form in the file.

Q *Does USCIS have jurisdiction over Claudia’s asylum case?*

Q *Does USCIS have jurisdiction if Claudia is 20 years-old by the time she filed her I-589?*

MAKING A NEW UAC DETERMINATION

NO PREVIOUS UAC DETERMINATION?



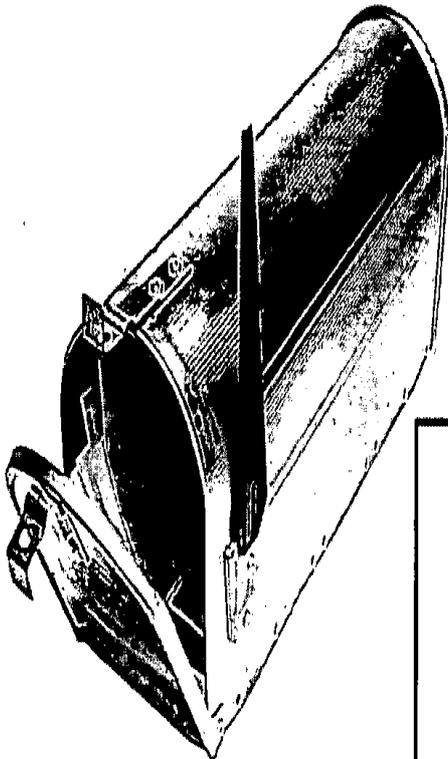
Removal Proceedings

or

No Removal Proceedings?

The only difference is the jurisdiction issue.

NO PREVIOUS UAC DETERMINATION?



In either case (removal proceedings or not), the key question is:

Were they a UAC at the time of filing?

NO PREVIOUS UAC DETERMINATION

And Applicant IS In Removal Proceedings:

- ◎The AO determines if the applicant was a UAC on the **date of the initial filing** of the asylum application
- ◎The AO makes a UAC determination by examining the applicant's age and unaccompanied status.
- ◎If the AO finds that USCIS does NOT have jurisdiction because applicant was not a UAC, write a memo-to-file on jurisdiction.

CASE EXAMPLE

- ◎ Leo and his father were apprehended by CBP in 2012 and placed in removal proceedings. His father was deported shortly after. Leo tells the IJ that he wants to apply for asylum and that he is unaccompanied.

- Q *Does USCIS have jurisdiction if he was 16 years old when he filed his I-589?*

- Q *What happens if the AO finds out during the interview that Leo has been living with his mother since 2012?*

- Q *What happens if AO determines that USCIS does not have jurisdiction?*

IF NO PREVIOUS UAC DETERMINATION

And Applicant Is NOT In Removal Proceedings:

- ⦿AO examines whether applicant was a UAC on the date of initial filing to determine if 1-year filing deadline applies.
- ⦿AO makes UAC determination using existing guidance on examining applicant's age and unaccompanied status.
- ⦿Jurisdiction is not at issue in this case.

CASE EXAMPLE

◎ Jenny entered the US in 2009 and has been living with her teenage friends since then. She was never apprehended and has never been in removal proceedings. She files Form I-589 with USCIS in 2013 at the age of 17.

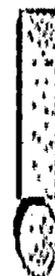
Q *Does USCIS have jurisdiction over Jenny's asylum case?*

Q *Does the AO need to determine if Jenny is a UAC? Why or why not?*

DETERMINING UAC STATUS

- Where, at the time of filing, the applicant has no parent or legal guardian in the US who is available to provide care and physical custody, the applicant is unaccompanied.
- A child is unaccompanied even if they are in the informal care and custody of other adults, including family members.

NOTE – Legal guardianship refers to a formal (legal/judicial) arrangement.



CARE & PHYSICAL CUSTODY

Generally, when a child is living with a parent or legal guardian at the time of filing the child would be considered accompanied.



CARE & PHYSICAL CUSTODY

- If the child is **not residing** with a parent or legal guardian at the time of filing, the child would be considered **unaccompanied** unless there is sufficient evidence to the contrary.
- Was a parent was “available” to provide care and custody?
 - Parental responsibility?
 - Financial support?
 - Emotional support?



CREDIBLE & REASONABLE FEAR

- ⦿ UACs should be placed in Section 240 removal proceedings and are not subject to expedited or administrative removal.
- ⦿ If the evidence indicates that a UAC was mistakenly put through the APSO process, the AO must make a UAC determination and communicate the findings to ICE or CBP as appropriate.

SUMMARY

- ◎ USCIS accepts the previous CBP or ICE determination of an asylum applicant's UAC status and takes jurisdiction over the asylum case.
- ◎ If CBP or ICE have not made a previous UAC determination, USCIS determines whether the applicant was a UAC at the time of filing.

THE ASSESSMENT



- ◉ TVPRA Language
- ◉ UAC Determination
- ◉ One-year Rule
- ◉ Credibility Language
- ◉ Negative decisions

THE ASSESSMENT

TVPRA Language

Section 235(d)(7) of the William Wilberforce Trafficking Victims Protection Act of 2008 (TVPRA) took effect on March 23, 2009 and amends section 208(b)(3) of the Immigration and Nationality Act (INA) to state that an asylum officer “shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child.” See TVPRA Public Law 110-457. The TVPRA grants initial asylum jurisdiction over these cases to USCIS notwithstanding regulations which state that “sole” and “exclusive” jurisdiction over asylum applications lies with the immigration court after service of the Notice to Appear or commencement of proceedings. See 8 C.F.R. §§ 208.2(b), 1003.14(b), and 1208.2(b). An unaccompanied alien child (UAC) is a child who has no lawful immigration status in the United States; has not attained 18 years of age; and has no parent or 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. See 6 U.S.C. § 279(g)(2).

THE ASSESSMENT

UAC Determination

The applicant was apprehended by US Border Patrol agents on [DATE], determined to be an Unaccompanied Alien Child (“UAC”) and transferred to the custody of the Office of Refugee Resettlement (“ORR”). On [DATE], the applicant was served with a Notice to Appear before the Immigration Court. The applicant was released from ORR custody to his [RELATIONSHIP], [NAME]. The applicant filed an application for asylum with USCIS on [FILING DATE].

THE ASSESSMENT

Credibility Language

In determining the applicant's credibility, his/her minor age at the time of the harms was considered as per Guidelines for Children's Asylum Claims. In light of the applicant's minor age at the time of the harms and the nature of the trauma he/she alleges, the applicant presented testimony which was consistent, sufficiently detailed and plausible. Therefore, the applicant was found to be credible.

THE ASSESSMENT

One-Year Rule

Because the applicant was determined to be a UAC at the time of his/her entry into the United States, the one year filing deadline does not apply.

or

The applicant is not a UAC but filed for asylum while still a minor. An extraordinary circumstance exists and the applicant is found to have filed within a reasonable period of time. Thus, the applicant is entitled to an exception to the one-year rule.

THE DECISION

- ◎ Grant
 - Issue standard grant letter, but copy local ICE OCC.
- ◎ Transfer
 - Replace referral notice with UAC Decision Notice for Non-Eligibility.
- ◎ Lack of jurisdiction
 - Use Notice of Lack of Jurisdiction (non-UAC). Instead of assessment, draft memo to file explaining lack of jurisdiction.

INTERVIEWING TIPS

PRE-INTERVIEW

Pre-interview Prep:

- Have a minors interview template where you include reminders of subjects to cover
- Review the application and identify important issues to discuss in interview
- Check for concurrent filings e.g. I-360 Special Immigration Juvenile Status (SIJ), T-visa, U-visa, VAWA
- **Question:** What are some important issues that need to be discussed on children's cases?

INTERVIEWING TIPS

PRE-INTERVIEW

- o All cases: Is there evidence of a prior UAC determination in the file? Is this a PRL case?
- o Where are the applicant's parents? Are they aware of/support the asylum application?
- o Who is the applicant's caregiver in the US and who was their caregiver in the home country?
- o Is there any indication in file that the applicant is not safe/being exploited? Are they in school/working?
- o Nexus: Note down all possible bases of claim

INTERACTIONS WITH THIRD PARTIES/SAFETY

- ⦿ Interactions with Third Parties
- ⦿ Who is present?
- ⦿ Attorney/waiver of representative?
- ⦿ Determine the relationships to the applicant of those present. Does the relationship seem bona fide?
- ⦿ Address any suspicions that arise at the interview. Consult an SAO, Minors POC, or Training Officer, if appropriate, for assistance.

INTERACTIONS WITH THIRD PARTIES/SAFETY

Guardianship/ Custody Issues

- ⦿ Who is present?
- ⦿ Relationships of those present
- ⦿ Living situation
- ⦿ Is there a formal guardianship arrangement?
- ⦿ Do they know what happened to the applicant?
- ⦿ Do they have additional information that the applicant is unaware of?
- ⦿ Does the applicant feel comfortable sharing all information in front of this individual?

INTERVIEWING TIPS IN INTERVIEW

- ⦿ Warmly welcome children to office
- ⦿ Ask child if they have any questions
- ⦿ Use a Child-Friendly Introduction
- ⦿ Make sure that the applicant can understand his/her interpreter (indigenous/Spanish)
- ⦿ Explain the Purpose/ Interview Process
- ⦿ If application references a particularly severe form of physical harm/sexual harm/long term discrimination/humiliation/share, acknowledge up front.

INTERVIEWING TIPS IN INTERVIEW

- ⊙ Build Rapport
- ⊙ Assessing Capacity
- ⊙ Developmentally-Appropriate questions
- ⊙ Confidence
- ⊙ Appearance
- ⊙ Cognitive/other delays?
- ⊙ Keep all PSGs in mind throughout questioning

INTERVIEWING TIPS

TRAUMA SENSITIVE TECHNIQUES

- ◎ Consider presence of third parties
- ◎ A child who has been raped or had other difficult experience is nervous and likely will dread talking about it. Put them at ease from the moment you start talking to them and you will see them visibly relax.
- ◎ Build rapport first and ask about circumstances of their lives, their affiliations (nexus), without touching on harm, if possible.

INTERVIEWING TIPS

TRAUMA SENSITIVE TECHNIQUES

- ⦿ When you are going to ask about harm, try to state something that provides an indicator about the fact that you will be discussing the harm. For instance, “I’m now going to talk about the hard part.”
- ⦿ When you finish speaking about the harm, let the minor know. Make your best effort to limit the time spent focused on the harm in the interview and keep this line of questioning contained.

INTERVIEWING TIPS

TRAUMA SENSITIVE TECHNIQUES

- ⦿ Extensive details about the harm is most times not necessary as nexus, credibility, and other material aspects of the claim can be established through other areas of questioning.
- ⦿ Remember that talking about their persecutor may = talking about the harm. If persecutor is Dad who sexually abused daughter, then asking her about who she lived with in home country is going to elicit an emotion because it ties directly into harm.

INTERVIEWING TIPS

CHECKING IN...

Check-in throughout interview...

- How old were you when that happened?
- Did you see that yourself or did someone tell you about that? Who?
- Did you understand that question? Do you need me to ask it again? Or explain?
- Note attention span
- Try not to introduce new concepts to them, stay within the realm of what they know
- Security issues - probe gang affiliations

CHALLENGES IN DETERMINING CREDIBILITY

- ⦿ Compare the objective reality with the actual facts of the case
- ⦿ Remain sensitive to the cultural and personal experiences of applicants
- ⦿ Reasonable expectation of detail (esp. related to time periods) when harm experienced as a child
- ⦿ Age and situation at the time of events

INTERVIEWING TIPS

CONCLUDING THE INTERVIEW

- ⦿ Make sure to ask explicitly if the applicant has any fears related to each of the five grounds
- ⦿ Always finish the interview on a more positive subject
- ⦿ After discussing the harm and persecutor, ask at least a few other questions so that the applicant can leave the office feeling calm and not upset because he or she recently disclosed the harm experienced.
- ⦿ Ask if they have anything to add/questions

MOCK EXERCISE

4/20/2017

59

QUESTIONS?

Quality Assurance Branch POCs- Asylum HQ

Jane Kochman

Mollie Isaacson

Operations Branch POC - Asylum HQ

Kimberly Sicard

With special thanks to *Vincent Ferri* at ZSF for the creative UAC Determination slides!

One-Year Interviewing – Practical Exercise (ADOTP)

Student Instructions: For this exercise, we will divide into small groups of students. After gathering with your group and facilitator, please individually read the fact pattern below, which presents a one-year scenario that contains multiple possible changed and extraordinary circumstances. As you read, (1) identify every possible changed circumstance and extraordinary circumstance and (2) draw a timeline of events. There is a student worksheet on page 2 to help you organize.

With your facilitator, the group will identify possible changed circumstance and extraordinary circumstance. You will then be then divided into pairs and assigned to interview the role-player focusing on one of these possible circumstances. Develop sufficient questions to determine whether your assigned issue qualifies as a changed circumstance or extraordinary circumstance and whether the delay in filing is reasonable. As pairs you will then ask the role-player these questions and any necessary follow-up for the identified changed circumstance or extraordinary circumstance and record the responses for discussion in the class.

STUDENT FACT PATTERN:

The applicant is a female native and citizen of Burkina Faso. She last entered the United States on January 1, 2010 at San Francisco International Airport on a valid F-1 student visa, which is established by DHS records and the applicant's credible testimony.

- The applicant's family contacted the applicant concerning having FGM performed on the applicant's U.S. citizen child.
- The applicant was in a car accident.
- The applicant consulted with someone on immigration matters.
- The applicant graduated in January 2015.

The applicant filed for asylum on March 3, 2015, which is date-stamped on the applicant's I-589.

Student Worksheet

For each pair (round of questions), identify the type of circumstance involved and how long the applicant delayed before filing.

1a. Possible circumstance: _____

1b. Length of delay: _____

Notes/Issues to Address: _____

2a. Possible circumstance: _____

2b. Length of delay: _____

Notes/Issues to Address: _____

3a. Possible circumstance: _____

3b. Length of delay: _____

Notes/Issues to Address: _____

4a. Possible circumstance: _____

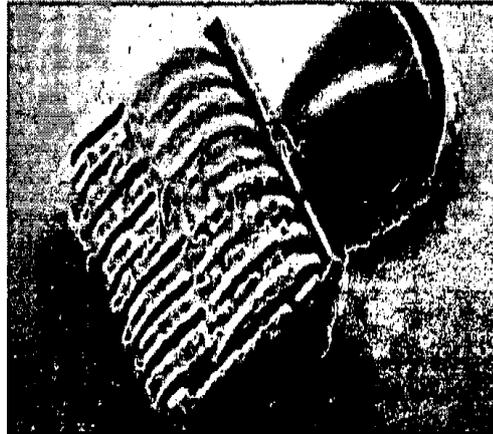
4b. Length of delay: _____

Notes/Issues to Address: _____

REAL ID ACT

HQ ASYLUM, MARCH 2017

1



DATE OF ENACTMENT - MAY 11, 2005

ONLY APPLIES TO ASYLUM APPLICATIONS FILED ON OR
AFTER THIS DATE



REAL ID ACT

Most relevant aspects of the law (for Asylum):

- **Codified certain asylum case law provisions re: Nexus, Corroboration, and Credibility**
- Broadened TRIG
- Removed cap on adjustments of status for asylees (had been 10,000/year)
- Removed cap on grants of asylum based on CPC (had been 1,000/year)

CHANGES UNDER REAL ID

3 Main Points

1. **Nexus**

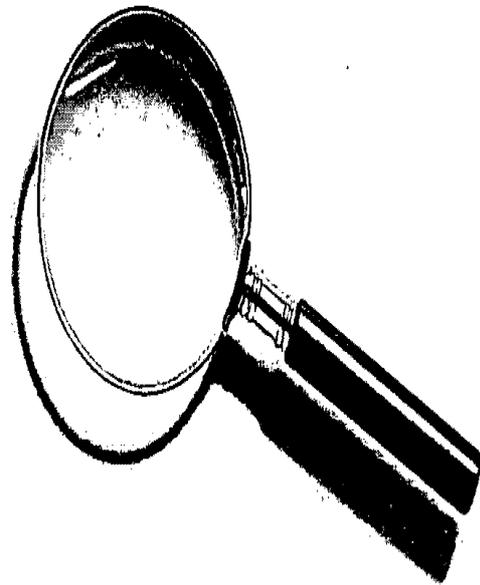
INA§ 208(b)(1)(B)(i)

2. **Corroborating Evidence**

INA§ 208 (b)(1)(B)(ii)

3. **Credibility**

INA§ 208(b)(1)(B)(iii)



1. NEXUS

The grounds remain the same...

- Race
- Religion
- Nationality
- Membership in a Particular Social Group ("PSG")
- Political Opinion

REAL ID did not change any of the grounds but it clarified what an applicant's must demonstrate to establish a nexus.

1. NEXUS

- “[O]ur **standard** in mixed-motive cases has **not been radically altered** by the [REAL ID Act]”
- The protected ground “**cannot play a minor role** in the [applicant's] past mistreatment or fears of future mistreatment.”
- The protected ground **cannot be “incidental, tangential, [or] superficial . . . to another reason for harm.”**
- “[M]otivation of the persecutors involves questions of fact, and the burden **can be met by testimonial evidence.**”

Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 214 (BIA 2007)

1. NEXUS: "ONE CENTRAL REASON"

"There is **no requirement that the motivation relating to the protected ground be dominant or primary.**"

Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009).

But it must be "at least one central reason."

INA § 208(b)(1)(B)(i)

1. NEXUS

For Assessment Writing

Identify the nexus and analyze facts to show that at least **one central reason** that the persecutor harmed applicant was on account of a protected ground.

- From the ADOTC Grant Assessment Template (DRAFT)

2. CORROBORATION

“**[T]estimony** of the applicant **may be sufficient** to sustain the applicant's burden without corroboration, **but only if** the applicant satisfies the trier of fact that the applicant's testimony is **credible, is persuasive, and refers to specific facts sufficient to demonstrate** that the applicant is a refugee.”

INA § 208 (b)(1)(B)(ii).

2. CORROBORATION

“[T]he trier of fact (**YOU**) may weigh the **credible testimony** along **with other evidence of record.**”



“Where the trier of fact determines that the applicant should provide evidence that corroborates **otherwise credible testimony**, such evidence **must be provided** unless the applicant **does not have** the evidence and **cannot reasonably obtain** the evidence.”

AKA the “Corroboration Rule” - INA § 208 (b)(1)(B)(ii).

3. CREDIBILITY DETERMINATIONS

**“THERE IS NO
PRESUMPTION OF
CREDIBILITY”**

INA § 208 (b)(1)(B)(iii)

3. CREDIBILITY DETERMINATIONS

What is credible testimony?

Testimony is credible if it is “detailed, consistent, and plausible.”

3. CREDIBILITY DETERMINATIONS

Considering the **totality of the circumstances**, and **all relevant factors**, a trier of fact **may** base a credibility determination* on:

- **Demeanor**, candor, responsiveness
- Inherent **plausibility** of the applicant's account
- **Consistency** between the applicant's written and oral statements**
 - internal consistency between all such statements;
 - consistency between such statements and other evidence of record (including DOS Country Conditions reports)
- Any inaccuracies or falsehoods in such statements
 - without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim
- **Any other relevant factor**

INA § 208(b)(1)(B)(iii)

*Of any applicant or witness

**Whenever made and whether or not under oath, and considering the circumstances under which the statements were made

REMINDER: THE BASIS WAS IN CASE LAW...

The **BIA** has held that the factors listed in the REAL ID Act relevant to credibility determinations were chosen because they were "**identified in case law**" and therefore help provide a "uniform standard for credibility."

Lack of Detail*

Internal Inconsistency

External Inconsistency

Plausibility

Inaccuracies or falsehoods

Candor or Responsiveness

Demeanor

Any other relevant factor

*Not listed in the statute but see: *Matter of Mogharrabi*

REMINDER: TOTALITY OF THE CIRCUMSTANCES

Each specific instance of any credibility concern must be addressed and then afforded the appropriate probative weight given the **"TOTALITY OF THE CIRCUMSTANCES"**

What does it mean?

According to the BIA, it is basically **the context of the entire record.**

3. CREDIBILITY DETERMINATION

TOTALITY OF THE CIRCUMSTANCES

Chinese Christian claim. IJ made adverse credibility determination based on several factors, including:

- applicant said he had to stand outside in the heat during his 2nd day in detention; written statement said 3rd day.
- applicant could not recall date or year of arrest – said it was within “four, five, or six months” of departure from China
- applicant's recitation of Lord's prayer was incorrect – knowledge of Christianity less than basic.

Ren v. Holder, 648 F.3d 1079 (9th Cir. 2011)

3. CREDIBILITY DETERMINATION

TOTALITY OF THE CIRCUMSTANCES

Factors

- Age: 19
- Father's recent death
- Separation from mother
- Put in care of "unsympathetic aunt"
- Long journey to US
- 8 months in detention upon arrival in US
- Applicant's explanations

Outcome

- BIA overturned an immigration judge negative credibility finding – based on the "totality" including these factors
- BIA held the applicant presented a plausible, detailed and internally consistent asylum claim

3. CREDIBILITY DETERMINATIONS

For extended discussions on:

- Demeanor
- Plausibility
- Inconsistencies

Refer to:

- RAIO CT Class "Credibility Determinations"
- RAIO Credibility Lesson Plan
- Asylum Supplement to the LP

3. "ANY OTHER RELEVANT FACTOR"

"Relevant" facts

- Do not have to go to the heart of the claim;
- But still must be logically connected;
- Tend to either prove or disprove a matter at issue (i.e. moves the needle one direction or the other)

REMINDER: ADDRESSING SPECIFIC CREDIBILITY CONCERNS

- Identify the type of credibility concern;
- Inform the applicant of your concern;
- Ask the applicant to explain;
- Assess the reasonableness of the explanation in the totality of the circumstances, given all relevant factors.

This is not a linear process. All these elements are ongoing and can happen before, during, and/or after the interview.

REMINDER: "ELICIT"

"To elicit": VERB

*to call forth or draw out
(as information or a
response)*

More than just asking a list of questions

- Listening
- Thinking
- Responding
- Documenting
- Clarifying
- Repeating
- Pausing
- *What else?*

TIPS FOR ELICITING ON CREDIBILITY

- Ask about biographic information
- Listen carefully
- Ask for the details you need
- Ask questions out of chronological order (when appropriate)
- Ask the applicant to explain again
- Take careful notes
- Review documents carefully
- Remain composed, even when you suspect misrepresentation

REMINDER: FACTORS THAT CAN PRESENT AS CREDIBILITY CONCERNS

Remember factors from the RAIO CT and all the LPs regarding factors such as:

- Incomplete / faulty memory
- Varied impacts/manifestations of trauma
- Cultural / societal barriers
- Dialect / Language Issues
- Limited Access to Counsel or understanding of the System
- Sensitive Topics (sexual violence, FGM, sexual orientation, etc.)

*These may be **RELEVANT** factors that you should address in the interview and in your analysis of the **TOTALITY OF THE CIRCUMSTANCES!***

REMINDER: FACTORS THAT ARE NOT RELEVANT TO CREDIBILITY DETERMINATIONS

- Your moral or value judgments
- The fact that applicants may make statements that are "self-serving"
- Your speculation as to what is plausible
- AO fatigue with hearing similar claims or dealing with similar populations
- **The legal conclusion that the Applicant's fear is not well-founded**

3. CREDIBILITY DETERMINATION

For Assessment Writing

If positive credibility finding, write:

- **“The applicant's testimony was detailed, consistent, and plausible. Therefore, it is found credible”**

If negative credibility finding:

- Fully analyze the relevant credibility factors

REAL ID ACT RECAP

Take Away Points

1. Nexus → “**one central reason**”
2. Corroboration Rule
3. Credibility → Any **relevant** factors in the **totality of the circumstances**



U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

CHILDREN'S CLAIMS

TRAINING MODULE

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

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

TERMINAL PERFORMANCE OBJECTIVE(S)

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

ENABLING PERFORMANCE OBJECTIVES

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

Describe procedural considerations when working with child applicants.

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

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

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

INSTRUCTIONAL METHODS

Interactive presentation

Discussion
Practical exercises

METHOD(S) OF EVALUATION

Written exam

REQUIRED READING

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

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

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

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

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

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

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

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

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

- Duncan, Julianne, *Best Interest Determination for Refugee Children: An Annotated Bibliography of Law and Practice*, United States Conference of Catholic Bishops, 15 October 2008.
- Geidd, Jay, "Inside the Teenage Brain," Frontline, PBS, January 2002.
- Memorandum from Joseph E. Langlois, INS Asylum Division, to Asylum Office Directors, et al., *H.R. 1209 – Child Status Protection Act*, (HQIAO 120/12.9) (7 August 2002).
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SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
8/21/2014	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/30/2015	Section 8.4, Nexus to a Protected Ground	Modified recommended PSG formulations for FGM and forced marriage	RAIO Training

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

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

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

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

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

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

2 INTERNATIONAL GUIDANCE

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

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

2.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations (U.N.) General Assembly on December 10, 1948.⁴ The UDHR sets forth a collective understanding of the rights that are fundamental to the dignity and development of every human being. Most relevant to your work are Article 14, which provides for the right to apply for asylum, and Article 25(2), which refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.

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

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

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

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

2.2 Convention on the Rights of the Child

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

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

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

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

Additionally, the United States ratified the Optional Protocol to the CRC on the involvement of children in armed conflict on January 23, 2003.¹⁰ In violation of current international standards that establish a minimum age for participation in armed conflicts, children under age eighteen are forcibly recruited by state-sanctioned armies or private militias to participate in military combat in some countries. Among other things, the Optional Protocol calls for States Parties to ensure that children under eighteen years of age do not take a direct part in hostilities, sets out safeguards for those under eighteen years of age who are voluntarily recruited into their nation’s armed forces, and prohibits

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

⁶ CRC, Article 3.

⁷ CRC, Article 12.

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

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

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

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

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

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

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

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

2.4 The United Nations High Commissioner for Refugees (UNHCR)

2.4.1 ExCom Conclusions

Over the years, the Executive Committee of the High Commissioner's Program¹² (or "ExCom") has adopted a number of conclusions concerning refugee children. Safeguarding the wellbeing of refugee children has long been a high priority of the UNHCR and the United States.

UNHCR ExCom Conclusion No. 47

In 1987, the Executive Committee issued its first conclusion devoted exclusively to children – Conclusion No. 47.¹³ This Conclusion urged action to address the human rights and needs of children who are refugees, highlighted the particular vulnerability of unaccompanied and disabled refugee children, and highlighted the need for action by UNHCR to protect and assist them. Conclusion No. 47 condemned specific violations of

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

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

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

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

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

UNHCR ExCom Conclusion No. 59

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

UNHCR ExCom Conclusion No. 107

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

2.4.2 UNHCR Policies and Guidelines

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

Policy on Refugee Children

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

Refugee Children: Guidelines on Protection and Care

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

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

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

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

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

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

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

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

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

UNHCR Guidelines on Determining the Best Interests of the Child

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

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

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

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

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

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

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

UNHCR's Framework for the Protection of Children

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

3 U.S. LAW

3.1 Definition of "Child"

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

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

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

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

²³ CRC, Article 1.

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

out specific definitions and categories of children.

Following are some of the different contexts and definitions:

- The INA defines a “child” as “an unmarried person under twenty-one years of age”²⁵ for purposes of eligibility for most immigration benefits under the INA, including derivative refugee or asylum status. In the case of a derivative, the child would not be the principal applicant, but rather would have derivative status based on a parent’s refugee or asylum claim. *See Derivative versus Independent Status*, below.
 - Refugee and IO officers adjudicate Refugee/Asylee Relative Petitions (Form I-730) for children up to age twenty-one.²⁶
 - An unmarried child of a principal applicant granted asylum may receive a derivative grant of asylum if the child was under twenty-one at the time the application was filed.²⁷
- For purposes of determining admissibility, “juvenile” is a term used in INA section 212 when discussing exceptions to criminal responsibility for persons under eighteen years of age.²⁸
- DHS regulations also use the term “juvenile” to describe an individual under eighteen for purposes of determining detention and release and parental notification.²⁹
- DHS regulations use the term “minor under the age of 14” for the following purposes:
 - A parent or legal guardian may sign for a person who is under fourteen (8 C.F.R. 103.5a(c)).
 - Service of any DHS document shall be made upon the person with whom the minor under fourteen lives, and if possible upon a near relative, guardian, committee, or friend (8 C.F.R. 103.5a(c) and 236.2).
- The Homeland Security Act of 2002³⁰ introduced a new term – “unaccompanied alien child” (or “UAC”) – to define a child who has no lawful immigration status in the United

²⁵ INA § 101(b)(1); INA § 101(c)(1).

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

²⁷ *Id.*

²⁸ INA § 212(a)(2)(A)(ii).

²⁹ *See* 8 C.F.R. § 236.3.

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

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

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

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

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

3.2 Derivative versus Independent Status

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

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

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

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

³³ 8 C.F.R. § 103.2

³⁴ 8 C.F.R. §§ 207.7 and 208.21(a).

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

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

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

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

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

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

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

If, however, the child turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless the petition or application was pending on August 6, 2002.³⁸

Children Who Turn Twenty-One Years of Age before Adjustment

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

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

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

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

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

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

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

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

4 CHILD DEVELOPMENT

4.1 General Considerations

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

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

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

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

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

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

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

4.2 Developmental Stages

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

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

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

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

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

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

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

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

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

⁴⁴ *Id.*

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

4.3 Factors that Influence Development

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

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

4.4 Factors that Accelerate or Stunt Development

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

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

4.5 Effects of Stress and Violence

⁴⁶ LIRS, pp. 6-7.

⁴⁷ LIRS, p. 7.

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

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

4.6 Culture and Development

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

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

Example

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

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

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

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

Example

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

4.7 Preconceptions

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

- **All governments are corrupt**

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

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

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

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

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

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

⁵⁰ LIRS, p. 35.

⁵¹ LIRS, p. 36.

⁵² LIRS, p. 36.

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

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

5 PROCEDURAL CONSIDERATIONS

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

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

5.1 Officers in the RAIO Directorate

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

5.2 Interview Scheduling

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

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

⁵³ See section 6, *Interview Considerations*.

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

6 INTERVIEW CONSIDERATIONS

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

6.1 Presence of a Trusted Adult at the Interview

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

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

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

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

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

6.2 Guardianship, Parental Knowledge, and Consent

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

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

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

- With whom is the child living?

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

⁵⁶ *Id.*

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

6.3 Conducting a Non-Adversarial Interview

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

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

6.4 Working with an Interpreter

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

⁵⁷ 8 C.F.R. § 208.9(b).

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

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

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

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

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

6.5 Building Rapport

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

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

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

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

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

⁶² LIRS, p. 45.

⁶³ UNHCR Handbook, para. 198.

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

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

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

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

6.6 "Reading" the Applicant

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

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

6.7 Explaining How to Respond to Questions

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

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

Example

⁶⁶ LIRS, pp. 45-46.

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

⁶⁸ LIRS, pp. 46-47.

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

⁷⁰ *Id.* at 50.

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

Child: I don't know.

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

6.8 Reassuring the Applicant

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

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

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

6.9 Taking Breaks

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

6.10 Concluding the Interview

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

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

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

6.11 Child-Sensitive Questioning and Listening Techniques

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

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

Example

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

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

Example

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

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

⁷⁴ *UNHCR Handbook*, para. 214.

⁷⁵ *Perry and Teply*, p. 1383.

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

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

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

⁷⁷ Symposium, p. 40.

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

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

⁸⁰ Symposium, p. 40.

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

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

⁸² Walker, reprinted in *LIRS*, p. 63.

⁸³ *Perry and Teply*, p. 1380.

⁸⁴ *Symposium*, p. 40.

⁸⁵ *Id.*

⁸⁶ *Id.*

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

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

⁸⁸ Symposium, p. 40.

⁸⁹ *Id.*

⁹⁰ LIRS, p. 47.

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

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

⁹² LIRS, p. 47.

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

⁹⁴ Walker, reprinted in LIRS, p. 64.

⁹⁵ Symposium, p. 41.

7 CREDIBILITY CONSIDERATIONS

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

7.1 Detail

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

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

Example

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

Measurements of Time and Distance

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

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

Example

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

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

⁹⁷ *Canadian Guidelines*, p. 8.

⁹⁸ *Symposium*, p. 41.

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

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

Example

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

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

Examples

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

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

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

“I don’t know” Responses

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

Example

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

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

7.2 Demeanor

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

Example

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

Trauma

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

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

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

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

Age and Developmental Considerations

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

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

Other Considerations

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

You should keep the following in mind:

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

Example

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

- the role of others in preparing children for interview

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

¹⁰¹ For additional information, see RAI0 module, *Credibility*; see also Bhabha and Young.

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

7.3 Evidence

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

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

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

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

¹⁰² *LIRS*, p. 51.

¹⁰³ *UNHCR Handbook*, para. 219.

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

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

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

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

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

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

Example

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

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

8 LEGAL ANALYSIS

8.1 Introduction

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

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

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

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

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

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

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

8.2 Persecution

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

Harm that Rises to the Level of Persecution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Types of Harm that May Be Imposed on Children

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

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

¹²² Bhabha and Young, pp. 760-61.

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

Identification of the Persecutor – Private versus Public Actors

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

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

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

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

¹²³ Convention on the Rights of the Child.

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

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

seeking protection.

8.3 Well-founded Fear of Future Persecution

General Considerations¹²⁶

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

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

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

Personal Circumstances

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

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

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

¹²⁸ *UNHCR Handbook*, para. 215.

¹²⁹ *UNHCR Handbook*, para. 216.

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

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

¹³² *UNHCR Handbook*, para. 218.

Family as similarly situated

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

Family's intentions

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

Child's arrival

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

Internal Relocation

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

¹³⁴ *Bhabha and Young*, 764.

¹³⁵ *UNHCR Handbook*, para. 219.

¹³⁶ *UNHCR Handbook*, para. 218.

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

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

8.4 Nexus to a Protected Ground

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

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

Burden of Proof

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

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

Inability to Articulate a Nexus to a Protected Ground

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

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

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

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

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

No requirement for Punitive Intent

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

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

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

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

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

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

Inability to Articulate a Political Opinion

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

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

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

Membership in a Particular Social Group

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

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

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

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

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

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

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

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

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

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

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

Example

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

Example

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

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

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

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

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

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

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

- “Females [of the applicant’s tribe or nationality] who are subject to gender-related cultural traditions” may be an appropriate particular social group formulation when the claim is based on FGM. You must assess whether FGM is persecution to an individual applicant, including in cases where FGM is imposed on a young child who does not have the capacity to welcome it as an important rite. As FGM is clearly objectively serious harm, the point of inquiry is the applicant’s perception of it.¹⁵⁴ If the applicant is still a young child who may not have the capacity to form an opinion about FGM, apply standard principles of supplementing the child’s testimony with other evidence, e.g., accompanying adult’s testimony, objective evidence in the form of country conditions reports concerning what the child was or would be subjected to.¹⁵⁵ It is also important to ask whether the applicant fears FGM to a child¹⁵⁶ or

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

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

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

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

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

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

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

8.5 Child-Specific Considerations Concerning Bars and Grounds of Inadmissibility

Firm Resettlement

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

Serious Nonpolitical Crime

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

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

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

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

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

¹⁶¹ *A-G-G-*, 25 I&N Dec. at 501.

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

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

9 OTHER IMMIGRATION STATUSES AVAILABLE TO CHILDREN

For additional information, see [ASM Supplement – Other Immigration StatUSES Available to Children](#).

10 SUMMARY

10.1 International Guidance

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

10.2 Child Development

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

10.3 Procedural Considerations

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

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

10.4 Interviewing Considerations

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

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

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

10.5 Legal Analysis

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

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

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

PRACTICAL EXERCISES

There are no practical exercises for this module.

OTHER MATERIALS**Sample Opening Statement for Children**

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

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

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

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

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

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

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

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

REQUIRED READING

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

ADDITIONAL RESOURCES

1. UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines* (2011).
2. UNHCR, *Guidelines on Determining the Best Interests of the Child* (2008).

SUPPLEMENTS

RAD Supplement – Married Minors

The Refugee Affairs Division and Department of State have independently issued guidance on how to adjudicate refugee cases involving married children.¹⁶² If UNHCR refers a case involving married minor, you may find a BID in the file under certain circumstances. If no BID is in the case file and you have concerns about the well-being of the married child, you must consult the team leader and request that a BID be done.

The information in this section is taken from Refugee Affairs Division Guidance

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

and Department of State Program Announcement 2010-03.

The following principles apply when processing married minors¹⁶³ for the U.S. Refugee Admissions Program (USRAP):

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

An officer may request a BID (for UNHCR P1 or P2 referrals) if there are cases which fall outside the norm and the officer would like a closer examination of what is in the best interests of the child. Ex: a BID could be requested for a 16-year-old married to a 50-year-old or where there is some suspicion of abuse.

The UNHCR BID Guidelines do not explicitly address the issue of minors who are married. However, in the absence of guidance in the Guidelines, some UNHCR offices have addressed it and have come up with the following position: A formal BID is not required for unaccompanied and separated children who marry before

¹⁶³ Minors are under the age of 18.

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

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

they turn 18 years, and the marriage has been carried out in accordance with national law and Convention on the Rights of the Child (CRC) standards. Such individuals will no longer be considered unaccompanied or separated children. However, to ensure that the marriage has been carried out in accordance with national law and CRC standards, that the child has not been forced into marriage, and that the case is not one of child trafficking, it is recommended that a best interests assessment be conducted prior to determining the recommended durable solution.

RAD Supplement – Standard Operating Procedures for Children's Cases

Since 2003, refugee adjudications have required that a formal Best Interest Determination (BID) be prepared by UNHCR for each child referred to the United States Refugee Program (USRAP) as a principal applicant.¹⁶⁶ The requirement has been formalized in SOPs for Children's Cases adopted in January, 2011.¹⁶⁷ Officers must review the BID to verify that the child's protection needs are being met in the application and adjudication process.

Key Elements of a Valid BID

Was the BID prepared by a qualified child welfare professional?

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

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

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

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

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

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

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

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

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

Verify information in BID with child

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

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

When interviewing a separated child:

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

Information To Be Included in the Refugee Assessment

After the USCIS interview:

Document clearly in the Assessment whether the Officer concurs with the recommendations in the BID. This concurrence should be noted after "Justification" at the end of Section VI of the Refugee Application Assessment.

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

- Example 1: If a separated child is found to be a refugee, but the officer has concerns about the current guardian, the officer may conclude that "Child is found to be a refugee; however, case should be returned to UNHCR or the referring entity for resolution of the caregiving

arrangement prior to final USCIS approval.”

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

Officer Responsibility for Child Safety

The officer must note any of the following:

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

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

Conflicts between the Child’s and Parents’ Interests

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

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

BID Process for Unaccompanied and Separated Refugee Children

In 2003 the U.S. Department of State announced that the United States abides by the “best interest” rule as stated in the Convention on the Rights of the Child. Furthermore, the United States relies on the formal Best Interest Determination

process of UNHCR to determine a course of action for an unaccompanied refugee child being referred to the USRAP for resettlement.¹⁶⁸

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

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

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

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

SUPPLEMENT B – ASYLUM DIVISION

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

REQUIRED READING

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

ADDITIONAL RESOURCES

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

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

SUPPLEMENTS

ASM Supplement – Procedural Considerations

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

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

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

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

Minor Principal and Unaccompanied Minor Fields in RAPS

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

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

- **Minor Principal**

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

- **Unaccompanied Minor**

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

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

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

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

• **Unaccompanied Alien Child (UAC)**

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

Applications from Children without Parental Knowledge or Consent

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

Statutorily, subject to the filing bars, "[a]ny alien who is physically present in the United States or who arrives in the United States," without regard to immigration status, has the right to apply for asylum.¹⁷⁴ Under certain circumstances, however, children may lack the capacity to assert this right to apply for asylum. In the case of young children who lack the capacity to make immigration decisions, you will need to determine who has the legal authority to speak for the child. Generally, the parent will have the authority to speak for the child, unless (as discussed below)

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

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

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

there are conflicts between the parent's and child's interests that prevent this.

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

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

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

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

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

Confidentiality and Notification of Parents

Federal regulations governing asylum adjudications generally do not permit the disclosure to third parties of information contained in or pertaining to an asylum application without the written consent of the applicant.¹⁷⁸ As a general matter, however, we would notify the parent of a claim by a child when the parent does not seem to be the one submitting the claim. Where a child lacks capacity and a parent or legal guardian has the authority to speak for the child, that parent or legal guardian may not in fact be a third party as a legal matter, so that notification of the parent or legal guardian will not implicate the asylum confidentiality provisions in 8 CFR § 208.6.¹⁷⁹ Further, even in cases where a child has capacity to assert a claim, the parent's liberty interest in directing the interests of their child generally requires notification of and an opportunity to participate in the proceedings, unless such notification would pose a serious risk to the child (such as in cases involving abuse or where the parent is involved in the persecution). Where a child applies for asylum without the parents' knowledge and/or consent, many complex issues are raised, and the Asylum Office should contact HQASM to coordinate in addressing any issues relating to the child's capacity to apply for asylum, potential conflicts between a child's and the parents' interests concerning the asylum application, or notification of the parent.

Affirmative Asylum Process for Unaccompanied Alien Children

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

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

¹⁷⁸ 8 C.F.R. § 208.6.

¹⁷⁹ See *Polovchak*, 774 F.2d at 735 (noting "the fundamental importance of the parents' interest in the residence, nurture and education of a minor child, then twelve or thirteen").

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

ASM Supplement – Bars to Applying for Asylum

One-Year Filing Deadline

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

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

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

In *Matter of Y-C-*, petitioner, an unaccompanied fifteen-year-old, attempted to file an asylum application with an Immigration Judge five months after being released from over a year in immigration custody.¹⁸³ The Immigration Judge refused to accept the application, but the petitioner successfully filed a second application within one year of being released from custody. The BIA found that the petitioner had established extraordinary circumstances because "he did not, through his own

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

¹⁸² 8 C.F.R. § 208.4(a)(5).

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

action or inaction, intentionally create these circumstances, which were directly related to his failure to meet the filing deadline.” Note that this case was decided before the TVPRA’s amendment to the INA to exclude unaccompanied minors from the one-year filing deadline took effect.

Safe Third Country

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

Serious Nonpolitical Crime

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

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability “shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime,” and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii).¹⁸⁶ The regulations are pending publication. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. It is still an open question whether the statute permits an

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

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

¹⁸⁶ CSAA, sec. 2(d)(1). See also Asylum lesson plan, Mandatory Bars to Asylum and RAI0 Training Module, *Discretion*.

exemption for children under the age of 15.

ASM Supplement – Other Immigration Statuses Available to Children

Special Immigrant Juvenile Status

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

Victims of Trafficking or Criminal Activity

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

The U visa is available to aliens who have "suffered substantial physical or mental abuse as a result of having been a victim" of qualifying criminal activity, which violated U.S. law or occurred in the United States.¹⁸⁹ The person must possess

¹⁸⁷ INA § 101(a)(27)(J).

¹⁸⁸ INA § 101(a)(15)(T)(i).

¹⁸⁹ INA § 101(a)(15)(U)(i). See USCIS Adjudicator's Field Manual, chapter 39, for further details.

information related to the criminal activity and have been helpful or be likely to be helpful in the investigation or prosecution of the criminal activity. Where the person is under sixteen years of age, a parent, guardian, or next friend may possess information and assist in the investigation or prosecution, in the place of the child under sixteen. A U visa holder may adjust status after three years of continuous presence from the date of admission as a nonimmigrant.

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

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

REQUIRED READING

None

ADDITIONAL RESOURCES

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

SUPPLEMENTS

IO Supplement

Adoptions

Most RAIO adjudications involving adoptions are intercountry adoption applications and petitions, reviewed by Overseas Adjudications Officers. A special unit covers this subject during the IOTC. However, their work is described briefly here. Additionally, Refugee Officers sometimes have to sort out issues related to the validity of a claimed adoption during their adjudications.

Intercountry Adoptions

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

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

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

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



U.S. Citizenship
and Immigration
Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

GENDER-RELATED CLAIMS

TRAINING MODULE

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GENDER-RELATED CLAIMS

Training Module

MODULE DESCRIPTION:

This module provides guidance on gender-related factors you must consider when interviewing and adjudicating claims related to gender, including claims based on violations of societal norms associated with gender.¹

TERMINAL PERFORMANCE OBJECTIVE(S)

You, the Officer, will identify and assess gender-related factors when adjudicating claims involving gender or violations of societal norms associated with gender.

ENABLING LEARNING OBJECTIVES

1. Evaluate gender-related claims by applying appropriate legal, policy, procedural, and international guidance.
2. Evaluate factors related to gender that must be considered in determining eligibility for a gender-related claim.
3. Assess factors that may inhibit an applicant's ability to present fully a gender-related claim, including the use of an interpreter.
4. Apply effective interviewing techniques to fully elicit sensitive issues related to gender in a non-adversarial manner.
5. Evaluate factors related to gender that must be considered in evaluating credibility.
6. Evaluate factors related to gender that may affect an applicant's ability to relocate within his or her country.

¹ Violations of social norms associated with gender are also addressed in RAIO Training Module, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*.

INSTRUCTIONAL METHODS

Classroom lecture, practical exercises

METHOD(S) OF EVALUATION

Written Test

REQUIRED READING

1. Coven, Phyllis. INS Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Asylum Gender Guidelines)*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995).

Division-Specific Required Reading - Refugee Division**Division-Specific Required Reading - Asylum Division****Division-Specific Required Reading - International Operations Division****ADDITIONAL RESOURCES**

1. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva: January 1992), P 57 (including the 1951 Convention and the 1967 Protocol; other UNHCR-provided materials).
2. United Nations High Commissioner for Refugees (UNHCR). Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme (Geneva: 1993), p.173.
3. United Nations High Commissioner for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. HCR/GIP/03/05, 4 September 2003, 9pp.
4. United Nations High Commissioner for Refugees, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses). HCR/GIP/03/03, 10 February 2003, 8 pp.
5. United Nations High commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
05/16/2013	Throughout document	Corrected minor typos, formatting, cites identified by OCC-TKMD.	L Gollub 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

This lesson provides guidance on special factors you must consider when interviewing applicants with gender-based claims. Gender-related claims most commonly arise in the context of female claimants seeking refugee protection. However, it is important to note that the forms of gender-based persecution described in this lesson can, and often are, inflicted on both females *and* males. Although the lesson often focuses on female applicants, you should keep in mind that the issues presented in this lesson may also impact male applicants, albeit less frequently. The discussion in this lesson will address the way gender-based claims may differ within the protection context.

2 GENDER-RELATED ISSUES

2.1 Overview of Gender-Related Persecution: Women's Human Rights

The Executive Office of the United Nations High Commissioner for Refugees (UNHCR) specifically addresses the need for special training on gender-related issues.² It calls upon States to adopt a gender-sensitive interpretation of the 1951 Convention and its 1967 Protocol.³ UNHCR also provides guidelines for those adjudicating refugee protection claims in order to ensure that all gender-related claims are recognized as such and given the proper consideration.⁴

² UNHCR Executive Committee Conclusion No. 98 (LIV) (2003).

³ UNHCR Executive Committee Conclusion No. 85 (LIV) (2003).

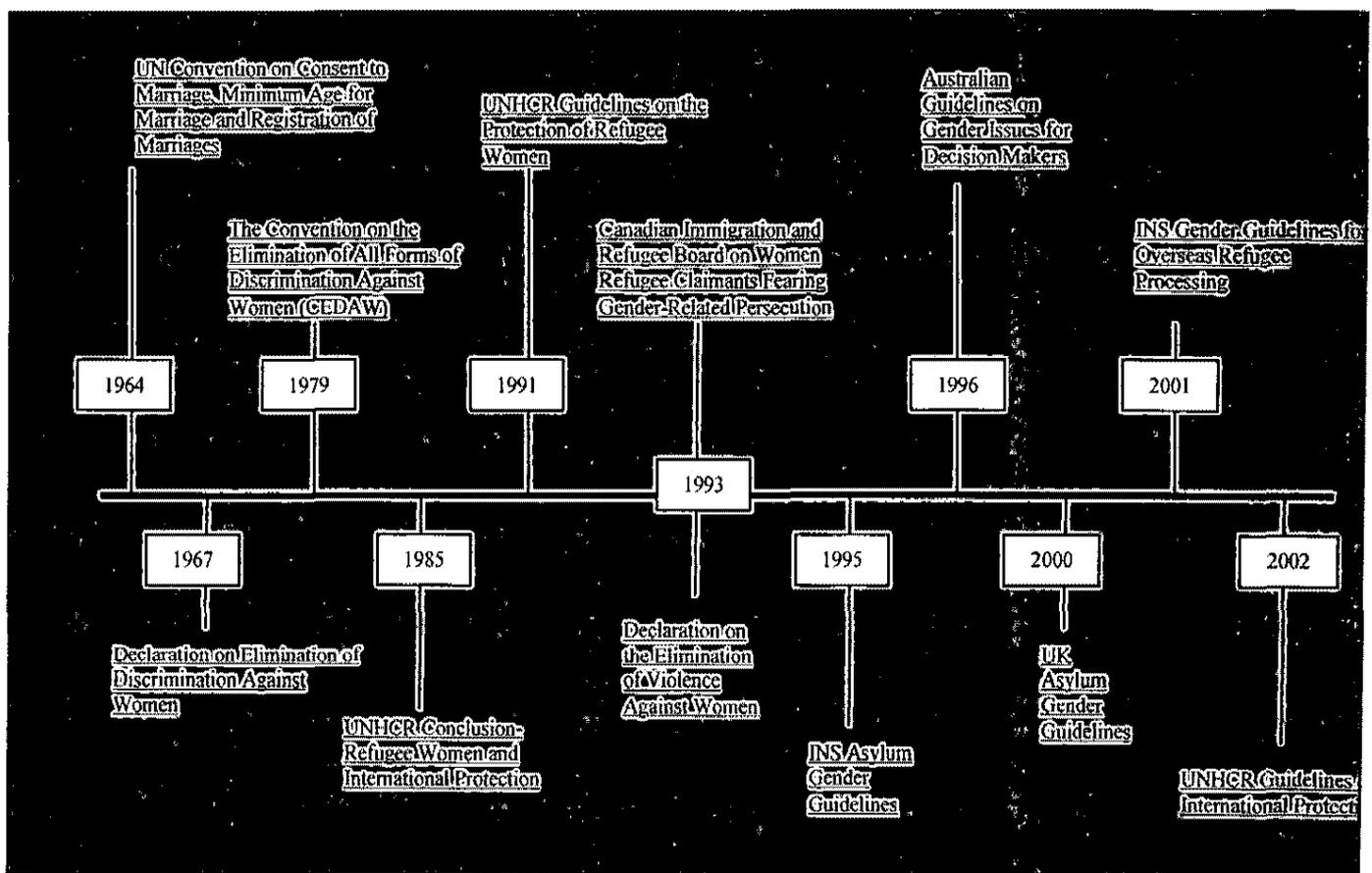
⁴ UNHCR *Guidelines on International Protection No. 1, Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 2002).

2.2 International and National Guidelines Relating to Women and Children

In recognition of the particular vulnerability of women and children, international bodies and national governments have issued several documents in an effort to enhance their protection. UNHCR has provided guidance on gender-related persecution within the context of Article IA(2) of the 1951 Convention and its 1967 Protocol. Immigration authorities in Canada, the United States, and Australia have all issued guidelines for adjudicators in evaluating gender-based claims.

The chart below provides a timeline of the various guidelines enacted over the years to specifically protect vulnerable populations. (move the mouse over each document name for a brief overview of the document. Control + click for the entire document.)

Table 1 - Evolution of Guidelines on Gender-Related Claims



Of particular note, in 1995 the Immigration and Naturalization Service (INS), predecessor of the U.S. Citizenship and Immigration Services (USCIS), issued Asylum Gender Guidelines, instructing Asylum Officers on issues to consider when interviewing

and evaluating gender-related claims.⁵ The guidelines are not binding on adjudicators outside of USCIS. However, they have been cited in asylum decisions by immigration judges, the Board of Immigration Appeals, and federal courts. In July 1995, INS issued a memorandum, *Follow Up on Gender Guidelines Training*, to further clarify guidance following a nation-wide training on this topic.⁶ In February 2001, INS also issued *Gender Guidelines for Overseas Refugee Processing*, which provided additional guidance in the overseas context and techniques for interviewing gender-related cases.⁷

On May 7, 2002, the UNHCR issued *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. The Guidelines recognize that while “gender-related persecution” has no legal meaning *per se*, gender can influence and dictate the type of persecution suffered and the reasons for the treatment. The Guidelines provide legal interpretative guidance for adjudicators in determining gender-related claims and offer recommendations for interviewing applicants with gender-based claims. The Guidelines are not binding on Officers adjudicating refugee or asylum claims, but, to the extent that they are consistent with U.S. law, are persuasive authority for the examination of gender-related claims.

The human rights of all individuals, regardless of gender, are guaranteed within international instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, due to discriminatory interpretations and applications, these instruments have not always provided sufficient protection to women who may be viewed negatively or harmed for transgressing social norms and refusing to conform to ascribed gender roles. Accordingly, over time other international instruments have been created to outline rights and protections specifically for women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁸ defines discrimination as:

[a]ny distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise

⁵ Coven, Phyllis. INS Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Asylum Gender Guidelines)*, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. Note that this memo was addressed to Asylum Officers. Refugee Officers have specific guidelines, as well. See Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

⁶ Melville, Rosemary, Asylum Division, Office of International Affairs, *Follow Up On Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs, (Washington, DC: 7 July 1995), 2 pp. plus attachments.

⁷ Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

⁸ To date, the U.S. has not ratified CEDAW.

by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁹

The Declaration on the Elimination of Violence against Women (Declaration) defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”¹⁰ Recognizing that violence against women occurs in both public and private settings, the Declaration states that violence against women includes any violence that occurs “in the family, within the general community or perpetrated or condoned by the State, wherever it occurs.”¹¹

2.3 State and Non-State Agents of Persecution

Intimidation and harassment of individuals as a strategy of gaining power and control over vulnerable populations occurs both within the public context of community and society, as well as within the private sphere of home and family life. However, States are generally obliged to protect their citizens from persecution. Specifically, under international law, States parties to specific human rights covenants may be responsible “for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”¹² “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”¹³

2.4 Torture and Psychological Trauma

Both men and women who are persecuted throughout the world often suffer torture and psychological trauma for a variety of reasons. “The severity of the harm inflicted upon women by private individuals can be as damaging as that inflicted on women who are tortured by agents of the state.”¹⁴ Many of the practices described in the sections below induce acute psychological trauma, in which women live in constant fear of harm amongst multiple possible and actual abusers, including close relatives and primary care givers.

⁹ Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly in 1979.

¹⁰ Declaration on the Elimination of Violence against Women, Article 1.

¹¹ Declaration on the Elimination of Violence against Women, Article 2.

¹² General Recommendations made by the Committee on the Elimination of Discrimination against Women, General Recommendation 19, point 9.

¹³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Dec. 2011, HCR/IP/4/Eng/REV.3.

¹⁴ Amnesty International, *Broken Bodies, shattered minds; torture and ill-treatment of women*, London, 2001 p. 5

Many abuses in the family or community are intentionally inflicted. In addition, such abuses are often inflicted for similar reasons to torture in custody. Torture in custody is often used not only to extract confessions but also to instill profound dread into victims, to break their will, to punish them and to demonstrate the power of the perpetrators. Similar purposes characterize acts of torture in the family or the community. The perpetrators may seek to intimidate women into obedience or to punish women for allegedly bringing shame on relatives by their disobedience.¹⁵

You should keep in mind that perpetrators of violence against women may be other women. For example, many girls experience pressure from female relatives to submit to female genital mutilation (FGM) or forced marriage. Concepts of gender inequality are often internalized and perpetuated by older women against younger generations.

3 GENDER-BASED PERSECUTION EXPERIENCES

In many societies, women hold significantly different positions than men. Experiences that give rise to women leaving their homelands are often different than the experiences of men. To properly evaluate the claims of women, you must be sensitive to certain unique aspects of their experiences and circumstances. You must also understand how to consider the experiences and circumstances in the context of refugee, asylum and immigration law.

3.1 Restrictive Social Norms

Social norms refer to the customary rules that govern behavior in groups and societies.¹⁶ In many countries around the world, women and girls face particularly restrictive social norms within their society and culture. For many women and girls, violence and discrimination at the hands of family members and the larger society is a reality.

Though some are subject to the brutality of individual family members, others suffer violence because cultural practices sanction the violence and make it legitimate and acceptable within the greater society. These structural forms of abuse are not always seen to constitute violence and are often embedded in the economic and social life of the community. Because of the link to notions of culture, these forms of violence are tenacious and extremely difficult to eradicate.

The type of violence and discrimination that women suffer under the guise of cultural practice are diverse and varied. Some cultural practices result in murder or severe pain and suffering, irretrievably transforming women's lives. Honor killings, female genital mutilation, bride burning, the pledging of young children to be concubines or sex slaves,

¹⁵ Amnesty International, *Broken bodies, shattered minds; Torture and ill-treatment of women*, London 2001 p. 6.

¹⁶ Social Norms, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/social-norms/> (March 1, 2011)

are just a few examples of the types of practices that shock the conscience because they involve physical violence and brutality.¹⁷

Discrimination against women may be entrenched in a country or society, leading to unequal status within constitutions, legislation, cultural ideology, institutions, the workplace, schools, community and the home.

3.2 Economic and Social Rights

In some countries women do not have access to the same social and economic rights as men. They may have limited access to formal education and healthcare; they are not able to own land or property, inherit, work outside the home, travel freely, hold a bank account in their own name or obtain credit, among other things. As a result, women are often wholly or partially dependent on their male relatives, physically and psychologically, making it difficult for them to escape violence within the home and community, and seek protection and redress. Their position, status and treatment in society often make it difficult for them to relocate to another area without the support of male relatives or a family network. In addition, it may not be economically feasible for a woman to relocate if she has been deprived of the opportunity to pursue an education or if her ability to work outside the home has been severely restricted.

Poverty and unemployment may force women and girls into trafficking and/or smuggling situations, at times leading to prostitution for survival; “prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them.”¹⁸

3.3 Reporting, Law Enforcement, and Access to State Protection

Historically, countries where women are socially and economically dependent on male relatives underreport abuses against women, particularly because most women are dependent on their abusers for subsistence. A woman who has made a complaint may be identified as a “trouble maker” and become vulnerable to further harassment.¹⁹ Women may be ostracized, face extreme stigma or reprisals for reporting practices which are considered culturally acceptable and for bringing dishonor to the family by making “private” matters public.

There may also be practical difficulties in reporting abuses, such as the attitudes of law enforcement officials or a lack of legislation supporting women’s rights. Cultures of gender inequality are often internalized to the point where women are not aware of their

¹⁷ Special Rapporteur on Violence Against Women, <http://www.unhcr.ch/hurricane/hurricane/nsf/view01/666287371B645B1C1256BA0004AADF5?opendocument>

¹⁸ General Recommendations made by the Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation No. 19.

¹⁹ Daily Dawn, Woman accuses police of harassment, 10 October 2007, available from <http://archives.dawn.com/2007/10/10/nat44.htm>

rights. Further, law enforcement officials and government entities often lack the sensitivity, professionalism and training to handle complaints of violence against women, and may use informal justice systems or cultural pressure to encourage women to return to an abusive situation rather than undertake serious investigations. In some countries women may be arrested and imprisoned “for their own protection.”²⁰ Attitudes amongst some law enforcement officials show that they down-play the significance of violence against women, perceiving acts of sexual violence within the family to be largely consensual and viewing domestic violence as a private, family matter rather than a criminal offense.²¹

In some countries gender discrimination is prevalent within legislation and the formal court system. Women may not have access to the same types of social or legal protections available to men. For example, requests for protection from abuse may be ignored if the abuser is a woman’s husband or father. In many countries, a woman’s testimony in court is not accorded the same legal weight as a man’s testimony.²²

Where legislation prohibiting violence against women does exist, women are often unable to access its protection and there is a failure by the State to prosecute the perpetrators. Women’s access to financial resources to pursue legal protection may be limited. The law may also criminalize female victims of violence, e.g., rape victims may be detained and prosecuted as adulterers and victims of trafficking may be prosecuted as prostitutes.²³

4 TYPES OF GENDER-BASED HARM

The types of harm that women suffer vary across a broad range of countries, cultures and classes. Forms of harm that are unique to, or more common to, women, include, but are not limited to:

- Sexual Violence
- Female Genital Mutilation (FGM)
- Forced and Early Marriage
- Domestic Violence
- Human Trafficking

²⁰ Amnesty International, Afghanistan: Women still under attack – a systematic failure to protect (May 2005).

²¹ Human Rights Watch, A Question of Security: Violence against Palestinian Women and Girls (November 2006) at p. 61.

²² See, e.g., U.S. Department of State Human Rights Report: Saudi Arabia (2010) at p. 35.

²³ Pearson, E., Human Traffic Human Rights: Redefining Victim Protection, Anti-Slavery International, London, 2002.

- Slavery
- Honor Crimes
- Infanticide
- Forced Abortion
- Bride Burning

The sections below address certain types of harm most often directed at women, though the list is not exhaustive. You should keep in mind that though these types of harm are most often directed at women, sexual violence can be, and often is, perpetrated against men as well.

4.1 Sexual Violence

Sexual violence is defined as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”²⁴ Much like beatings, torture or other forms of physical violence, sexual violence is a serious form of harm and may rise to the level of persecution, such as in the case of rape. For asylum and refugee status, sexual violence must be perpetrated on account of a protected characteristic. It is important for you to remember that the appearance of sexual violence in a claim does not mean that the claim is an instance of purely “personal harm.”

Rape is an act of violence serving non-sexual needs or aims. Rape is not based on a need for a sexual relationship; it is based on a desire to degrade, control or terrorize the victim or the victim’s community and is perpetrated against both males and females. Rape has long been an integral part of conflict, used as a tactical weapon to terrorize civilian communities, to achieve ethnic cleansing, to seek revenge against an enemy, and to suppress political opposition.²⁵

The rape of one woman is translated into an assault upon the community through the emphasis placed in every culture on a woman’s virtue: the shame of the rape humiliates...all those associated with the survivor.²⁶

²⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, September 2, 1998, at ¶ 688.

²⁵ See Human Rights Watch Women’s Rights Project, *The Human Rights Watch Global Report on Women’s Human Rights* (1995); Giller, Joan E. MA, MB, MRCOG; Swiss, Shana MD, *Rape as a Crime of War – A Medical Perspective*, JAMA (Vol. 270, No.5, 4 August 1993), pp 612-615. Human Rights Watch/Africa Human Rights Watch Women’s Rights Project, *Shattered Lives - Sexual Violence During the Rwandan Genocide and its Aftermath* (September 1996).

²⁶ Pearson, E., *Human Traffic Human Rights: Redefining Victim Protection*, Anti-Slavery International, London, 2002.

In an extensive investigation of rape in a wide range of countries, including former Yugoslavia, India (Kashmir), Haiti, Somalia, and Peru, Human Rights Watch found that:

Of all the abuses committed in war or by repressive regimes, rape in particular is inflicted predominantly against women. Although men also are raped, efforts to document human rights abuse reveal that women are overwhelmingly the targets. Despite how pervasive it is, rape has often been a hidden element of strife, whether political or military, a fact that is inextricably linked to its largely gender-specific character. That this abuse is committed by men against women has contributed to its being narrowly portrayed as sexual or personal in nature, a characterization that depoliticizes sexual abuse in conflict and results in its being ignored as a crime.

Yet rape in conflict or under repressive regimes is neither incidental nor private. It routinely serves a strategic function and acts as a tool for achieving specific military or political objectives. Like other human rights abuses, rape serves as a means of harming, intimidating and punishing individual women. Further, rape almost always occurs in connection with other forms of violence or abuse against women or their families.

Far from being an isolated sexual or private act, rape often occurs alongside other politically motivated acts of violence.²⁷

Note that the historic portrayal of rape as "sexually" or "personally" motivated influences the way that many women articulate the assailant's motives for attacking her. An applicant may initially characterize the attack as motivated by sexual desire, but you should make efforts to elicit any evidence that the assault occurred on account of a protected ground. The following exchange, quoted in *Shoafera v. INS*²⁸, recognizes that rape is not primarily motivated by sexual desire, and is instructive on how to elicit relevant information about a sensitive incident:

[Q.] Now, with regard to the rape, do you have any idea—and I know this is a difficult question, but do you have any idea why Hagos Belay did this to you?

[A.] I just--He probably was attracted to me. I don't know.

Q. Aside from the fact that he may have been attracted to you, can you think of any other circumstances or factors that might have made you an easier target for him, or someone who he felt he could do this to?

A. 'Cause I'm an Amhara. If I was a Tigrean he wouldn't do it.

²⁷ Human Rights Watch Women's Rights Project, *The Human Rights Watch Global Report on Women's Human Rights* (1995).

²⁸ *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000) (reversing the immigration judge who held that the applicant's comment that the rape was on account of her ethnicity was "speculative," despite supporting testimony by her sister and country conditions information).

4.2 Female Genital Mutilation (FGM)

Female genital mutilation (FGM) is a custom involving the cutting or removal of all or part of the female genitalia. The origins of FGM are unknown. It predates Christianity and Islam and is not required by the Bible or the Koran. FGM crosses religious, ethnic and cultural boundaries.

FGM can expose women to serious and potentially life threatening physical complications. Factors that allow for the continued practice of FGM include traditional beliefs, superstition, the role of women in the society and the belief that FGM will suppress and control sexual behavior. It may be performed on infants, children, adolescents, single, married, pregnant, or post-partum women, and corpses.²⁹

FGM is most prevalent in Africa. It is practiced in at least twenty-eight African countries as well as in several Middle East countries, including Egypt, Oman, Saudi Arabia, Yemen and the United Arab Emirates. It is found in India, Pakistan, Indonesia and Malaysia, as well as within small indigenous groups in Peru, Mexico and Brazil.

4.2.1 Types of FGM

Some people refer to the practice of FGM as “circumcision.” Circumcision is only one type of FGM, and it is the least physically traumatic and dangerous. Only a small percentage of women subjected to FGM are circumcised. The vast majority of women suffer more drastic and dangerous forms of FGM.

1. Circumcision

The clitoral prepuce or tip of the clitoris is cut away. About five percent of the women who undergo FGM undergo circumcision.

2. Excision

The clitoris and/or prepuce are partially or totally cut away. In addition, all, or part of, the labia minora are cut away. This is the most commonly practiced type of FGM.

3. Infibulation

The clitoris, the prepuce, the labia minora and a part of the labia majora are cut away. The edges of the labia majora are then sewn, pinned, or brought together with an adhesive in order for scar tissue to form.

²⁹ United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women’s Issues, Female Genital Mutilation (FGM) (Washington, DC: Feb. 1, 2000, updated June 27, 2001).

4.2.2 Short and Long Term Consequences of FGM

FGM can have devastating and harmful consequences for a woman throughout her life.

Those performing FGM have varying degrees of expertise. FGM is often performed without anesthesia, under unsanitary conditions, by non-medical personnel. The type of procedure, the degree of sterility and the expertise of the individual performing the procedure affect the degree of harm experienced. However, long-term serious harm may result even when the least damaging procedure (circumcision) is performed by qualified surgeons in sterile operating rooms.³⁰

Short-term consequences include: bleeding, post-operative shock, infection, tetanus, damage to other organs and death.

Long-term consequences include retention of blood in the abdomen and swelling of the stomach, chronic infections of the bladder and vagina, extremely painful menstruation, child-birth obstruction, risk of HIV infection, psychological problems and sexual dysfunction.

4.3 Forced and Early Marriage

Forced marriage is arranged and enforced against the victim's wishes. International human rights documents recognize that the right to marry is a fundamental human right, and they also mandate that "no marriage shall be legally entered into without the full and free consent of both parties." However, some women and girls are married against their will in forced marriages.³¹

In some circumstances, a forced marriage may be determined to be persecution,³² although you will still need to establish a nexus to a protected characteristic. It is important to distinguish between forced marriages and arranged marriages. Arranged marriages are an important tradition in many cultures and are often entered into willingly, even in situations where the girl might not have reached 18 years of age. Factors to consider in determining whether a marriage was or would be forced include the type and level of coercion to which an applicant was or would be subjected, the applicant's ability to avoid the marriage at all, and the nature of the consequences for the applicant if she were to refuse to submit to the marriage.

³⁰ United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women's Issues, Female Genital Mutilation (FGM) (Washington, DC: Feb. 1, 2000, updated June 27, 2001)

³¹ United Nations, Covenant on Consent to Marriage, Minimum Age for Marriage and Registration at Marriage, G.A. Res. 1763(A)(XVII), U.N. GAOR, Nov. 7, 1962 (Note the United States has not ratified this treaty); United Nations, Universal Declaration of Human Rights, G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

³² See, e.g., *Bi Xia Ou v. Holder*, 618 F.3d 602, 607-09 (6th Cir. 2010)(finding women in China who have been subjected to forced marriage and involuntary servitude constitute a particular social group and that the applicant suffered past persecution).

Forced marriage takes place throughout the world and occurs for a variety of reasons stemming from issues such as poverty, gender discrimination, and lack of security.³³ A family may sell or offer a daughter in marriage to alleviate the financial burden on the family, to settle a debt, to provide the daughter with a “better life,” or to afford additional wives for the male family members. In some contexts, forced marriage may provide a method to atone for criminal conduct or as punishment to the perpetrator of a gender-based crime such as rape. Forced marriage may serve the purpose of uniting two families or adhering to religious and cultural traditions. Families may wish to force their daughters to marry to protect them from rape or to keep their virginity intact.³⁴

Forced marriage violates numerous human rights. It provides an arena in which sexual abuse, sexual exploitation, domestic violence, forced labor, and slavery often go unnoticed. Women in forced marriages may have fewer educational and work opportunities and their freedom of movement may be restricted. In some cultures, women and girls may be subjected to FGM prior to the forced marriage. A woman’s attempt to refuse the forced marriage may result in abusive or harmful treatment.³⁵

Forced marriage poses particular human rights concerns for girls, who are subject to early marriage. Early marriage is one which takes place before a child reaches the age of majority. According to the Convention on the Rights of the Child, a girl under the age of 18 is a minor and cannot give informed consent.³⁶ Thus, under this standard, it might be possible to consider any underage marriage as forced. It would not constitute persecution, however, unless the applicant experienced it, or her treatment within it, as serious harm.

Although most countries have minimum age requirements for marriage, the age for girls is often two or three years lower than the age for boys and national age requirements may be ignored at the local level. For example, in most of Africa, Asia, Latin America, and the Middle East, girls are often married before the age of 18.

4.4 Domestic Violence

³³ See, e.g., For Somali Women, Pain of Being a Spoil of War, New York Times, December 27, 2011, describing how militants are forcing families to hand over girls for short-term forced marriages which “are essentially sexual slavery.”

³⁴ UNHCR, Sexual and Gender-based Violence Refugees, Returnees and Internally Displaced Persons (May 2003) at 24; Elizabeth Warner, Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls, 12 Am. U.J. Gender Soc. Pol’y & L. 233 (2004)

³⁵ *Id.*; The Forum on Marriage and the Rights of Women and Girls, Early Marriage: Sexual Exploitation & the Human Rights of Girls (Nov. 2001); Sexual and Gender-based Violence Refugees, Returnees and Internally Displaced Persons at 18.

³⁶ Early Marriage: Sexual Exploitation & the Human Rights of Girls; Convention on the Rights of the Child, G.A.Res 44/25, U.N.GAOR, Nov. 20, 1989.

Violence against mothers, sisters and daughters, like other forms of violence against women, is often related to the historically more powerful position of men in the family and in society, the perceived inferiority of women, and unequal status granted by laws and societal norms. In many societies, the police, the court system, and even the laws may condone the practice, allow for it, and at best may simply do nothing to prevent it or to punish the perpetrator. For example, in some countries, there is no legal recognition that sexual assault is a crime, if committed by a husband against his wife.³⁷

Speaking to the extent and scope of domestic violence in certain societies, a Special Rapporteur on violence against women reported to the UN Commission on Human Rights:

There are many different types of domestic violence. Young girls are often the victims of sexual assault within the family. Elderly family members and the infirm may also be subject to ill treatment. In extended families, mothers-in-law are often violent towards their daughters-in-law. Though there are many incidents of assault directed against the husband, studies show that they are not so frequent and rarely result in serious injury.³⁸

Although most battered women engage in various forms of resistance to abuse, there are many factors that may make it difficult for a battered woman to leave her abuser. Fear of losing her children is one such factor as socio-economic factors may make it impossible for a woman to support herself and her children without assistance from her husband. Other factors include fear of arrest themselves and the stigma of leaving their husbands caused by cultural, religious and social norms. Leaving the batterer also could pose an even greater threat to a woman's safety than staying, unless she can escape to a place where the batterer has no access to her.

At the point that separation (or the decision to separate) occurs, the risk of violence to the battered woman increases, a phenomenon referred to as "separation abuse." When battered women are killed, they are more likely to be killed after having left the relationship.³⁹

Therefore, for some women, staying with the batterer may actually be a strategy to protect herself or her children.

4.5 Human Trafficking

"Trafficking in persons" is defined as the recruitment, harboring, transportation, provision, or obtaining of persons by means of the threat or use of force or other forms of

³⁷ United Nations Commission on Human Rights, *Violence Against Women, its Causes and Consequences*, Preliminary Report by the Special Rapporteur Ms Radhika Coomaraswamy, 22 November 1994; United Nations Commission on Human Rights, *Violence Against Women, Report by the Special Rapporteur*, 24 February 2000.

³⁸ *Id.* p. 22.

³⁹ Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 Fla.B.J. 24, Oct 1994.

coercion, or fraud for the purpose of exploitation.⁴⁰ Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or removal of organs.⁴¹

Trafficked women are bought and sold as commodities; they are held against their will and subjected to sexual slavery, forced labor or forced marriage, for the profit of their trafficker. Traffickers use various control mechanisms including repeated rape by the agent and his associates to erode a girl's sense of "self" and to break her will. Agents will use physical and psychological abuse against the victim and make threats towards her family. Agents create debt bondage by imposing debts for the journey, accommodation, clothes and make-up. Women can be imprisoned and isolated by their traffickers. Agents withhold passports and identity papers. Because a woman's immigration status is often as an illegal entrant, she may fear law enforcement officials. Women may believe that the law enforcement agencies are complicit in the trafficking of women. Traffickers also instill this fear to deter escape.⁴²

Women are lured into trafficking in different ways, often by deception or force. Women may be made false promises of jobs as nannies, waitresses, etc., through bogus recruitment agencies, only to discover en route or upon arrival that they have been deceived. The trafficker may pretend to be romantically interested in a woman, developing a coercive relationship in which the woman finds that her "boyfriend" forces her to have sex with his "friends." Women may be drugged and abducted. Some girls are trafficked with family involvement. While some parents may innocently believe they are sending their child to receive an education, other parents are aware that they are selling their child into slavery.⁴³

A more detailed discussion of trafficking and smuggling is available in the RAIO Training Module, *Detecting Possible Victims of Trafficking*.

4.6 Honor Crimes

In some cultures women are perceived to be the keepers of a family's honor, conditioning women and girls to be self-controlled, show deference to men throughout their lives, and present subservient behavior. A woman is considered to bring shame on her family and community if she does not adhere to strict social norms of behavior and conduct. Honor crimes are acts carried out to "restore" a family's honor. Perpetrators may be members of a woman's family or community. Abuses involving the concept of honor are prevalent

⁴⁰ See RAIO Training Module, *Detecting Possible Victims of Trafficking*. See also Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

⁴¹ *Id.*

⁴² See Department of State, Trafficking in Persons Report (2010).

⁴³ The International Association of Chiefs of Police (IACP), The Crime of Human Trafficking: A Law Enforcement Guide to Identification and Investigation, p. 7.

throughout the world and are factors in other types of persecution listed in this section, including, but not limited to, FGM and domestic violence.

Examples of honor crimes include, but are not limited to, stoning, abduction, imprisonment, rape, poisoning, acid attacks, disfigurement, forced marriage, murder, or attempts to coerce the victim to commit suicide. Women also may suffer reprisal attacks as a result of another relative's perceived behavior.⁴⁴

The family may go to great lengths to pursue women (and men) accused of violating a family's honor. Families employ bounty hunters, private detectives and social networks to pursue victims and searches may persist over years. In cultures with extended family networks over a large geographical area, relocation may offer no real protection. In patriarchal societies, women without family or male relatives may create suspicion in a new community, attracting further stigmatization and persecution. It may be difficult for a woman to integrate and support herself economically. In many countries there are few shelters or other resources available to women who seek to escape harm and access to those resources may be impeded by cultural factors or considered taboo. Women may be at risk of being arrested "for their own protection"⁴⁵ or prosecuted for adultery.

Acts deemed to transgress a family's honor may include, but are not limited to, having sex before or outside marriage, losing virginity, even as a result of rape. Some societies do not make a clear distinction between rape and consensual sexual relations and will hold a woman who has been raped fully responsible for losing her virginity or committing "adultery."⁴⁶ Other acts of transgression include refusing to accept a forced marriage, being suspected of having an affair,⁴⁷ attracting gossip within the community, seeking an education, being assertive and outgoing in behavior or inappropriate dress.⁴⁸

Victims of rape may be murdered for bringing shame upon their family, or victims may be forced to marry their rapists to appease family honor.⁴⁹ Controlling women through the concept of honor is permitted in many countries. Even in countries where honor crimes are illegal, lesser sentences may be given if the crime was committed in the name of honor.⁵⁰

⁴⁴ BBC, Acquittals in Pakistan gang rape, April 21, 2011.

⁴⁵ UNICEF, Innoceti Digest, Early Marriage: Child Spouse, No. 7 March 2001.

⁴⁶ See, e.g., Afghanistan: Woman Jailed on Charges of 'Forced Adultery' Is Released, NY Times, Dec. 14, 2011.

⁴⁷ Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011).

⁴⁸ See, e.g., Afghanistan: Woman Jailed on Charges of 'Forced Adultery' Is Released, NY Times, Dec. 14, 2011; Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Vol. II, Chapter III, ¶. 336-7 at 171 (2004)(describing how under Sierra Leonean customary law, "[f]amilies usually settle crimes of rape and sexual violence by accepting monetary compensation or by the offender being compelled to enter into marriage with the minor victim. The Commission recommends...end[ing] the practice under customary law of compelling women and girls who have been raped to enter into marriage with the offender."

⁴⁹ *Id.*

⁵⁰ Human Rights Watch, Jordan: Victims Jailed in Honor Crime Cases, April 2004.

5 INTERVIEWING CONSIDERATIONS

The purpose of this section is to emphasize the importance of creating an interview environment that allows applicants to discuss freely the elements and detail of their claims and to identify issues that may be related to a female applicant's gender. This section should be considered in conjunction with the RAIO Modules on Interviewing.

5.1 Pre-Interview File Review

Prior to the interview, you may have the opportunity to review the information in the case file. You should take this time to identify any gender-related issues involved in the claim. You are expected to conduct interviews involving gender-related claims in a non-adversarial manner and with sensitivity. Due to the very delicate and personal issues arising from sexual abuse, some applicants may have inhibitions about disclosing past experiences to an interviewer of the opposite sex.

To the extent that personnel resources permit, you should honor an applicant's request for an interviewer of a particular sex. If a pre-interview review of the case file indicates that the case may involve sensitive gender-related issues, you should consult with your supervisor prior to the interview to evaluate whether it would be more appropriate for an Officer of the opposite sex to conduct the interview.

5.2 Considerations Related to Gender and Culture

Cultural factors, such as the expected role of a woman in her society, may significantly affect an applicant's testimony. In order to properly elicit and evaluate testimony, you must be aware of such factors when eliciting testimony at the interview.

1. Cultural norms may exacerbate reluctance to relate sensitive information.

Due to strict cultural norms in many countries, applicants may be reluctant to disclose experiences of sexual violence. This may be especially true for women from societies that place extreme importance on preserving a woman's virginity. With regard to sexual assault, this type of harm perpetrated on men, as well as women is seen as a violation of community or family morality. The combination of shame, feelings of responsibility and blame for having been victimized in this way can seriously limit a man's or a woman's ability to discuss or even to mention such experiences.

2. Cultural norms may limit an applicant's knowledge of other family members' activities

In some cultures, men normally do not share the details of their political, military or even social activities with spouses, sisters, daughters or mothers. Women from such cultures may be able to present only vague testimony about experiences of male relatives, even

husbands. Some women may not be able to explain which male relatives were politically active or, if they are aware of the relative's political activity, may be unable to provide any details about it.

3. Presence of relatives may inhibit testimony

For a variety of reasons, the presence of relatives, particularly a husband, father, or child, may impede an applicant's willingness to discuss gender-related persecutory acts or fears. For example:

- The applicant's relatives may not be aware of the harm experienced by the applicant. She may wish that the relative remain unaware of her experiences, or she may be ashamed to say what she has experienced or fears in front of a relative.
- The applicant's claim may be based, in part, on fear of the relative who is present.
- In some cases, a woman may be accustomed to having a male relative speak for her and may try to defer to that male relative in the interview, or the male relative may insist on speaking for the applicant, in which case you should remind the relative that the applicant must answer the question herself.

While the presence of a relative may inhibit testimony, as described above, in other cases a woman may be more comfortable testifying with the presence of a relative, male or female. Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. She should be asked her preference directly, and in the absence of any relatives, when possible, prior to the interview.

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

4. Interpreters may inhibit testimony

Testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing gender-related issues with an interpreter, especially one of the opposite sex. The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing gender-related issues or using certain terms. For example, the interpreter may substitute the word "harm" for "rape," because the interpreter is not comfortable discussing rape or because of cultural taboos. *See also* RAIO Training Module, *Interviewing – Working with an Interpreter*.

5.3 Suggested Interview Techniques

In all cases, you must use your utmost care to assure that all interviews are conducted in a non-adversarial and open atmosphere that allows for the discussion of various issues, including past experiences and fears of future harm and its ramifications.

Some techniques that may be employed (discussed in greater detail in the lessons on interviewing) include the following:

- Begin with easy topics to establish rapport and give the applicant time to become accustomed to the interview.
- If the applicant becomes upset, pause to allow the applicant to regain composure.
- Acknowledge how difficult it may be for the applicant to answer certain questions by assuring the applicant that it is all right to let you know when something is difficult to discuss in detail.

Note: In the protection context, it is necessary for you to elicit a certain level of detail in order to establish credibility. The applicant may be able to provide sufficient detail about certain parts of the claim to establish credibility, without providing minute detail on particularly sensitive topics. Example: The applicant provides detail about circumstances of arrest and conditions of detention, but finds it extremely painful to provide detailed description of certain torture she endured during detention. You do not need to press for detail about the torture if the applicant's testimony about the arrest and the general conditions of detention is credible.

- Temporarily switch from the sensitive topic to something less sensitive, remembering to return to the sensitive topic later if more information is required.
- Approach the issue from a different angle. For example, ask about events that led up to the traumatic experience and how the applicant felt after the experience, instead of asking about the specifics of the traumatic incident.
- Switch the focus to another victim the applicant has testified about and then return to the applicant's experience.
- Ask open-ended questions to explore the applicant's claim, then ask specific follow-up questions, as needed, to establish the credibility of the claim. Be mindful that your tone of voice and questions don't come across as judgmental, as that may place the applicant on the defensive and possibly impede the flow of communication.
- Emphasize the confidential nature of the interview.
- Remind the applicant that in order to evaluate eligibility for the benefit, you need to understand the applicant's history, including the harm she may have experienced.

5.4 Examples of Questions to Elicit Sensitive Information

If you suspect the applicant may have been sexually abused but is not forthcoming, you may try to help the applicant relax by reassuring her of the confidentiality of the process and by acknowledging that the interview process may be difficult for her.

- “I understand that it is difficult to talk about such things. I know that women in your country often have bad experiences. Everything we talk about here is completely confidential. No one in your country (family) will know what you tell me today, unless you tell them yourself. Is there anything else you want to tell me?”

In some instances country conditions reports may reflect that individuals in the applicant’s country may be ostracized for being raped. However, where no such country conditions information exists, you should still attempt to elicit testimony about any potential harm by asking questions like:

- “Would anything happen to you if your family and community found out what happened to you while you were detained?”

In cases where sexual assault is alleged and the applicant has difficulty providing details, you may focus on the circumstances surrounding the incident.

- “You said you were assaulted. I understand that this is difficult to talk about, but it would be helpful for me to understand more about what happened.
 - Where were you at the time?
 - Were you alone?
 - What happened to your sister who was with you?
 - Did that also happen to you?
 - Did you tell anyone about the incident?
 - What did the attacker say to you?
 - Do you remember what you did immediately after the assault?”

You should always ask questions one at a time and give the applicant sufficient time to fully answer.

In cases where applicants fear the stigma or other social consequences of being seen as a rape victim, it may help to remind the applicant that everything she or he says in the interview is kept confidential.

6 LEGAL ANALYSIS – ASYLUM AND REFUGEE CASES

6.1 Persecution and Agent of Persecution

Neither this lesson, nor the component-specific lessons on this subject provide guidance that expands the statutory definition of a refugee. The legal criteria used to evaluate a female asylum or refugee applicant's eligibility for immigration benefits, whether the claim is gender-based or not, is the same criteria used in all other asylum and refugee adjudications. However, because female applicant's experiences are often different than those of men, it is useful to discuss how those experiences fit into the legal framework of established asylum and refugee law.

6.1.1 Persecution

As explained in greater detail in RAIO Training Modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution*, the term "persecution" is not defined by treaty, statute, or regulation, and you must rely on guidance from various sources, including international human rights norms, to evaluate whether harm constitutes persecution. To be eligible for asylum or refugee status, the applicant must also establish that the persecution is "on account of" a protected characteristic in the refugee definition. This section focuses on the type of harm that may constitute persecution. The requirement that the persecution be on account of a protected characteristic ("Nexus") will be discussed in the next section.

1. General Considerations

In evaluating whether harm constitutes persecution in a gender-related case, you should consider the same factors as in an asylum or refugee case that is not related to gender. The relevant considerations are:

- Whether the harm the applicant experienced and/or fears is serious enough to constitute persecution by objective standards,
- Whether the applicant would experience the harm in question as serious harm, and
- Whether the persecutor is the government (or agent of the government) or an entity that the government is unable or unwilling to control.

The fact that a practice is widespread, (e.g., domestic violence, FGM, rape as part of an occupation during war) is not relevant to determining whether the alleged acts constitute persecution.⁵¹

⁵¹ See *Mohammed v. Gonzales*, 400 F.3d 785, 796, n.15 (9th Cir. 2005) (rejecting the government's argument that the widespread practice and acceptance of FGM in Somalia meant that FGM could not form a basis for a past persecution claim. The court stated that the approach to analyzing refugee claims does not change because a type of harm is commonly accepted and practiced.)

1. Rape and Other Sexual Violence

Rape constitutes harm serious enough to amount to persecution. Other sexual violence may constitute persecution, depending on the degree of harm experienced by the applicant. In some countries a woman may experience severe discrimination and social ostracism because she was raped. The ostracism is further harm after the rape, and may itself be sufficiently serious to constitute persecution.⁵² In other words, even if the harm of the original rape was not “on account of” a protected ground, societal perception of a rape victim and the social consequences arising from that perception may give rise to a well-founded fear of persecution on a protected ground, most likely membership in a particular social group. See RAIO Training Module, *Nexus – Particular Social Group*.

2. Torture, Beatings, and Inhuman Treatment

Female asylum and refugee applicants may have experienced or fear the same types of “traditional” persecution experienced by male applicants, such as torture, beatings, and other inhuman treatment. Note that rape in detention is a form of torture that occurs to both men and women.

3. Female Genital Mutilation (FGM)

Harm resulting from FGM is sufficiently serious to constitute persecution. FGM has been internationally recognized as a violation of women's and female children's rights and is criminalized under federal law. The U.S Court of Appeals, Second Circuit stated that FGM involves the infliction of “grave harm constituting persecution.”⁵³ Thus it is clearly serious harm by objective standards. The applicant's testimony that she experienced or would experience FGM as serious harm is best and sufficient evidence on this point.

Note that even if a woman has been subjected to FGM in the past, it is a form of harm that is capable of repetition.⁵⁴ Moreover, a woman is not required to show that she would

⁵² See *Shoaf v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape by gov't official constitutes persecution).

⁵³ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007) (vacated in part, *Matter of A-T-*, 24 I&N Dec. 617 (A.G.2008)); *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999) citing to Report of the Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 14, U.N. GAOR, 45th Sess., Supp. No. 38, at 80, ¶ 438, U.N. Doc. A/45/38; and The Beijing Declaration and The Platform for Action, Fourth World Conference on Women, Beijing, China, 4-15 September 1995, U.N. Doc. DPI/1776/Wom (1996) ¶¶ 112-113.

⁵⁴ *Matter of A-T-*, 24 I&N Dec. 617, 621 (AG 2008) (vacating BIA's determining that FGM was a one-time act incapable of repetition and that future harm need not be in the identical form as the original harm).

undergo the identical form of past harm to establish well-founded fear in cases in which the past harm (e.g., FGM) is unlikely to be repeated.⁵⁵ Consideration of the enduring harm, in such circumstances, is also appropriate to the analysis of whether there are compelling reasons arising from the severity of the past persecution to grant asylum status in the absence of a well-founded fear.⁵⁶

In *Matter of A-K-*, the BIA clarified that an applicant cannot establish eligibility for asylum based solely on a fear that his or her child would be subject to FGM. The rationale is that an applicant must establish persecution that is targeted at him or herself. An applicant may certainly be affected by his or her child undergoing FGM. But, in most cases, the persecutor is directing the FGM at the child, not the parent. However, a parent who actively opposes FGM and takes affirmative steps to keep a child from undergoing the procedure could conceivably suffer other harm on account of this political or religious opinion.

Also, the harm must be on account of a protected characteristic. When a child is being subjected to FGM, it is generally not because of a parent's protected characteristic. Rather, the FGM is imposed on the child because of the child's characteristic of being a female who has not yet undergone FGM as practiced by his or her culture.⁵⁷ If, however, there were evidence that the child would be targeted for FGM in order to punish the parent for the parent's opposition to FGM (or for some other protected reason), this might be distinguishable from the scenario discussed in *Matter of A-K-*.

4. Forced Marriage

In some circumstances, forced marriage may constitute persecution. However, it is important to note the distinction between forced marriage and arranged marriage. Arranged marriage is not considered persecution as both parties willingly enter into the arrangement, even if reluctantly. Forced marriage, on the other hand, may constitute persecution as one or both parties do not consent to the arrangement. You should also consider whether the consequences for refusal would constitute persecution.⁵⁸

NOTE: You should keep in mind that in addition to asylum and refugee cases, you may encounter victims of forced marriage in the family petition context (e.g., I-130 and I-730).

⁵⁵ *Id.* at 622.

⁵⁶ See *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008). See also *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). This consideration exists primarily within the asylum context since a refugee applicant need not establish a well founded fear of return if she or he has established past persecution.

⁵⁷ *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007).

⁵⁸ See United Nations, Convention on Consent to Marriage, Minimum Age for Marriage and Registration at Marriages, G.A. Res. 1763(A)(XVII), U.N. GAOR, Nov. 7, 1962 (Note the United States has not ratified this treaty); United Nations, Universal Declaration of Human Rights, G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

Asylum and refugee claims involving forced marriage often include allegations that the applicant was subjected to FGM or fears being subjected to FGM. You must analyze whether the FGM or forced marriage, or both, were inflicted (or would be inflicted) on account of a protected characteristic. See RAIO Training Module, *Nexus – Particular Social Group*.

5. Forced Abortion and Forced Sterilization

The INA provides that forced abortion and forced sterilization, or persecution for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, constitute harm amounting to persecution that is on account of political opinion.⁵⁹

6. Discrimination and Harassment

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulates to the level of persecution, or is so serious that that it leads to consequences of a substantially prejudicial nature. An applicant's deprivation of educational opportunities, the right to work, the right not to be forced into marriage, and other deprivations of internationally recognized rights may constitute persecution, depending on how such deprivations affect the applicant's well-being.

7. Violation of Fundamental Beliefs

The U.S. Court of Appeals, Third Circuit indicated that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs."⁶⁰

In *Fatin v. INS*, the court considered whether the asylum applicant's opposition to strict Iranian dress codes would constitute persecution. In that case, the court found that the record before it failed to establish that obeying the strict dress codes would be "so profoundly abhorrent" as to amount to persecution, but left open the possibility that other applicants could make such a case.⁶¹

6.1.2 Agent of Persecution

⁵⁹ INA § 101(a)(42)(B); *Matter of X-P-T*, 21 I&N Dec. 634 (BIA 1996).

⁶⁰ *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

⁶¹ *Id.* See also *Sharif v INS*, 87 F.3d 932 (7th Cir. 1996) (finding that applicant failed to meet this standard because she did not offer evidence that conforming to Iranian law caused her serious harm).

As in any other asylum or refugee claim, in order to establish persecution, the applicant must demonstrate that the persecutor is the government (including agents of the government) or an entity that the government is unable or unwilling to control. The persecutor may be a rebel group, a clan, a tribe, or a family member, such as a brother, father, or husband.⁶²

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, you should consider whether the government protection that is available is reasonably effective. Factors to consider include whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection. Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable.⁶³

In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection. For example, the evidence may indicate that the applicant would not have received assistance if she had sought it. Country conditions information may reveal that government officials in the applicant's country view violence perpetrated by a family member, clan member, or tribal member as a "private" dispute for which governmental intervention is inappropriate.

Or, evidence may establish that seeking protection would have placed an applicant at even greater risk of persecution. For example, country conditions information shows that women from Pakistan who report rape to the authorities are often themselves arrested and jailed under laws prohibiting sexual relations outside of marriage, and may be subject to verbal and physical abuse. Therefore, a woman from Pakistan may reasonably fear reporting a rape and seeking state protection from the person who raped her.⁶⁴

You often must consult country conditions information to evaluate whether state protection is available to an applicant who suffered or fears persecution from a non-governmental entity.

6.2 Nexus

The "nexus" requirement, discussed in the RAI0 Training Modules, *Nexus and the Protected Grounds**, and *Nexus – Particular Social Group*, applies equally to female and male applicants and to all claims, including those related to gender. Because "nexus" is discussed in detail in other modules, this section focuses on common nexus issues raised

⁶² *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)

⁶³ See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (finding applicant had established a state action where country conditions evidence showed that applying to the police would have been futile and dangerous and that legal remedies were generally unavailable to women).

⁶⁴ See U.S. Department of State, "Pakistan," Country Reports on Human Rights Practices for 2005 (Washington, DC: U.S. Government Printing Office, Mar. 8, 2006); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000)

in gender-related claims, explaining how the analysis may be formulated, taking into account the social circumstances of female applicants.

6.2.1 Overview

To be eligible for asylum or refugee status, the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the persecutor perceives the applicant to possess a protected characteristic. The persecutor's perception can be either because the applicant actually has such a characteristic, or because the persecutor incorrectly imputes it to the applicant.⁶⁵

Evidence about patterns of violence in the society against individuals similarly situated to the applicant may be relevant to the "nexus to a protected ground" determination. For example, in a domestic violence claim, an adjudicator would consider evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she is in a domestic relationship. This would include any direct evidence about the abuser's own actions; as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society.⁶⁶

Such circumstantial evidence (in addition to the direct evidence regarding the abuser's statements or actions) would be relevant to determining whether the abuser believes he has the authority to abuse and control the victim "on account of" her status in the relationship. Further, in domestic violence cases, there is often no evidence that the abuser would seek to harm other women who share the same social status in a domestic relationship. Rather, it often appears that the abuser is motivated only to harm his own spouse or partner. While evidence of motivation to harm others who share the applicant's protected trait may help to establish nexus, it is not required. Where other evidence shows that the persecutor harms the victim because of her status within the relationship, the absence of a motivation to harm others with that trait does not undermine a finding of nexus.

There are two factors to consider when evaluating "nexus." The first is whether the harm is "on account of" a protected characteristic. The second is whether the applicant possesses or is believed to possess a protected characteristic.

1. "On account of"

⁶⁵ *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); RAO Training Module, *Nexus – Particular Social Group*.

⁶⁶ See *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (noting that in Morocco, a father's power over his daughter is unfettered).

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.⁶⁷ For more on these standards, see RAIIO Training Module, *Nexus and the Protected Grounds**. In asylum adjudications, as long as at least one central reason motivating the persecutor is the applicant’s possession or perceived possession of a protected characteristic, the applicant may establish the harm is “on account of” a protected characteristic. This “one central reason” standard was added to the statute by the REAL ID Act, and applies only to asylum adjudications. The Board has explained, however, that the “one central reason” language should be interpreted consistent with prior Board precedent that allows nexus to be established where the persecutor has mixed motivations.⁶⁸

2. Protected Characteristics (“Five Grounds”)

As the Court of Appeals for the Ninth Circuit has noted, “gender” is not specifically listed as one of the five enumerated characteristics in the refugee definition. However, an asylum or refugee applicant may present a claim that is based on one of the five protected characteristics and that is at the same time related to the woman’s gender. Additionally, gender may be one of the characteristics included in the formulation of a particular social group.⁶⁹

6.2.2 Political Opinion

1. Actual Political Opinion

There are a few important points you should bear in mind when evaluating women asylum or refugee applicants’ claims. First, women often express political opinions in the traditional sense of actively participating in political institutions within a country, such as political parties, and organizing or participating in political demonstrations. Even in countries with extremely restrictive norms and laws governing women’s behavior, some women may risk severe harm by taking such actions.

Second, women may also engage in more non-traditional political expression than men, because of their situation in society. For example, a woman may cook and provide food for an opposition group or rebel forces, rather than campaign for the group or fight with the rebel forces. Or women may organize to try to obtain release of male relatives detained for political reasons.

⁶⁷ *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996)

⁶⁸ *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)

⁶⁹ *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); Asylum Gender Guidelines.

Third, opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion. Feminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions.⁷⁰

2. Imputed Political Opinion

- Activities of Family Members

In evaluating why a persecutor may have harmed or seek to harm an applicant, it may be important to inquire into any political activities of the applicant's family members and whether the government has attributed a family member's political views to the applicant. For example, if the applicant's husband is involved in opposition political activities, the authorities might assume that the applicant has assisted her husband and shares his political views.

- Violation of Social Norms

In some cases, a political opinion may be attributed to a woman who refuses to comply with social norms or laws governing behavior based on gender. For example, authorities might attribute a feminist political opinion to a woman who refuses to participate in an arranged marriage or who otherwise attempts to live outside the constraints governing the role of women in her society. It is important for you to elicit information regarding how the feared persecutor views the woman for such behavior.

Violation of social norms may also indicate persecution on account of religion. The Board of Immigration Appeals considered the case of a young Moroccan woman whose father repeatedly abused her. He burned her thighs to discourage her from wearing short skirts, brutally beat her for giving directions to a man on the street, and forbade her from leaving the house, all because of his religious viewpoint about the proper role of women in society. The Board found that the applicant, in wearing western-style clothing and interacting with men, was demonstrating that her religious beliefs were different than those of her father. Although both were Islamic, the Board determined that the father persecuted the daughter on account of her religion.⁷¹

- Applicants Living in Theocracies

In some cases, a political opinion may be imputed to an asylum or refugee applicant who resides in a theocracy, if she displays behavior that is considered contrary to societal norms. Where tenets of the governing religion in such a country require certain kinds of

⁷⁰ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

⁷¹ *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

behavior, contrary behavior may be perceived by the government as evidence of an unacceptable political opinion, because it is perceived as being in opposition to the national law.⁷²

Cases involving female applicants who flee theocracies may be complex. You must determine whether the applicant is subject to legitimate prosecution for violating the laws of the country (including an assessment of whether the law itself is persecutory), or whether there is evidence that the applicant is perceived as holding an adverse political (or religious) opinion and punished as a result.⁷³

- Imputing a Political Opinion as a Means of Control

In one case, the court found an applicant eligible for asylum based on persecution on account of imputed political opinion because an army sergeant who had in effect enslaved the applicant threatened to tell the authorities that she supported the guerrillas. Although the sergeant knew that the applicant did not support the guerrillas, he used the threat to terrorize the applicant into submission and keep control over her. Because of his position in society, it was found that the sergeant would be believed by the authorities and therefore the applicant's fear of future persecution on account of imputed political opinion was reasonable.⁷⁴

6.2.3 Religion

The notion of freedom of religion encompasses the freedom to hold and express a belief system of one's choice and the right not to be subjected to coercion that impairs the freedom to have or adopt a religion or belief of one's choice.⁷⁵

Just as in claims involving political opinion or imputed political opinion, the relevant inquiry in evaluating whether an applicant has established a connection between the harm she suffered and/or fears and religion, is how the persecutor views the woman. The fact that the persecutor may target a woman because of the persecutor's religious beliefs about how a woman should behave does not, in itself, establish that the persecutor is targeting the woman because of the woman's religious beliefs or religious beliefs imputed to her. However, a woman may, through her behavior, demonstrate that her beliefs are at odds with those of the persecutor.⁷⁶

⁷² Punishment for refusal to comply with laws established in a theocracy may also constitute persecution on account of religion. See section on religion. See also RAIO Training Module, *Nexus and the Protected Grounds**, section on prosecution vs. persecution.

⁷³ See, e.g., *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (finding that evidence in the record failed to establish applicant would be subject to persecution as opposed to prosecution for violating Iranian laws governing conduct and dress of women.); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

⁷⁴ *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

⁷⁵ Universal Declaration of Human Rights (Art. 18); The International Covenant on Civil and Political Rights (Art. 18).

⁷⁶ See *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

Certain religions assign particular roles to women; if a woman does not fulfill her assigned role she may be viewed as having “incorrect” religious views and punished. Such punishment would be considered to be “on account of” religion.

As explained in the section above on persecution, the U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that fundamentally are abhorrent to a person's deeply-held religious convictions may constitute persecution.⁷⁷

6.2.4 Particular Social Group

The factors to consider in evaluating whether an applicant is a member of a particular social group and whether harm is on account of that group membership are discussed in detail in another module.⁷⁸ The purpose of this section is to focus on gender-specific issues related to particular social group.

The BIA has held that members of a particular social group must share a “common, immutable characteristic” that the members “cannot change, or should not be required to change because such characteristic is fundamental to their individual identities or conscience.”⁷⁹ The group must also reflect social distinctions, such that the persecutor is not motivated by purely personal reasons, but rather is influenced by broader social mores or factors (“social visibility” or “social distinction” element). This element can be satisfied by evidence that the society in question meaningfully distinguishes individuals who have the shared characteristic from individuals who do not have it.

Gender is an immutable trait and has been recognized as such by the BIA and some federal courts. Further, there may be circumstances in which an applicant's marital status or status within a family could be considered immutable. A father-daughter relationship, or a marriage in which a woman could not reasonably be expected to divorce because of religious, cultural or legal constraints, are examples of such immutable traits. Any intimate relationship could also be immutable if the evidence indicates that the relationship is one that the victim could not reasonably be expected to leave. Note that the particular social groups identified by the courts prior to the BIA's 2006 decision in *Matter of C-A-* emphasized a “social distinction” consideration in the analysis of “particular social group.” However, an examination of the facts reveals that the society's perception of the group members was a factor in deciding these cases.⁸⁰

⁷⁷ *Fatin v. INS*, 12 F. 3d 1233 (3d Cir. 1993).

⁷⁸ See RAIO Training Module, *Nexus – Particular Social Group*.

⁷⁹ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

⁸⁰ See, e.g., *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005). See also *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

Though some circuits have discussed gender as a basis of a particular social group, few have found an individual to be eligible for asylum on the basis of a particular social group defined solely by the applicant's gender. Generally, this is because the persecutor was not motivated to harm the applicant solely because of her gender, but because of her gender and some other characteristic she possessed.

6.2.5 Race and Nationality

A female applicant's claim may be based on persecution or feared persecution on account of her race or nationality, or a combination of race or nationality and other characteristics in the refugee definition.

The U.S. Court of Appeals for the Ninth Circuit, found an applicant who was raped by a policeman to be eligible for asylum because she had been persecuted on account of her ethnicity. The applicant testified that the Tigrean policeman had raped her because she was Amharic, her sister's testimony supported her claim, and documents submitted on her behalf also supported that conclusion."⁸¹

6.3 Internal Relocation

An applicant does not have a well-founded fear of persecution if he or she could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.⁸² You should remember that in some circumstances it is unreasonable to expect that applicants could relocate within their own country. For example, if the government is the feared persecutor, then the threat is presumed to be countrywide and it would be unreasonable to assume the applicant has the ability to relocate. The same reasoning would apply in situations where the feared persecutor is a group operating countrywide that the government is unable or unwilling to control. In assessing reasonableness, you may also consider other serious harm the applicant may face in the place of suggested relocation; any ongoing civil strife within the applicant's home country; the administrative, economic, or judicial infrastructure of that country; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.⁸³ For a more detailed discussion, see RAI0 Training Module, *Well-Founded Fear*.

The crucial aspect of analyzing the internal flight alternative is an inquiry as to whether relocation would be reasonable under all the circumstances. Reasonable relocation possibilities for a woman may vary substantially from the relocation possibilities for a man from the same country.

⁸¹ *Shoafra v. INS*, 228 F.3d 1070 (9th Cir. 2000)

⁸² 8 C.F.R. 208.13(b)(2)(ii)

⁸³ *Id.*

Legal restrictions and cultural or social norms governing women's behavior must be considered in evaluating whether it would be reasonable for a female applicant to relocate within her country. Keep in mind also that women may have other vulnerabilities even in the absence of specific laws or norms restricting their movement; for example, in a very corrupt country, where a man might have to give a bribe in order to secure a residence permit, a woman may be more likely to be coerced or forced into giving sexual "favors". Likewise, in countries with high rates of trafficking, women who do not have the protection of their families or communities may be particularly vulnerable.

6.3.1 Ability to Travel

In evaluating whether it would be reasonable for a woman to relocate within her country, you must consider whether there are significant restraints on a woman's right to travel. For example:

- Saudi women may not undertake domestic travel alone, may not legally drive, and risk arrest for riding in a vehicle driven by a male who is not a close relative.⁸⁴
- If there is civil strife or war ongoing in the woman's country, she may be particularly vulnerable if she travels outside the area in which she is protected by family or clan.

You should inquire into whether there are any legal or social constraints on the applicant's ability to travel. This information should be elicited during the interview and also may be found in country conditions information.

6.3.2 Economic Circumstances

You should consider whether it would be reasonable to expect a woman to survive economically, if she were to relocate within her country to avoid future persecution. In many parts of the world, women are still economically dependent on men and availability of employment opportunities is quite restricted for women.

6.3.3 Social Circumstances

In some countries, a woman living outside the protection of her father, spouse, or clan may be vulnerable to attack and/or damaging social stigma. For example, in some countries it is assumed that a woman living on her own or with other unrelated women is a prostitute. In other countries, women are not allowed to rent an apartment, open a bank account or own property. Therefore, you must be aware of conditions for women living on their own in the applicant's country to evaluate whether internal relocation to avoid future persecution is reasonable.

7 CREDIBILITY

⁸⁴ U.S. Department of State. "Saudi Arabia," Country Reports on Human Rights Practices for 2006 (Washington, DC: U.S. Government Printing Office, Mar. 6, 2007)

Cultural differences and norms governing women's behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum and refugee applicants.⁸⁵

7.1 Detail

An applicant's gender may affect her ability to provide detailed testimony in a number of ways. In evaluating the amount of detail an applicant should be expected to provide regarding any element of a claim, you should take into account the applicant's social background and role in society. When an applicant is not able to provide detail about certain aspects of her claim, you should inquire into the reason why she is unable to do so.

Some factors that may limit a female applicant's ability to provide detail include the following.

1. Social Constraints May Limit Access to Information

Social constraints governing gender roles may restrict a woman's role in an opposition organization and she therefore may be unable to provide many details about the organization, even if she is a member of the organization. Although a woman may take great risks to further the goals of the organization, male members of the organization may limit the female members' knowledge of the detailed workings and structure of the organization.

A woman who may be at risk of persecution because of her relationship to a male family member may be unable to provide detail about the activities of the male family member that placed the family at risk. In many societies it is normal for a male family member not to discuss his "public" activities (such as political activities, or activities in a union or religious organization) with female members of the family, even with his wife.

2. Effects of Trauma

As discussed in other modules and earlier in this module, effects of trauma may have a significant impact on an applicant's ability to present details about her claim. The effect of trauma on an applicant's ability to present a credible claim is not unique to gender. However, because persecution directed against women may involve sexual harm, you need to be sensitive to the possibility that a woman is reluctant to provide detail about certain experiences because those experiences may be difficult to discuss, particularly with a male officer or through a male interpreter.

⁸⁵ As explained in the RAIO Training Module, *Credibility*, when evaluating credibility, you must consider "the totality of the circumstances" including all relevant factors, such as detail, consistency and plausibility. All of these factors may be affected by circumstances related to an applicant's gender.

3. Gender Roles

A woman's cultural and social background may also affect her ability or the ease with which she discusses her history with a stranger. In some cultures, women live secluded lives and may only rarely have contact with strangers, particularly strangers of the opposite sex. When women in such societies do encounter strangers, they may be accustomed to having male relatives speak for them. This may result in an applicant providing only short, limited answers to questions you pose.

4. Education Level

In some countries or cultures, women are denied the opportunity to obtain an education, or for a variety of reasons, may only be able to obtain a very limited education. In many refugee-producing countries, the literacy rate for women is quite low. A lack of education can affect a woman's ability to express herself or her understanding of the context of the social situation. A woman with little or no education may be unable to clearly express her claim, or may express it in a confused or halting manner creating the false impression that she is being evasive.

7.2 Consistency

Given some women's limited literacy skills, coupled with the fact that women in some societies may be accustomed to having male relatives conduct all "public" activities for them, female asylum or refugee applicants may sign or mark applications that have been completed by a male relative who did not allow them to review it for accuracy. As in any asylum or refugee case, you should always inquire into who prepared the application for the applicant and whether the applicant had an opportunity to review it for accuracy before signing.

7.3 Plausibility

You should exercise care in evaluating the plausibility of the claims by someone from a different culture when behavior or life choices are being evaluated. What may seem implausible behavior to you could be plausible in the applicant's culture, or given conditions in the applicant's country.

7.4 Demeanor

As explained in the RAIO Training Module, *Credibility*, demeanor is often an unreliable and misleading indicator of credibility. This may be particularly true in cases involving torture or sexual violence. While some individuals who have been tortured become emotionally overcome when recalling their ordeals, others may exhibit no emotion at all. Because there are such a wide variety of emotional reactions to recounting experiences of torture, you should not expect the asylum or refugee applicant to manifest any particular emotion when recounting traumatic experiences.

In some cultures, keeping the head down and avoiding eye contact are signs of respect. For many women, making eye contact and speaking clearly and directly are considered highly inappropriate conduct and should not be viewed as indicators of lack of credibility.

8 EVIDENTIARY CONSIDERATIONS

The same evidentiary rules apply to female applicants, whether or not the claim is gender-related, as apply to male applicants. Testimony alone may be sufficient to establish eligibility if it is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. However in some cases, additional corroboration of material facts may be required. “[W]here it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, such evidence should be provided or an explanation should be given as to why such information was not presented or as to why such corroboration cannot be provided.”⁸⁶

In evaluating whether an applicant should be expected to provide documentation, you must take into account the applicant’s situation in the country she fled and the circumstances under which she fled. For a number of reasons, a female asylum or refugee applicant might not have access to identity documents or other documentary proof of her claim. For example, women in the applicant’s country may not be afforded full rights of citizenship, or an applicant’s means of support may have been dependent upon a male relative who had control over any documents pertaining to the female applicant.

It may be unreasonable to expect a woman from a refugee-producing country to have documentation of sexual violence she suffered. Because of strong cultural stigma attached to rape, “women survivors of sexual violence often are reluctant to seek medical assistance or to file police reports, because they do not want it known that they were raped.”⁸⁷

9 CONCLUSION

Understanding the role of gender and how to evaluate gender-based claims is important for all Officers within the RAIO Directorate. Although not all of the divisions will encounter gender-based issues on a routine basis, you should familiarize yourself with the types of potential gender-based issues that could arise in the course of adjudicating cases. Being familiar with the terminology and applicable laws and regulations relevant to the adjudications will help you recognize and adjudicate gender-based claims and make legally sufficient decisions.

⁸⁶ INA § 208(b)(1)(B)(ii); 8 CFR § 208.13(a); *Diallo v. INS*, 232 F.3d 279 (2d. Cir. 2000); *Matter of S-M-J*, 21 I&N Dec 722 (BIA 1997).

⁸⁷ Human Rights Watch Women’s Rights Project, *The Human Rights Watch Global Report on Women’s Human Rights* (August 1995) <http://www.hrw.org/sites/default/files/reports/general958.pdf>

10 SUMMARY

10.1 Gender-Related Issues

Women often suffer types of harm unique to women or much more commonly experienced by women than men, and at times women may suffer harm solely because of their gender. In many societies, women are subject to much greater social restrictions and harsher penalties for social violations than are men.

Furthermore, social constraints placed on women in many countries pose great obstacles to accessing the protection of the state or fleeing harm.

10.2 International and National Guidelines Relating to Women Refugees

Recognizing the particular vulnerability of women, international bodies and national governments have issued several documents in an effort to enhance their protection. These documents may be helpful reference tools for you in evaluating gender-based claims, including determining whether a type of harm experienced or feared by a woman seeking protection has been condemned by the international community as contrary to international human rights norms.

Some of those instruments and documents are:

- Declaration on Elimination of Discrimination Against Women (1967)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- UNHCR Guidelines on the Protection of Refugee Women (1991)
- Declaration on the Elimination of Violence Against Women (1993)
- INS Asylum Gender Guidelines (1995)
- UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)

10.3 Types of Gender-Based Harm

The types of harm that women suffer vary across a broad range of countries, cultures, and social classes. You will confront particular types of harm in the claims of women interviewed.

10.3.1 Rape and Other Sexual Violence

Rape and other forms of sexual assault are acts of violence serving non-sexual needs or aims. Rape is based on a desire to degrade, control, and/or terrorize a victim or her community. Rape of women civilians has long been an integral part of conflict, used as a tactical weapon to terrorize civilian communities.

10.3.2 Female Genital Mutilation (FGM)

Female genital mutilation (FGM) is a custom of unknown origins involving the cutting or removal of all or part of the female genitalia. This practice can have devastating and harmful consequences for a woman throughout her life.

10.3.3 Forced Marriage

Forced marriage takes place against the victim's wishes and without the informed consent of both parties. The practice occurs throughout the world and may arise out of gender discrimination. Forced marriage constitutes a human rights violation and may constitute persecution where the applicant experiences it as serious harm.

10.3.4 Domestic Violence

Violence against women by relatives is related to the historically more powerful position of men in the family and society. In many societies, the police, the court system, and laws may condone the practice, allow for it, or may simply do nothing to prevent it or punish perpetrators. Although most battered women make efforts to avoid or resist abuse, there are many factors that make it difficult for a battered woman to leave her abuser.

10.3.5 Human Trafficking

Women and men are sometimes victims of human trafficking, a circumstance that involves their exploitation as forced laborers or prostitutes, among other types of harm. They are held against their will, either physically or psychologically. A victim of human trafficking is sometimes lured into her position by deception such as false promises of employment or under false pretenses that the trafficker is romantically interested in the victim. Traffickers often withhold their victims' passports and identity documents. More information is available in the RAIO Training Module, *Detecting Possible Victims of Trafficking*.

10.3.6 Honor Crimes

In some cultures, women are perceived to be the keepers of their families' honor. The family and society consider that a woman has brought shame on her family if she does not adhere to strict social norms of behavior and conduct. Families carry out honor crimes to restore honor to their families. Perpetrators may be members of the woman's family or her community.

Honor crimes include: stoning, abduction, imprisonment, rape, poisoning, acid attacks, disfigurement, forced marriage, murder, and attempts to coerce the victim to commit suicide. A woman may be subjected to these honor crimes for engaging in, or for being accused of engaging in, sex before or outside of marriage, even as a result of rape; refusing to agree to a forced marriage; assertiveness; or wearing inappropriate clothing. Even in countries where honor crimes are illegal, lax enforcement or lesser sentences may be given to perpetrators of these crimes.

10.4 Interviewing Considerations

Cultural factors, such as the expected role of a woman in her society, may significantly affect an applicant's testimony. Cultural norms may exacerbate a reluctance to discuss an issue or limit an applicant's knowledge on a particular subject. The presence of certain people, such as family members or interpreters, may inhibit an applicant's testimony.

You must use your utmost care to assure that the interview is conducted in a non-adversarial manner and to employ questioning techniques that both encourage testimony and put the applicant at ease.

10.5 Legal Analysis – Persecution and Agent of Persecution

The Asylum Gender Guidelines do not expand the statutory definition of a refugee. The legal criteria used to evaluate a female asylum or refugee applicant's eligibility for asylum or refugee status is the same criteria used in all other protection adjudications.

10.5.1 Persecution

When considering whether the harm that an applicant has suffered or fears rises to the level of persecution, keep in mind that rape and FGM are serious enough forms of harm to amount to persecution. According to statute, forced abortion and forced sterilization and other serious harm imposed for resistance to a coercive population control program constitute harm amounting to persecution.

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulate to the level of persecution, or is so serious that it leads to consequences of a substantially prejudicial nature. Some case law has also indicated that being compelled to engage in conduct that is abhorrent to an individual's deeply-held beliefs may constitute persecution.

10.5.2 Agent of persecution

As in any other asylum or refugee claim, in order to establish persecution, the applicant must demonstrate that the persecutor is the government (including agents of the government) or an entity that the government is unable or unwilling to control. The

persecutor may be a rebel group, a clan, a tribe, or a family member, such as a brother, father, or husband.

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, you should consider whether the government provides reasonably effective protection. Factors to consider include whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to existing state protection.

Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable. In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection.

Keep in mind also that, while the existence of laws on the books criminalizing domestic abuse and government agencies or initiatives devoted to addressing the problem are factors which may serve to indicate a willingness and ability to protect victims of domestic violence, they are not in and of themselves proof that such protection exists and is effective.

10.6 Legal Analysis – Nexus

The “nexus” requirement applies equally to female and male applicants and to all claims, including those in which gender is an element.

When examining claims based on female applicants’ political opinion, you must remember that in addition to expressing political opinions in the traditional sense of actively participating in political institutions within a country, women also express their political opinion in more non-traditional ways, such as cooking or providing food to rebel forces. Women also express political opinions when they oppose or challenge institutionalized discrimination or restrictive social norms.

The BIA has recognized gender as an immutable trait that could form the basis of a particular social group, as have a few federal courts. However, most courts analyzing gender-related social groups consider gender along with other characteristics.

10.7 Legal Analysis – Internal Relocation

Determinations regarding whether a female applicant could avoid future harm through internal relocation must take into consideration the legal restrictions and cultural or social norms governing women’s behavior. This includes a woman’s ability to travel, her economic circumstances, and her social circumstances.

10.8 Credibility

Cultural differences and norms governing women’s behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum and

Q. Why does this mean she was killed?

A. What else could it mean? My brothers had been very upset when they learned she was pregnant. They said terrible things about her. Called her terrible names. They talked to my cousins who were also very upset. They said she brought shame upon the entire family and that something had to be done. Then she suddenly had an accident. I don't believe it was an accident.

Q. Was there an investigation?

A. There never is.

After reviewing the excerpt from the notes above, answer the following questions:

- 1. What other questions should be asked?**
- 2. Are there better ways to have asked any of the above questions?**
- 3. On these facts and, in light of country conditions, can the applicant establish eligibility for asylum?**

OTHER MATERIALS

There are no other materials for this module.

SUPPLEMENT A – 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.

READING

Required

1. Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

2.

Recommended

1.

2.

SUPPLEMENTS

RAD Supplement – 1

There are no RAD supplements.

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.

READING

Required

- 1.
- 2.

Recommended

1. Melville, Rosemary, Asylum Division, Office of International Affairs, *Follow Up On Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs, (Washington, DC: 7 July 1995), 2 p. plus attachments.
2. Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

SUPPLEMENTS

ASM Supplement – 1

There are no Asylum supplements.

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

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

READING

Required

- 1.
- 2.

Recommended

- 1.
- 2.

SUPPLEMENTS

IO Supplement – 1

There are no IO supplements.



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 RAI0 (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?

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

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

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

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

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

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

Step One: Common Immutable Characteristic

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

Unchangeable Characteristics

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

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

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

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

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

Fundamental Characteristics

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

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

Assumption of Risk Considerations

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

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

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

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

⁸ *Id.*

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

¹⁰ *Id.* at 3.

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

Step Two: Social Distinction

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

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

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

¹² *Id.*

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

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

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

¹⁶ *W-G-R-*, 26 I&N Dec. at 217.

¹⁷ *M-E-V-G-*, 26 I&N Dec. at 238.

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

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

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

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

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

¹⁹ *M-E-V-G-*, 26 I&N Dec. at 240.

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

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

²² *M-E-V-G-*, 26 I&N Dec. at 242.

²³ *A-R-C-G-*, 26 I&N Dec. at 394.

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

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

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

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

²⁵ *Id.* at 1084 n.7.

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

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

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

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

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

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

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

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

Step 3: Particularity

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

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

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

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

³³ *Id.*

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

³⁵ *Id.* at 239.

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

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

³⁸ *W-G-R*, 26 I&N Dec. at 214.

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

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

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

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

2.2 General Principles for Formulating Particular Social Groups

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

³⁹ *Id.* at 214-15.

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

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

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

⁴³ *Id.*

⁴⁴ *Id.*

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

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

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

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

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

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

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

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

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

Avoid Circular Reasoning

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

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

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

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

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

⁵¹ *Cece*, 733 F.3d at 671-72.

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

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

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

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

No size limitation

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

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

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

No voluntary associational relationship needed

⁵⁴ *Id.* at 167.

⁵⁵ *Id.* at 170.

⁵⁶ *Id.* at 178-79.

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

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

⁵⁹ *Id.*

⁶⁰ *Id.*

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

Cohesiveness or homogeneity not required

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

3. IS THE PERSECUTION OR FEARED PERSECUTION “ON ACCOUNT OF” THE APPLICANT’S PARTICULAR SOCIAL GROUP MEMBERSHIP?

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

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

4. PRECEDENT DECISIONS (SPECIFIC GROUPS)

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

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

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

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

4.1 Family Membership

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 Clan Membership

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

4.3 Age

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

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

⁷⁰ *Id.* at 19.

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

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

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

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

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

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

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

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

4.4 Gender

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

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

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

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

⁷⁹ *Id.*

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

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

4.4.1 Female Genital Mutilation (FGM)⁸⁴

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

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

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

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

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

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

⁸⁴ Sometimes referred to as female genital cutting.

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

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

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

Eligibility Based on Feared FGM of Applicant's Children

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

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

4.4.2 Widows

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

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

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

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

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

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

4.4.3 Gender-Specific Dress Codes

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

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

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

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

⁹⁰ *Id.*

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

⁹² *Fatin*, 12 F.3d at 1241-42.

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

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

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

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

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

For more information, see RAI0 Training Module, *Guidance for Adjudicating LGBTI Refugee and Asylum Claims*.

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

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

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

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

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

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

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

4.6 Domestic Violence

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

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

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

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

¹⁰¹ *Id.* at 389.

¹⁰² *Id.* at 392-93.

¹⁰³ *Id.* at 394.

¹⁰⁴ *Id.* at 392.

¹⁰⁵ DHS’s Supplemental Brief in *Matter of L-R-*, April 13, 2009.

socially, or physically unable to leave the abusive relationship, or where “the abuser would not recognize a divorce or separation as ending the abuser’s right to abuse the victim.”¹⁰⁶

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

4.6.2 Other Types of Domestic Relationships

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

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

¹⁰⁶ *Id.* at n.12.

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

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

¹⁰⁹ *Id.* at 985.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 985-86.

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

4.6.3 Children in Domestic Relationships

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

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

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

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

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

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

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

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

The group of children who are viewed as property by virtue of their position within a domestic relationship also can be described with sufficient particularity because it is possible to determine who falls within the group: they are (1) minors¹¹⁷ (2) who fall within the boundaries of a domestic relationship, and (3) are treated and perceived as property because of their subordinate status within that relationship.¹¹⁸ As noted by the Board in examining the particularity of a group involving violence within the domestic relationship, “the terms can combine to create a group with discrete and definable boundaries.”¹¹⁹

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

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

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

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

¹¹⁹ *Id.*

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

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

4.7. Ancestry

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

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

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

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

4.8 Individuals with Physical or Mental Disabilities

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

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

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

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

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

¹²⁵ *Id.* at 892.

¹²⁶ *Id.* at 893.

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

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

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

4.9 Unions

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

¹²⁷ *Id.* at 894.

¹²⁸ *Id.* at 895.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 896-97.

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

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

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

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

4.10 Students and Professionals

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

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

4.11 Small-Business Owners Indebted to Private Creditors

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

4.12 Landowners

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

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

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

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

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

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

¹⁴⁰ *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005).

The Seventh Circuit has found that the “educated, landowning class” in Colombia who had been targeted by the Revolutionary Armed Forces of Colombia (FARC) constituted a particular social group for asylum purposes. The court distinguished the situation in Colombia from other situations where the risk of harm flowing from civil unrest affects “the population in a relatively undifferentiated way” and found that members of this group were the “preferred victims” of the FARC.¹⁴¹

The court further distinguished this group from groups based solely on wealth, a characteristic that had been rejected as the basis of a particular social group when considered alone by the BIA in *Matter of V-T-S*, because it included the members’ social position as cattle farmers, their level of education, and their land ownership. These shared past experiences were of a particular type that set them apart in society such that the FARC would likely continue to target the group members, even if they gave up their land, cattle farming, and educational opportunities.¹⁴²

In a separate case, the Seventh Circuit found that Colombian landowners who refuse to cooperate with the FARC constituted a particular social group.¹⁴³ The Seventh Circuit emphasized that “there can be no rational reason for the Board to reject a category of ‘land owners’ when the Board in *Acosta* specifically used land owning as an example of a social group.”¹⁴⁴

The Board opined in *Matter of M-E-V-G-* that “in an underdeveloped, oligarchical society,” a group of landowners may meet the particularity and social distinction criteria.¹⁴⁵ If analyzing a claim involving landowners, the Board instructed adjudicators to “make findings whether ‘landowners’ share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers ‘landowners’ as a significantly distinct group within the society.”¹⁴⁶

Additionally, the Ninth Circuit has held that landownership may form the basis of a particular social group.¹⁴⁷ The court emphasized that “landownership [is] an illustrative example of a characteristic that might form the basis of a particular social group.”¹⁴⁸ The

¹⁴¹ *Tapiero de Orejuela v. Gonzalez*, 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.*

3. Gender Roles

A woman's cultural and social background may also affect her ability or the ease with which she discusses her history with a stranger. In some cultures, women live secluded lives and may only rarely have contact with strangers, particularly strangers of the opposite sex. When women in such societies do encounter strangers, they may be accustomed to having male relatives speak for them. This may result in an applicant providing only short, limited answers to questions you pose.

4. Education Level

In some countries or cultures, women are denied the opportunity to obtain an education, or for a variety of reasons, may only be able to obtain a very limited education. In many refugee-producing countries, the literacy rate for women is quite low. A lack of education can affect a woman's ability to express herself or her understanding of the context of the social situation. A woman with little or no education may be unable to clearly express her claim, or may express it in a confused or halting manner creating the false impression that she is being evasive.

7.2 Consistency

Given some women's limited literacy skills, coupled with the fact that women in some societies may be accustomed to having male relatives conduct all "public" activities for them, female asylum or refugee applicants may sign or mark applications that have been completed by a male relative who did not allow them to review it for accuracy. As in any asylum or refugee case, you should always inquire into who prepared the application for the applicant and whether the applicant had an opportunity to review it for accuracy before signing.

7.3 Plausibility

You should exercise care in evaluating the plausibility of the claims by someone from a different culture when behavior or life choices are being evaluated. What may seem implausible behavior to you could be plausible in the applicant's culture, or given conditions in the applicant's country.

7.4 Demeanor

As explained in the RAI0 Training Module, *Credibility*, demeanor is often an unreliable and misleading indicator of credibility. This may be particularly true in cases involving torture or sexual violence. While some individuals who have been tortured become emotionally overcome when recalling their ordeals, others may exhibit no emotion at all. Because there are such a wide variety of emotional reactions to recounting experiences of torture, you should not expect the asylum or refugee applicant to manifest any particular emotion when recounting traumatic experiences.

In some cultures, keeping the head down and avoiding eye contact are signs of respect. For many women, making eye contact and speaking clearly and directly are considered highly inappropriate conduct and should not be viewed as indicators of lack of credibility.

8 EVIDENTIARY CONSIDERATIONS

The same evidentiary rules apply to female applicants, whether or not the claim is gender-related, as apply to male applicants. Testimony alone may be sufficient to establish eligibility if it is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. However in some cases, additional corroboration of material facts may be required. “[W]here it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, such evidence should be provided or an explanation should be given as to why such information was not presented or as to why such corroboration cannot be provided.”⁸⁶

In evaluating whether an applicant should be expected to provide documentation, you must take into account the applicant’s situation in the country she fled and the circumstances under which she fled. For a number of reasons, a female asylum or refugee applicant might not have access to identity documents or other documentary proof of her claim. For example, women in the applicant’s country may not be afforded full rights of citizenship, or an applicant’s means of support may have been dependent upon a male relative who had control over any documents pertaining to the female applicant.

It may be unreasonable to expect a woman from a refugee-producing country to have documentation of sexual violence she suffered. Because of strong cultural stigma attached to rape, “women survivors of sexual violence often are reluctant to seek medical assistance or to file police reports, because they do not want it known that they were raped.”⁸⁷

9 CONCLUSION

Understanding the role of gender and how to evaluate gender-based claims is important for all Officers within the RAIO Directorate. Although not all of the divisions will encounter gender-based issues on a routine basis, you should familiarize yourself with the types of potential gender-based issues that could arise in the course of adjudicating cases. Being familiar with the terminology and applicable laws and regulations relevant to the adjudications will help you recognize and adjudicate gender-based claims and make legally sufficient decisions.

⁸⁶ INA § 208(b)(1)(B)(ii); 8 CFR § 208.13(a); *Diallo v. INS*, 232 F.3d 279 (2d. Cir. 2000); *Matter of S-M-J*, 21 I&N Dec 722 (BIA 1997).

⁸⁷ Human Rights Watch Women’s Rights Project, *The Human Rights Watch Global Report on Women’s Human Rights* (August 1995) <http://www.hrw.org/sites/default/files/reports/general958.pdf>

10 SUMMARY

10.1 Gender-Related Issues

Women often suffer types of harm unique to women or much more commonly experienced by women than men, and at times women may suffer harm solely because of their gender. In many societies, women are subject to much greater social restrictions and harsher penalties for social violations than are men.

Furthermore, social constraints placed on women in many countries pose great obstacles to accessing the protection of the state or fleeing harm.

10.2 International and National Guidelines Relating to Women Refugees

Recognizing the particular vulnerability of women, international bodies and national governments have issued several documents in an effort to enhance their protection. These documents may be helpful reference tools for you in evaluating gender-based claims, including determining whether a type of harm experienced or feared by a woman seeking protection has been condemned by the international community as contrary to international human rights norms.

Some of those instruments and documents are:

- Declaration on Elimination of Discrimination Against Women (1967)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- UNHCR Guidelines on the Protection of Refugee Women (1991)
- Declaration on the Elimination of Violence Against Women (1993)
- INS Asylum Gender Guidelines (1995)
- UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)

10.3 Types of Gender-Based Harm

The types of harm that women suffer vary across a broad range of countries, cultures, and social classes. You will confront particular types of harm in the claims of women interviewed.

10.3.1 Rape and Other Sexual Violence

Rape and other forms of sexual assault are acts of violence serving non-sexual needs or aims. Rape is based on a desire to degrade, control, and/or terrorize a victim or her community. Rape of women civilians has long been an integral part of conflict, used as a tactical weapon to terrorize civilian communities.

10.3.2 Female Genital Mutilation (FGM)

Female genital mutilation (FGM) is a custom of unknown origins involving the cutting or removal of all or part of the female genitalia. This practice can have devastating and harmful consequences for a woman throughout her life.

10.3.3 Forced Marriage

Forced marriage takes place against the victim's wishes and without the informed consent of both parties. The practice occurs throughout the world and may arise out of gender discrimination. Forced marriage constitutes a human rights violation and may constitute persecution where the applicant experiences it as serious harm.

10.3.4 Domestic Violence

Violence against women by relatives is related to the historically more powerful position of men in the family and society. In many societies, the police, the court system, and laws may condone the practice, allow for it, or may simply do nothing to prevent it or punish perpetrators. Although most battered women make efforts to avoid or resist abuse, there are many factors that make it difficult for a battered woman to leave her abuser.

10.3.5 Human Trafficking

Women and men are sometimes victims of human trafficking, a circumstance that involves their exploitation as forced laborers or prostitutes, among other types of harm. They are held against their will, either physically or psychologically. A victim of human trafficking is sometimes lured into her position by deception such as false promises of employment or under false pretenses that the trafficker is romantically interested in the victim. Traffickers often withhold their victims' passports and identity documents. More information is available in the RAI0 Training Module, *Detecting Possible Victims of Trafficking*.

10.3.6 Honor Crimes

In some cultures, women are perceived to be the keepers of their families' honor. The family and society consider that a woman has brought shame on her family if she does not adhere to strict social norms of behavior and conduct. Families carry out honor crimes to restore honor to their families. Perpetrators may be members of the woman's family or her community.

Honor crimes include: stoning, abduction, imprisonment, rape, poisoning, acid attacks, disfigurement, forced marriage, murder, and attempts to coerce the victim to commit suicide. A woman may be subjected to these honor crimes for engaging in, or for being accused of engaging in, sex before or outside of marriage, even as a result of rape; refusing to agree to a forced marriage; assertiveness; or wearing inappropriate clothing. Even in countries where honor crimes are illegal, lax enforcement or lesser sentences may be given to perpetrators of these crimes.

10.4 Interviewing Considerations

Cultural factors, such as the expected role of a woman in her society, may significantly affect an applicant's testimony. Cultural norms may exacerbate a reluctance to discuss an issue or limit an applicant's knowledge on a particular subject. The presence of certain people, such as family members or interpreters, may inhibit an applicant's testimony.

You must use your utmost care to assure that the interview is conducted in a non-adversarial manner and to employ questioning techniques that both encourage testimony and put the applicant at ease.

10.5 Legal Analysis – Persecution and Agent of Persecution

The Asylum Gender Guidelines do not expand the statutory definition of a refugee. The legal criteria used to evaluate a female asylum or refugee applicant's eligibility for asylum or refugee status is the same criteria used in all other protection adjudications.

10.5.1 Persecution

When considering whether the harm that an applicant has suffered or fears rises to the level of persecution, keep in mind that rape and FGM are serious enough forms of harm to amount to persecution. According to statute, forced abortion and forced sterilization and other serious harm imposed for resistance to a coercive population control program constitute harm amounting to persecution.

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulate to the level of persecution, or is so serious that it leads to consequences of a substantially prejudicial nature. Some case law has also indicated that being compelled to engage in conduct that is abhorrent to an individual's deeply-held beliefs may constitute persecution.

10.5.2 Agent of persecution

As in any other asylum or refugee claim, in order to establish persecution, the applicant must demonstrate that the persecutor is the government (including agents of the government) or an entity that the government is unable or unwilling to control. The

persecutor may be a rebel group, a clan, a tribe, or a family member, such as a brother, father, or husband.

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, you should consider whether the government provides reasonably effective protection. Factors to consider include whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to existing state protection.

Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable. In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection.

Keep in mind also that, while the existence of laws on the books criminalizing domestic abuse and government agencies or initiatives devoted to addressing the problem are factors which may serve to indicate a willingness and ability to protect victims of domestic violence, they are not in and of themselves proof that such protection exists and is effective.

10.6 Legal Analysis – Nexus

The “nexus” requirement applies equally to female and male applicants and to all claims, including those in which gender is an element.

When examining claims based on female applicants’ political opinion, you must remember that in addition to expressing political opinions in the traditional sense of actively participating in political institutions within a country, women also express their political opinion in more non-traditional ways, such as cooking or providing food to rebel forces. Women also express political opinions when they oppose or challenge institutionalized discrimination or restrictive social norms.

The BIA has recognized gender as an immutable trait that could form the basis of a particular social group, as have a few federal courts. However, most courts analyzing gender-related social groups consider gender along with other characteristics.

10.7 Legal Analysis – Internal Relocation

Determinations regarding whether a female applicant could avoid future harm through internal relocation must take into consideration the legal restrictions and cultural or social norms governing women’s behavior. This includes a woman’s ability to travel, her economic circumstances, and her social circumstances.

10.8 Credibility

Cultural differences and norms governing women’s behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum and

refugee applicants. For example, social constraints controlling access to information, the effects of trauma, or customs of social interaction may limit a woman's ability to provide detailed testimony about certain aspects of her claim. Also, as women from certain countries are less likely to be literate than their male compatriots, they may not have the ability to review the asylum or refugee application for accuracy.

PRACTICAL EXERCISESPractical Exercise # 1

- **Title: Analysis of Harm in a Gender-Related Claim**
- **Student Materials: Gender Fact Pattern**

Applicant is a 22-year old woman from country X, which is engaged in a civil war between the government and rebel forces. When she was about 9 years old in 1993, rebel forces began going to Applicant's village and demanding that men join them. They often would kidnap men to join their forces, and men who resisted were killed. The rebel forces took about 20 men from the village, which was about 1 per family.

A few years later, the military began coming to the village. They would beat men, women and children. They also would rape women. Over the next several years, soldiers raped someone in village every 8 – 15 days. Applicant claimed that the military targeted the village and retaliated against residents based on the mistaken belief that the villagers had voluntarily joined the rebels and therefore the village supported the rebels.

When Applicant was 19, soldiers came to her home at night. They beat her father and mother. The soldiers told her father that they wanted to "eat and to be with a woman." They tied Applicant's father behind the house and forced her mother into the kitchen to cook. Applicant was then left alone with three soldiers who beat and raped her. After the soldiers left, the Applicant's parents sent her to stay with an aunt in a nearby village. Fearing further harm, Applicant fled her country.

When asked why she thought she and her family were assaulted, Applicant testified, "I think they were attacking us because the guerrillas had taken my brother away, so they thought we were in favor of the guerillas." When asked why she believed there was a connection between her brother's kidnapping and her rape so many years later, she responded, "Because the guerrillas continued to kidnap people from the town. So for the same reason, the military soldiers thought that all the persons they took away, that they were in agreement with the guerillas."

Analyze whether the harm Applicant experienced was persecution on account of a protected characteristic. What additional information would be helpful in making this determination?

Practical Exercise # 2

- **Title: Interviewing a Gender-Related Case**
- **Student Materials: Excerpt of Interview Notes; Country Conditions Information**

- Q. Why are you afraid to return to Pakistan?
A. I would be killed absolutely.
- Q. Who would kill you and why?
A. My brothers. They would kill me. I have shamed them.
- Q. Why would they kill you?
A. I have dishonored them. Brought shame on my family.
- Q. What do you mean? How have you dishonored them?
A. They will say that I had intimate relations and I am not married.
- Q. Why will they think that?
A. My neighbor violated me. He made me submit. I didn't want to and now I am pregnant and no one will believe me.
- Q. What do you mean when you say no one will believe you?
A. My neighbor, he will deny it. He will say he didn't touch me – or he will say I asked for it.
- Q. I know this is difficult to talk about, but I must ask you, did he rape you?
A. Yes. (Applicant begins to cry).
- Q. Describe to me what happened.
A. They will say I have dishonored the family.
- Q. When did your neighbor harm you?
A. It was in October – last October.
- Q. Why do you think your brothers would harm you because of this?
A. I am not married. It is illegal. They won't believe me that I was forced.
- Q. Have you told anyone in your family what happened?
A. No.
- Q. Why not?
A. It is too shameful.
- Q. Did you tell the police?
A. No. They would arrest me. No one will believe me.
- Q. Do you know any other women who have been raped?
A. No. But my cousin got pregnant when she was not married and she died.
- Q. How did she die?
A. They said it was an accident, that she fell down the stairs. But I know that she was killed by my uncle and his sons.
- Q. How do you know this?
A. After she died, my oldest brother said that her family did the right thing, that they saved the family honor.

Q. Why does this mean she was killed?

A. What else could it mean? My brothers had been very upset when they learned she was pregnant. They said terrible things about her. Called her terrible names. They talked to my cousins who were also very upset. They said she brought shame upon the entire family and that something had to be done. Then she suddenly had an accident. I don't believe it was an accident.

Q. Was there an investigation?

A. There never is.

After reviewing the excerpt from the notes above, answer the following questions:

- 1. What other questions should be asked?**
- 2. Are there better ways to have asked any of the above questions?**
- 3. On these facts and, in light of country conditions, can the applicant establish eligibility for asylum?**

OTHER MATERIALS

There are no other materials for this module.

SUPPLEMENT A – 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.

READING

Required

1. Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

2.

Recommended

1.

2.

SUPPLEMENTS

RAD Supplement – 1

There are no RAD supplements.

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.

READING

Required

- 1.
- 2.

Recommended

1. Melville, Rosemary, Asylum Division, Office of International Affairs, *Follow Up On Gender Guidelines Training*, Memorandum to Asylum Office Directors, SAOs, AOs, (Washington, DC: 7 July 1995), 2 p. plus attachments.
2. Weiss, Jeffrey L., Office of International Affairs, *Gender Guidelines for Overseas Refugee Processing*, Memorandum to all Overseas District Directors (Washington, DC: 23 February 2001), 2 pp. plus attachment.

SUPPLEMENTS

ASM Supplement – 1

There are no Asylum supplements.

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

READING

Required

- 1.
- 2.

Recommended

- 1.
- 2.

SUPPLEMENTS

IO Supplement – 1

There are no IO supplements.



**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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court also pointed out that both petitioners offered evidence suggesting that landowners in their respective countries (Colombia and Mexico) are targets of persecution. One petitioner offered country conditions showing that the FARC specifically targets “wealthy landowners.” The other petitioner relied on testimony of a professor specializing in Latin American politics to show that the applicant’s family had been established landowners in Mexico for generations and this was a significant factor in why the applicant had been targeted by drug cartels.¹⁴⁹

4.13 Groups Based on “Wealth” or “Affluence”

In *Matter of A-M-E- & J-G-U-*, the BIA found that groups defined by wealth or socio-economic levels alone often will not be able to establish that they possess an immutable characteristic, because wealth is not immutable.¹⁵⁰ Wealth is, however, a characteristic that an individual should not be required to change, and therefore could be considered fundamental within the meaning of *Acosta*. In evaluating groups defined in terms of wealth, affluence, class, or socio-economic level, you must closely examine whether the proposed group can be defined with enough particularity and whether it is socially distinct. In *A-M-E- & J-G-U-*, the BIA concluded that the proposed group failed the particularity requirement, noting that the terms “wealthy” and “affluent” standing alone fail to provide an adequate benchmark for determining group membership. To support its particularity conclusion, the BIA stated that the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.¹⁵¹

In the context of the facts established in *A-M-E & J-G-U-*, the BIA rejected various particular social group formulations involving wealth and socio-economic status for failure to establish social visibility (or social distinction). The BIA stressed that this analysis must take into account relevant country of origin information. Considering Guatemalan country conditions, the BIA found a variety of groups failed as particular social groups, including groups defined by “wealth,” “affluence,” “upper income level,” “socio-economic level,” “the monied class,” and “the upper class.”¹⁵²

The BIA, however, did not reject altogether the possibility that a group defined by wealth could constitute a particular social group. The court noted that these types of social groups must be assessed in the context of the claim as a whole. For example, the Board opined that such a group might be valid in a case where persecutors target individuals within certain economic levels.¹⁵³

¹⁴⁹ *Id.* at 1114-15.

¹⁵⁰ *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

The BIA's emphasis on social context is consistent with the Seventh Circuit's approach in *Tapiero de Orejuela v. Gonzales*, where members of the "educated, landowning class" in Colombia were recognized as members of a particular social group. Although affluence was a shared trait for this group, group members also shared a distinctive social status (albeit one derived in significant part from affluence and the attributes of affluence) that made them preferred targets of the FARC.¹⁵⁴ The significance of this social status was evident when the claim was viewed in the context of the country conditions that showed that the FARC is a "leftist guerilla group that was originally established to serve as the military wing of the Colombian Communist Party" and that membership in an economic class, not merely "wealth," was an important motivating factor for them.¹⁵⁵

When encountering claims involving particular social groups based in whole or in part on wealth, you must assess the viability of the particular social group asserted in each case and carefully consider relevant country of origin information and other relevant evidence to determine if the group constitutes a particular social group as defined by the BIA and other courts. As the Seventh Circuit pointed out, "[t]here may be categories so ill-defined that they cannot be regarded as groups—the 'middle class,' for example. But this problem is taken care of by the external criterion—if a Stalin or a Pol Pot decides to exterminate the bourgeoisie of their country, this makes the bourgeoisie 'a particular social group,' which it would not be in a society that didn't think of middle-class people as having distinctive characteristics; it would be odd to describe the American middle class as 'a particular social group.'"¹⁵⁶

4.14 Present or Former Employment in Either Law Enforcement or the Military

When an applicant asserts membership in a particular social group that involves either past or present service as a police officer or soldier, you must first determine whether, in the context of the applicant's society, persons employed, or formerly employed, as police officers or soldiers form a particular social group.

Note, however, that often claims by persons employed, or formerly employed, as police officers or soldiers may also be analyzed under another protected ground, such as actual or imputed political opinion, depending on the facts of the case.

4.14.1 Former Military/Police Membership

¹⁵⁴ *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2006).

¹⁵⁵ *Id.* at 668.

¹⁵⁶ *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009).

The BIA recognized in both *Matter of C-A-* and *Matter of Fuentes* that former military leadership is an immutable characteristic that may form the basis for a particular social group under some circumstances. Similarly, while holding that the dangers arising solely from the nature of employment as a policeman in an area of domestic unrest do not support a claim, the Board indicated in *Fuentes* that former service in the national police is an immutable characteristic that, in some circumstances, could form the basis for a particular social group. In order to satisfy the definition of a particular social group, the applicant also must demonstrate that the purported social group has a distinct identity in society to meet the “social distinction” test.¹⁵⁷

The USCIS interpretive memo on *C-A-* clarifies that “harm inflicted on a former police officer or soldier in order to seek revenge for actions he or she took in the past is not on account of the victim’s status as a former police officer or soldier.”¹⁵⁸ In other words, if the former officer is being targeted for his or her “status” as a former officer, he or she could establish an asylum claim, but not if he or she is being targeted only for his or her actions as a former police officer. It is important to note, however, that many of these cases will involve mixed motives, and it is possible that a former officer is being targeted on account of both status and former acts. An applicant would satisfy the “status” requirement where (1) there is a cognizable particular social group, (2) he or she is a member of the group, and (3) he or she is being targeted because of his or her membership, regardless of whether there may be evidence that he is also being targeted on account of past acts. As long as the membership in a cognizable particular social group is a sufficient reason to meet the requisite nexus standard, evidence that he is also targeted on account of past acts should not undermine the claim.

The Ninth Circuit, in *Madrigal v. Holder*, reviewed a case where the petitioner based his past persecution claim partially on the mistreatment he suffered while serving in the military and partially on events that occurred after he left the military.¹⁵⁹ The Ninth Circuit analyzed the petitioner’s proposed particular social group of “former Mexican army soldiers who participated in anti-drug activity,” and noted that case law distinguishes between current versus former military or police service when determining whether a particular social group is cognizable.¹⁶⁰ The Ninth Circuit concluded that the petitioner’s proposed particular social group was valid and remanded the case to the

¹⁵⁷ Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007); *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006); see also *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988); *Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004) (finding that the rationale of *Fuentes* applies to threats from terrorist organizations resulting from an applicant’s work as a law enforcement official targeting terrorist groups because the threat was received as a result of the employment, not the applicant’s political opinion).

¹⁵⁸ Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

¹⁵⁹ *Madrigal v. Holder*, 716 F.3d 499, 503-04 (9th Cir. 2013).

¹⁶⁰ *Id.* at 504.

Board.¹⁶¹ Specifically, the Ninth Circuit noted, “Although mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim, if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is ‘one central reason’ for his persecution.... In Tapia Madrigal’s case, even if revenge partially motivated Los Zetas’ mistreatment of him, the record makes clear that their desire to intimidate members of his social group was another central reason for the persecution.”¹⁶²

The Seventh Circuit has indicated that “former law-enforcement agents in Mexico” can be a viable particular social group.¹⁶³ In that case, drug organizations initially offered the applicant, an investigator, bribes to cooperate with them; however, when he refused, they tried to kill him under their “plata o plomo” policy— “money or bullets.” Afraid of being killed, the applicant resigned from his position and opened an office supply business, trying to conceal his former position. The Seventh Circuit concluded that being a former law enforcement agent is an immutable characteristic, as the applicant cannot erase his employment history.¹⁶⁴ The record also contained evidence supporting that the feared persecution was because the applicant was a former agent. The record contained evidence that drug organizations have tried to kill other officers who resigned from the police. The Seventh Circuit noted that “[p]unishing people after they are no longer threats is a rational way to achieve deterrence . . . [and] there’s nothing implausible about [the applicant’s] testimony that drug organizations in Mexico share this view of deterrence.”¹⁶⁵

4.14.2 Current Military/Police Membership

Current service as a soldier or police officer, under some circumstances, could define a particular social group if that service is so fundamental to the applicant’s identity or conscience that he or she should not be required to change it. The applicant would also have to demonstrate that the purported social group has a distinct identity in the society, and that the group is particular. If these requirements are met, it is possible that an applicant could establish a cognizable social group in such circumstances.¹⁶⁶

Even if membership in a particular social group is established in such a case, however, the determination that the persecution was or will be “on account” of the particular social group is especially difficult. The determination requires special scrutiny.

¹⁶¹ *Id.* at 505.

¹⁶² *Id.* at 506 (internal citations omitted).

¹⁶³ *R.R.D. v. Holder*, 746 F.3d 807, 810 (7th Cir. 2014).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*. Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

Harm inflicted on a police officer or soldier because of his role as a public servant carrying out his official government duties in an ongoing armed struggle or civil war is not on account of the applicant's membership in a group of police officers or soldiers.¹⁶⁷ Such a claim would therefore fail on the "on account of" element, even if the applicant has established membership in a group that constitutes a particular social group.

Under a different set of circumstances, if the evidence showed that the applicant was targeted because he or she was a police officer or soldier, the nexus requirement may be met. It is only where the harm is inflicted because of the applicant's membership in a group, rather than to interfere with his or her performance of specific duties, that the nexus requirement may be met. This is a particularly difficult factual inquiry. One factor that may assist in making this determination is whether the harm inflicted on the applicant or threats occur while the applicant is on official duty, as opposed to once the applicant has been taken out of combat or is no longer on duty.

The Ninth Circuit also has held that the general risk associated with military or police service does not, in itself, provide a basis of eligibility. The Ninth Circuit, like the BIA, recognizes a distinction between *current* service and *former* service when determining the scope of a cognizable social group.¹⁶⁸

It is important to note that the fact of current service does not preclude eligibility. A police officer or soldier may establish eligibility if he or she can show that the persecutor is motivated to harm the applicant because the applicant possesses, or is perceived to possess, a protected characteristic. The following passage from *Cruz-Navarro v. INS*, is instructive:

Fuentes, therefore, does not flatly preclude "police officers and soldiers from establishing claims of persecution or fear of persecution." [citing *Velarde* at 1311] Rather, *Fuentes* suggests that persecution resulting from membership in the police or military is insufficient, by itself, to establish persecution on account of membership in a particular social group or political opinion.¹⁶⁹

The Seventh Circuit has not adopted the distinction between current and former police officers set forth in *Fuentes*. In dicta, the Court expressed disapproval of any reading of *Fuentes* that would create a *per se* rule that dangers encountered by police officers or military personnel during service could never amount to persecution. However, in the case before it, the Court upheld the BIA's determination that the dangers the applicant

¹⁶⁷ *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

¹⁶⁸ *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000); *Velarde v. INS*, 140 F.3d 1305 (9th Cir. 1998) (former bodyguard of daughters of Peruvian President threatened by Shining Path with reference to the applicant's specific duties); see also *Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (suffering while in military on account of applicant's race, not participation in military).

¹⁶⁹ *Cruz-Navarro v. INS*, 232 F.3d at 1029.

experienced while serving as a military and police officer arose from the nature of his employment and were not on account of a protected characteristic.¹⁷⁰

4.15 Drug Traffickers

Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.¹⁷¹ In *Bastanipour v. INS*, an applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear, asserting that the Iranian government executes individuals who traffic in illegal drugs. The Seventh Circuit held that:

[w]hatever its precise scope, the term “particular social groups” surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other. We suppose there might be an exception for some class of minor or technical offenders in the U.S. who were singled out for savage punishment in their native land, but a drug felon sentenced to thirty years in this country (though Bastanipour’s sentence was later reduced to fifteen years) cannot be viewed in that light.¹⁷²

4.16 Criminal Deportees

Similarly, the USCIS position that criminal activity or association may not form the basis of a particular social group is consistent with courts’ views of criminal deportees as an invalid particular social group. In *Elien v. Ashcroft*, the First Circuit upheld a finding by the BIA that a group defined as “deported Haitian nationals with criminal records in the United States” does not qualify as a particular social group for the purposes of asylum. The First Circuit agreed with the BIA that it would be unsound policy to recognize criminal deportees as a particular social group, noting that the BIA had not extended particular social group to include persons who “voluntarily engaged in illicit activities.”¹⁷³

¹⁷⁰ *Ahmed v. Ashcroft*, 348 F.3d 611, 616 (7th Cir. 2003).

¹⁷¹ Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

¹⁷² *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (citations omitted).

¹⁷³ *Elien v. Ashcroft*, 364 F.3d 392, 397 (1st Cir. 2004); see also *Toussaint v. Attorney General of U.S.*, 455 F.3d 409, 417 (3d Cir. 2006) (adopting the reasoning of the First Circuit in ruling that criminal deportees to Haiti do not constitute a particular social group).

4.17 Persons Returning from the United States

The Ninth Circuit has held that “returning Mexicans from the United States” does not constitute a valid particular social group.¹⁷⁴ The applicant in that case pointed to reports of crime against Americans on vacation, as well as Mexicans who had returned to Mexico after living in the United States, to support the fear of harm based on membership in the proposed social group.¹⁷⁵

The First Circuit has also upheld the BIA’s conclusion that a group defined as “Guatemalan nationals repatriated from the United States” did not constitute a particular social group. In that case, the court reasoned that the applicant was essentially arguing that he would be targeted by criminals for perceived wealth, and “being a target for thieves on account of perceived wealth, whether the perception is temporary or permanent, is merely a condition of living where crime is rampant and poorly controlled.”¹⁷⁶

4.18 Tattooed Youth

The Sixth Circuit has found that a group of “tattooed youth” does not constitute a particular social group under the INA. The court found that having a tattoo is not an innate characteristic and that “tattooed youth” are not closely affiliated with one another. Further, the court stated that “the concept of a refugee simply cannot guarantee an individual the right to have a tattoo.”¹⁷⁷

4.19 Individuals Resisting and Fearing Gang Recruitment, and Opposition to Gang Authority

In *Matter of S-E-G-*, the BIA rejected a proposed particular social group defined as “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities,” because it lacked “well-defined boundaries” that make a group particular and, therefore, lacked social visibility.¹⁷⁸ Similarly, in *Matter of E-A-G-*, the BIA held that the applicant, a young Honduran male, failed to establish that he was a member of a particular social group of “persons resistant to gang membership,” as the evidence failed to establish that members of Honduran

¹⁷⁴ *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151-1152 (9th Cir. 2010).

¹⁷⁵ *Id.* at 1151-52.

¹⁷⁶ *Escobar v. Holder*, 698 F.3d 36, 39 (1st Cir. 2012).

¹⁷⁷ *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003).

¹⁷⁸ *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group.¹⁷⁹

In *Matter of M-E-V-G-*, a Honduran gang threatened to kill the applicant if he refused to join the gang.¹⁸⁰ The applicant claimed that he was persecuted on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs. Citing *S-E-G-*, the BIA recognized that it is often difficult to conclude that such a group is much narrower than the general population, and noted that it might be difficult to satisfy the social distinction and particularity requirements.¹⁸¹ The BIA, however, remanded the case for the immigration judge to analyze updated country conditions and arguments regarding the applicant's particular social group claim.¹⁸² The BIA reasoned that its holdings in *S-E-G-* and *E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs; the applicant's proposed particular social group had evolved during the pendency of his appeal; and the BIA's guidance on particular social group claims had been clarified since the case was last before the immigration judge.¹⁸³

After the BIA's decision in *M-E-V-G-*, the Ninth Circuit, in *Pirir-Boc v. Holder*, held that a group characterized as individuals "taking concrete steps to oppose gang membership and gang authority" may be cognizable.¹⁸⁴ Prior to the Board's decision in *M-E-V-G-*, the Board had rejected the proposed group that Ninth Circuit analyzed in *Pirir-Boc*.¹⁸⁵ In *Pirir-Boc*, the petitioner's younger brother had joined the Mara Salvatrucha gang in Guatemala. Gang members overheard the petitioner instructing his brother to leave the gang. After his brother left the gang, gang members severely beat the petitioner and threatened to kill him. Without conducting case-specific analysis, the Board rejected the petitioner's proposed particular social group, citing to *S-E-G-*. On petition for review, the Ninth Circuit remanded the case to the Board to determine whether Guatemalan society recognizes the petitioner's proposed social group.¹⁸⁶

In *Rodas-Orellana v. Holder*, the Tenth Circuit, applying *M-E-V-G-* and *W-G-R-*, upheld the BIA's determination that a social group characterized as "El Salvadoran males threatened and actively recruited by gangs, who resist joining because they opposed the gangs" was not socially distinct.¹⁸⁷ The Court found that the petitioner, a Salvadoran who

¹⁷⁹ *Matter of E-A-G-*, 24 I&N Dec. 591, 594-95 (BIA 2008).

¹⁸⁰ *Matter of M-E-V-G-*, 26 I&N Dec. 227, 228 (BIA 2014).

¹⁸¹ *Id.* at 249-50.

¹⁸² *Id.* at 253.

¹⁸³ *Id.* at 251-52.

¹⁸⁴ *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1084.

¹⁸⁷ *Rodas-Orellana v. Holder*, 780 F.3d 982, 992 (10th Cir. 2015).

was threatened and beaten for refusing to join the Mara Salvatrucha, had not presented evidence suggesting that Salvadoran society perceived individuals who resisted gang recruitment as a distinct group; rather, the record in that case showed that “Salvadoran gangs indiscriminately threaten people for monetary gain or for opposing them.”¹⁸⁸ The Court rejected the petitioner’s argument that the case needed to be remanded for additional analysis in light of *M-E-V-G* and *W-G-R-*, finding that, unlike in *Pirir-Boc*, the Board had properly considered the record before it.

4.20 Non-Criminal Informants, Civilian Witnesses, and Assistance to Law Enforcement

The question of whether and when serving as a witness or providing other law enforcement assistance may form the basis of a particular social group is an evolving area of the law. In *Matter of C-A-*, the Board concluded that a group composed of confidential non-criminal informants did not constitute a particular social group.¹⁸⁹ The Board pointed out that “social visibility” is “limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.”¹⁹⁰

Circuit courts have subsequently recognized select circumstances where serving as a witness or cooperating with law enforcement may form the basis of a particular social group. In *Garcia v. Att’y Gen. of U.S.*, involving an individual placed in witness protection and relocated by the Guatemalan Public Ministry outside of her country, the Third Circuit recognized that “[c]ivilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Guatemala” share an immutable characteristic.¹⁹¹ In *Gashi v. Holder*, involving an individual who observed alleged military crimes by a leader of the Kosovo Liberation Army and cooperated with international investigators by being placed on a list of potential witnesses though ultimately not testifying in court, the Second Circuit held that a group of cooperating witnesses could constitute a particular social group.¹⁹² The Ninth Circuit held in *Henriquez-Rivas v. Holder* that witnesses “who testified in court against gang members” in El Salvador may be a cognizable particular social group.¹⁹³ The

¹⁸⁸ *Id.* at 993.

¹⁸⁹ *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

¹⁹⁰ *Id.* at 960 (emphasis added).

¹⁹¹ *Garcia v. Att’y Gen. of U.S.*, 665 F.3d 496, 504 n.5 (3d Cir. 2011) (distinguishing case from *C-A-* because the applicant’s identity was “known to her alleged persecutors,” whereas in *C-A-* the assistance to law enforcement was confidential).

¹⁹² *Gashi v. Holder*, 702 F.3d 130, 137 (2d Cir. 2012) (holding that the group was immutable due to the shared past experience, was socially visible due to Gashi being labeled as a traitor for meeting with international investigators, and particular due to the finite number of people who have cooperated with official war crimes investigators).

¹⁹³ *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (finding that the BIA erred in applying its own precedents in deciding whether Henriquez-Rivas was a member of a particular social group, citing to language in *C-A-* that those who testify against cartel members are socially visible); see also *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (citing *Henriquez-Rivas* for the principle that a retributive motive may exist alongside a protected motive, noting, “Gang persecution of adverse witnesses would certainly have revenge as one motive, but group-based intimidation would be another.”).

Henriquez-Rivas court concluded that “for those who have publicly testified against gang members, their ‘social visibility’ is apparent,” as it involves “a distinct group of persons.”¹⁹⁴ In addition, *Henriquez-Rivas* met the particularity criterion, as her “group can be easily verified – and thus delimited – through court records documenting group members’ testimony.”¹⁹⁵

While the public nature of the past experience in *Garcia*¹⁹⁶ and *Henriquez-Rivas*¹⁹⁷ helped establish social distinction, the Ninth Circuit has emphasized that it “by no means intend[s] to suggest that the public nature of [the applicant’s] testimony is essential” for a viable particular social group.¹⁹⁸ Further, in *Garcia*, the Third Circuit case, the assistance was not completely public in that the applicant testified while wearing a disguise.¹⁹⁹ The Board, in *Matter of M-E-V-G*²⁰⁰ and *Matter of W-G-R*,²⁰¹ has since made clear that literal visibility in the public or elsewhere is not a requirement to show social distinction.

Some courts have rejected particular social groups where gangs were targeting and harming the petitioners, and then the petitioners reported the gangs to the police. For instance, in *Zelaya v. Holder*, the Fourth Circuit rejected a group consisting of young Honduran males who (1) refuse to join a gang, (2) have notified authorities of gang harassment, and (3) have an identifiable tormentor within the gang.²⁰² In *Garcia v. Holder*, the Eighth Circuit rejected a particular social group consisting of “young Guatemalan men who have opposed the MS-13, have been beaten and extorted by that gang, reported those gangs to the police[,] and faced increased persecution as a result” because the group was insufficiently particular and the petitioner failed to produce sufficient evidence of social distinction.²⁰³

¹⁹⁴ *Id.* at 1093.

¹⁹⁵ *Id.*

¹⁹⁶ *Garcia*, 665 F.3d at 504.

¹⁹⁷ *Henriquez-Rivas*, 707 F.3d at 1092.

¹⁹⁸ *Id.* n.14.

¹⁹⁹ *Garcia*, 665 F.3d at 500.

²⁰⁰ *Matter of M-E-V-G*, 26 I&N Dec. 227, 240 (BIA 2014).

²⁰¹ *Matter of W-G-R*, 26 I&N Dec. 208, 216 (BIA 2014).

²⁰² *Zelaya v. Holder*, 668 F.3d 159, 162 (4th Cir. 2012). While the Fourth Circuit rejected the proposed group in *Zelaya* due to lack of particularity, the court subsequently held in another case that “[e]ach component of the group... might not have particular boundaries[;]... [o]ur case law is clear, however, that the group as a whole qualifies.” *Temu v. Holder*, 740 F.3d 887, 896 (4th Cir. 2014) (citing *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (recognizing a particular social group of family members of those who actively oppose gangs by agreeing to be prosecutorial witnesses, even if on its own, “[p]rosecutorial witnesses’ might reach too broad a swath of individuals” and “those who actively oppose gangs’ might be too fuzzy a label for a group.”)).

²⁰³ *Garcia v. Holder*, 746 F.3d 869, 872-73 (8th Cir. 2014).

In *Carvalho-Frois v. Holder*, the First Circuit rejected a group of “witnesses to a serious crime whom the government is unable or unwilling to protect” as not socially visible.²⁰⁴ The applicant in that case heard two gunshots at a neighbor’s home, and was warned by two men leaving the home that she was in danger and not to reveal anything about what she saw. She subsequently learned that a murder had occurred. The applicant relocated after receiving a phone call that the callers knew where she lived and they would kill her if she said anything to the police. This decision was based on lack of social visibility, and was reached before the BIA’s decisions in *M-E-V-G-* and *W-G-R-* on social distinction and particularity.

In addition, in *Bathula v. Holder*, the Seventh Circuit upheld the BIA’s determination that an Indian applicant who was threatened after testifying in court against a land mafia had not established nexus to a protected ground because he “was the victim of intimidation and then retaliation for his specific testimony in a specific case against the land mafia” rather than on account of his membership in a particular social group, which he had defined as “those willing to participate, despite personal risk, in the orderly administration of justice against criminal elements.”²⁰⁵ The court only considered the nexus issue and did not address the validity of the group.

Several circuit courts have upheld decisions that applicants who served as informants in the U.S. did not establish persecution on account of a protected ground.²⁰⁶ In *Costa v. Holder*, the First Circuit considered the case of a Brazilian applicant who had worked as an ICE informant in the United States and received indirect threats from the family of a man named Lelito who had been arrested because of the applicant’s work. It upheld the BIA’s conclusion that she had not established that the threats were on account of her membership in the particular social group of “former ICE informants.”²⁰⁷ The Court reasoned, “Although Costa participated in multiple sting operations, the record indicates that only Lelito’s arrest triggered the threats that form the basis of her application.... There is little to suggest that the scope of persecution extends beyond a ‘personal vendetta.’”²⁰⁸ Similarly, in *Martinez-Galarza v. Holder*, the applicant proposed two groups: people who have provided information to ICE to enable that organization to remove individuals residing illegally in the United States, and witnesses for ICE. The Eighth Circuit rejected

²⁰⁴ *Carvalho-Frois v. Holder*, 667 F.3d 69, 73 (1st Cir. 2012) (“[t]he fact that the petitioner was known by a select few to have witnessed a crime tells us nothing about whether the putative social group was recognizable to any extent by the community... Because we discern no feature of the group that would enable the community readily to differentiate witnesses to a serious crime from the Brazilian populace as a whole, the claimed group is simply too amorphous to satisfy the requirements for social visibility.”).

²⁰⁵ *Bathula v. Holder*, 723 F.3d 889, 900-01 (7th Cir. 2013).

²⁰⁶ See, e.g., *Jonaitiene v. Holder*, 660 F.3d 267 (7th Cir. 2011); *Wang v. Gonzales*, 445 F.3d 993 (7th Cir. 2006); *U.S. v. Aranda-Hernandez*, 95 F.3d 977 (10th Cir. 1996).

²⁰⁷ *Costa v. Holder*, 733 F.3d 13, 17 (1st Cir. 2013).

²⁰⁸ *Id.* See also *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009); *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) (involving a Salvadoran man who provided information to the police and testified before a grand jury concerning arson committed in the U.S. by two gang members, the First Circuit held, “Amilcar-Orellana’s fear of persecution stems from a personal dispute with X and Y, not his membership in a particular social group.”).

a nexus to these proposed groups, stating, “Sanchez’s alleged reason for wanting to harm Martinez–Galarza—because Martinez–Galarza ended Sanchez’s American dream—is motivated by purely personal retribution, and thus not a valid basis for an asylum claim.”²⁰⁹ The court acknowledged, “There may be asylum protections for an applicant who shows the threatened persecution is motivated by both personal retaliation and a protected motive, but Martinez–Galarza presents no evidence to suggest this is the situation here. He does not allege that Sanchez has threatened or attacked other ICE informants.”²¹⁰ Based on the specific facts of the case, it may nonetheless be possible that an informant to U.S. law enforcement officials may be able to establish eligibility.

When you encounter potential particular social groups related to testifying against criminals or cooperating with law enforcement against criminals, there is no bright-line rule about what type of testimony or law enforcement assistance will establish a cognizable particular social group. As the Board held in *M-E-V-G-* and *W-G-R-*, the viability of a particular social group must be analyzed on a society-by-society and case-by-case basis. You should analyze country reports, news articles, testimony, and other evidence to determine whether someone who assists law enforcement through courtroom testimony or other means is perceived by society as distinct. Depending on the evidence, a certain type of law enforcement assistance or witness testimony might be socially distinct in one society, but not in another society. You also would need to articulate how the proposed group has definable boundaries, so it is clear who fits within the group and who does not.

The nexus inquiry may be difficult in cases where an applicant claims to have been targeted for having assisted law enforcement. Even where such a social group is cognizable and the applicant is a member of the group, you should examine the evidence to determine whether the applicant was targeted on account of his or her membership in a group defined by past assistance to law enforcement.

It is possible that an applicant who appears to have been targeted out of revenge for having cooperated with law enforcement may also be able to establish nexus to a particular social group defined by this shared past experience. You must carefully consider any direct evidence in the record of the persecutor’s motive and indirect evidence such as the timing and circumstances of the harm or threats the applicant claims to have experienced, the applicant’s testimony about the experiences of similarly situated individuals in the society, and country conditions reports or news articles relating to the treatment of other members of the group to make this determination. You should generally first examine whether there exists a group that meets the requirements of a particular social group, and then should analyze whether the applicant was or will be persecuted on account of any cognizable particular social group.

²⁰⁹ *Martinez-Galarza v. Holder*, 782 F.3d 990, 993 (8th Cir. 2015).

²¹⁰ *Id.* at 994 (internal citation omitted).

4.21 Gang Members

The Ninth Circuit has found that “tattooed gang members” is not a particular social group, because the group is not defined with particularity. The court also found that neither former nor current gang membership constitutes a valid particular social group.²¹¹

A group defined as “gang members” is not a particular social group, despite having the shared immutable trait of past experience and arguably being able to establish the social distinction prong, because the group’s shared experience stems from criminal activity.²¹² Groups based upon criminality do not form the basis for protection, because the shared trait is “materially at war with those [characteristics] we have concluded are innate for purposes of membership in a social group.”²¹³ To find otherwise, said the court, would pervert the humanitarian purpose of refugee protection by giving “sanctuary to universal outlaws.” The court also found that “participation in criminal activity is not fundamental to gang members’ individual identities or consciences.”²¹⁴

The court also analyzed whether current gang membership gives rise to a particular social group using the Ninth Circuit’s alternate “voluntary association” test. The court found that current gang membership does not constitute a particular social group, because the gang association is for the purpose of criminal activity. Thus, it is not an association that is fundamental to human dignity; i.e., it is not the kind of association that a person should not be required to forsake. Therefore, current gang members are not members of a particular social group on the basis of their gang membership.²¹⁵

The applicant also failed to establish a particular social group of “former” gang members. Disassociation from a gang does not automatically result in the creation of a new social group. Citing to *Matter of A-M-E- & J-G-U-*, the court found that “non-association” and “disaffiliation” are unspecific and amorphous terms, even if qualified with the word “tattooed,” as in “former tattooed gang members.”²¹⁶

4.22 Former Gang Members

Some circuit courts have found that “former gang members” may be a particular social group. This finding is not consistent with USCIS’s and RAIO’s legal interpretation, according to which a particular social group may not be based on criminal activity or

²¹¹ *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007).

²¹² *Id.* at 945-46.

²¹³ *Id.* at 945.

²¹⁴ *Id.* at 946.

²¹⁵ *Id.*; see also *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship).

²¹⁶ *Id.*

associations, past or present.²¹⁷ However, for cases arising within the jurisdiction of those circuits, asylum officers must follow these rulings²¹⁸ as well as the analytical framework laid out by the BIA in *Matter of W-G-R-* and *Matter of M-E-V-G*.²¹⁹ See Asylum Supplement – Former Gang Membership as a Particular Social Group. Because refugee applications are adjudicated outside of the jurisdiction of any circuit court of appeals, refugee officers are not bound by these circuit court decisions and should follow USCIS, RAIO and RAD guidance.

5. SUMMARY

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity. A common, immutable characteristic is one that the members of the group either cannot change, or should not be required to change because it is fundamental to the member's identity or conscience. For social distinction, a group's shared characteristic must be perceived as distinct by the relevant society. Social distinction does not require the shared characteristic to be seen by society (i.e., literally visible). To satisfy the particularity requirement, there must be a benchmark and definable boundaries for determining who falls within the group and who does not. All three elements are required, and the elements must be analyzed on a case-by-case basis and society-by-society basis. In analyzing particular social groups, it also is important to consider the other general principles discussed in this lesson plan, including: to avoid circular reasoning; to avoid defining a group by terrorist, criminal, or persecutory activity; and to recognize that voluntary association, cohesiveness, or homogeneity are not required.

You should also avoid conflating nexus with the validity of a particular social group. Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. Membership in a particular social group also may be imputed to an applicant who, in fact, is not a member of a particular social group. Finally, membership in a particular social group may overlap

²¹⁷ See Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

²¹⁸ *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir. 2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of “particular social group” based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); *Martinez v. Holder*, 740 F.3d 902, 911–13 (4th Cir. 2014) (concluding that Martinez's membership in a group that constitutes former MS-13 members is immutable, but did not address the social distinction and particularity criteria. The court remanded the case to consider other criteria).

²¹⁹ *Matter of W-G-R-*, 26 I&N Dec. 208, 215 n.5 (BIA 2014) (opining that “[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect”); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

PRACTICAL EXERCISES

Practical exercises will be added at a later time.

Practical Exercise # 1

- **Title:**
- **Student Materials:**

OTHER MATERIALS

There are no "Other Materials" for this module.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

RAD Supplement

Given the nature of access to the U.S. Refugee Admissions Program (USRAP), many refugee applicants abroad are able to establish eligibility through nexus to one of the four protected grounds apart from membership in a particular social group (PSG). For that reason, a nexus to the other protected grounds should always be analyzed first. At pre-departure briefings, refugee officers will usually be informed of PSGs that have previously been recognized in populations they will be interviewing in that region. New PSGs are generally reviewed by the RAD Policy Branch to ensure consistency in RAD adjudications throughout all regions.

In the past, RAD has recognized PSGs of, for example, sexual minorities in certain countries as well as women from certain countries who have been subjected to sexual and gender-based violence (SGBV) who face familial and social ostracism, and other stigmatization or harm as a result. Before applying any of these PSGs to other populations, refugee officers must first ensure that the PSG meets the requisite three-part test and that country conditions support all elements of the PSG. For example, for women from a certain country who have been subjected to SGBV, country conditions should indicate that such women are socially distinct as

stigmatized, ostracized or facing other harm as a result of the violence before any such PSG claim is recognized to avoid circularity in the PSG definition.

For gender based PSG claims, it is also important to distinguish between UNHCR's designation of "women at risk" from any possible PSG to which such women may belong. "Women at risk" refers to one of UNHCR's seven categories for submission of refugees for resettlement and is one way in which a refugee may be granted access to the USRAP through a Priority 1 referral. However, UNHCR's identification of a refugee applicant as a "woman at risk" cannot be conflated with her eligibility for refugee status. Any gender-based PSG to which the applicant may belong must be fully analyzed and supported by the record and relevant evidence of country conditions where appropriate.

For further guidance, see RAIO Training Module, *Gender-Related Claims*; RAD Policy Branch, Responses to Queries: *PSGs within the context of Afghan Women at Risk* and *PSGs within the context of sexual and gender based violence against Congolese women*. Please note that these RAD documents were issued prior to the Board's articulation of the three-part test in 2014. Nonetheless, the documents contain other relevant guidance and suggested lines of inquiry.

SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

ASM Supplement - Former Gang Membership as a Particular Social Group in the Fourth, Sixth, and Seventh Circuits

Prior to the Board of Immigration Appeals' decisions in *Matter of M-E-V-G-* and *Matter of W-G-R*, the Sixth and Seventh Circuits issued decisions holding that former gang membership can form the basis of a particular social group.²²⁰ The Fourth Circuit has also held that former members of the MS-13 gang in El Salvador shared an immutable characteristic and rejected the argument that a particular social group may not be defined by former criminal associations, though it did not decide whether the group met the "particularity" or "social distinction" criteria and remanded for the Board to consider whether the proposed group met those criteria.²²¹ On the other hand, the First and Ninth Circuits have held that former gang membership does not give rise to a particular social group.²²²

²²⁰ *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

²²¹ *Martinez v. Holder*, 740 F.3d 902, 911-13 (4th Cir. 2014).

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

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.

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. *Elfen 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

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Quiz for Gender Related Claims (*Answer Key*)

1. Gender related claims only concern female applicants.

- A) True
- B) False**

B- False – “...it is important to note that the forms of gender-based persecution described in this lesson can, and often are, inflicted on both females *and* males.” *Introduction to Gender lesson*

2. The human rights of all individuals are guaranteed within international instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There was, however, a need for special instruments addressing the rights of women because:

- A) the more general international instruments fail to specify gender as a protected characteristic
- B) the other instruments specifically exclude gender as a factor
- C) those instruments have not always provided sufficient protection to women due to discriminatory interpretations and applications**
- D) the other instruments were enacted before the women’s rights movement

C – taken from page 12 in the lesson plan under, International and National Guidelines Relating to Women and Children

3. The most severe form of Female Genital Mutilation is:

- A) Excision
- B) Concatenation
- C) Infibulation**
- D) Circumcision

C – Infibulation (see page 19 of lesson, Types of FGM)

4. The lesson on Gender Related Claims and various international instruments protecting women have altered the legal criteria used to evaluate an asylum or refugee claim that is gender-based.

- A) True
- B) False**

B – False, the lesson plan, in the legal analysis section, states that nothing in the lesson provides guidance that expands on the statutory definition of refugee

5. In evaluating whether internal relocation is reasonable all of the following are important considerations, EXCEPT:

- A) significant restraints on a woman's right to travel
- B) the applicant comes from a country where women are still economically dependent on men
- C) **the applicant's husband does not want to relocate**
- D) in the applicant's country a woman living outside the protection of her father, spouse, or clan may be vulnerable to attack and/or damaging social stigma

C – The husband's wishes are not a consideration. The other three choices are specifically mentioned in the lesson. The husband's preferences, without more, would not be a reason for not seeking to relocate internally. For that matter, the woman's preference, without more, would not be sufficient either.

6. Because of the stigma attached to rape, it is unusual for a woman to have documentary evidence, such as medical or police reports, documenting the rape.

- A) True
- B) False

A- True It may be unreasonable to expect a woman from a refugee-producing country to have documentation of sexual violence she suffered. Because of strong cultural stigma attached to rape, "women survivors of sexual violence often are reluctant to seek medical assistance or to file police reports, because they do not want it known that they were raped."

7. What factor that would affect a female applicant's ability to provide detailed testimony is NOT related to gender?

- A) Social constraints may limit access to information
- B) Gender roles
- C) Education level
- D) **Faulty memory**

D – Faulty memory is a human factor and is not specific to gender.

8. All gender based claims fall under the particular social group protected ground.

- A) True
- B) False

B- B – False, in some instances gender may be a factor in political opinion and religious claims

RAIO DIRECTORATE OFFICER TRAINING

*RAIO Combined Training Program**

DISTANCE TRAINING COMPONENT WORKBOOK

Last Updated: February 2, 2017

This Workbook and the materials for the RAIO Combined Training Program's Distance Training can be accessed through the [RAIO CT Distance Training page](#) on the RAIO Training [home page](#).

*This workbook covers the requirements for Distance Training for the RAIO Combined Training Program *only*. Please contact your local training officer(s) or your Division's training coordinators with any questions about about your Division-specific Distance Training requirements, if any.

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I. Introduction

A. Welcome to the first component of the RAIO Combined Training Program (“RAIO CT”) – the Distance Training component. Although you will be in your home office during the Distance Training (DT), you will not be performing your routine office duties during this time. Each office is required to allocate a certain amount of time for new officers to complete the DT—approximately 80 hours are required for the RAIO CT topics, plus any additional time allocated by your division to cover division-specific topics (see Division-Specific Supplements at the end of this Workbook). The DT is designed to give you time to read and process selected training materials. This will help prepare you for attending the second component of RAIO CT, the Face-to-Face component, which will be conducted in Glynco, Georgia. You will have an opportunity to raise questions during the DT Webinars and during the Face-to-Face component, where the topics may be addressed again.

B. Contact Information

- If you have questions about DT, please contact:

- [Redacted]
- and (b)(6)
- Julie A. Endy, Adjudications Officer, RAIO Training

[Redacted]

Please title your email: **RAIO CT DT Question – (subject of question)**
(include a few words in the title about nature of question).

- For questions about your Division-specific training requirement(s), please contact:

Refugee Affairs Division: Training and Quality Assurance

[Redacted]

(b)(6)

Asylum Division: Asylum Division Training Coordinators

[Redacted]

International Operations: Quality Assurance, Training and Communication

[Redacted]

(b)(6)

C. RAIO CT – Background

The staff of the RAIO Training branch (RAIO Training) coordinates both components of RAIO CT (DT and Face-to-Face), after which the divisions will conduct division-specific training.

Each of the three divisions – the Refugee Affairs Division (RAD), the Asylum Division (ASM), and the International Operations Division (IO) – has its own, well-established training section. RAIO Training is relatively new – in place since approximately 2011. Its main goals are to:

- Facilitate the sharing of information and resources among the divisions' training sections and outside of RAIO
- Support the divisions in their training efforts
- Develop and deliver RAIO CT

Why have a combined training course if the divisions already have their own training sections and training programs?

RAIO CT covers content that is common to all divisions. It was developed to:

- Avoid redundancies in training – The content of the training courses for new officers at the divisions, particularly the protection topics covered by RAD and ASM, were very similar. An officer who was trained as a refugee officer and moved to the Asylum Division had to attend the entire six-week ASM training, even though there were many topics that they had studied at the RAD training and had used in their daily work with RAD as refugee officers. Officers now only study the basics of these topics once – at RAIO CT.
- Provide consistency in the message and guidance across the divisions on common topics – This is accomplished by having common training materials and common instructors and instruction.
- Consolidate resources – Updating common training materials is centralized so there will be no duplication of efforts; instructors will be from all of the divisions and will only need to teach a topic once, rather than the same topic being taught at each divisions' training; the divisions will need to conduct only their division-specific course which is shorter than their previous courses. This will result in a more efficient use of resources.
- Develop an “esprit de corps” among all officers at RAIO – Each division has its own “esprit de corps.” To promote communication, sharing, and support among divisions in working toward mutual goals, RAIO wants to develop an “esprit de

corps” among all officers at RAIO, not just within the divisions. Attending a combined training can develop a RAIO “*esprit de corps*.”

- Support officers’ ability to move within RAIO – At RAIO CT, you will not be learning how to do the work of the other divisions. Rather, the common elements of the work of each division are the focus of RAIO CT. The topics that are common to all three divisions are protection issues and issues that arise when adjudicating refugee and asylum claims. Refugee law and asylum law are very similar, as are interviewing techniques and issues of fraud, national security, and credibility. Officers who attend RAIO CT will have an understanding of these important cross-division issues.

D. Purpose of DT

The main reasons that DT has been developed as part of RAIO CT are to:

- **Give you time to read materials before attending the Face-to-Face training**
The training materials are very lengthy, and reading them is time-consuming. To fully understand the topics addressed at the training, officers must read the training materials prior to attending class. There is no class time allotted for reading materials during the face-to face training; if class time were given, it would make the Face-to-Face residential training much longer than it currently is. DT allows you the time needed – during work hours at your home office, rather than away from home at the Face-to-Face training – to do that reading.
- **Ensure that you begin the Face-to-Face training with a basic foundation of the subject matter**
Officers new to RAIO have varying levels of knowledge of the topics that are covered in class. Some of you will have in-house certification training, others will not; some of you have been involved in immigration work for many years, others have not. Because of this, instructors must teach classes with students of varying levels of knowledge, which is difficult for both the instructors and the students. The DT component prior to the Face-to-Face classroom component attempts to reduce this knowledge level gap so that all of you will have a basic foundation in/understanding of the course topics prior to the start of the Face-to-Face component. If you are already familiar with the course content, and able to complete the reading and assignments for a topic quickly, utilize any additional allotted time to expand your knowledge and to help others: complete the additional activities in this workbook, read the Additional Resources in the lesson plans, and help your colleagues in your office who are new to this work. For more information about how to use your time during the DT, see section 2 – How to Use this Workbook, item 9.
- **Better utilize the Face-to-Face time for exercises and practical application of the concepts in the materials**

When all students have read the materials in advance and have a basic understanding of the course topics, instructors do not need to go over the content in great detail during class. Instead, a summary of the content can be provided and the majority of class time can be spent on discussion and practical application of the information and concepts in the training materials.

E. Content and Structure of the DT

What You Will Need:

The information and materials, including links to other materials that you will need for DT, are in this Workbook. **Important Note: Refer to the ECN version of the DT Workbook rather than downloading a copy on your computer. This Workbook may periodically be updated with new links or additional training modules.** Additional instructions and links to documents for DT may also be posted on the USCIS Enterprise Collaboration Network (ECN), the virtual work environment that allows us to collaborate and share information with other USCIS ECN users. Therefore, it is important to refer regularly to the [Distance Training page](#) on the RAIO Training [home page](#) while you are completing the DT. If you download the Workbook to your desktop, that version may not have the most recent links or updates.

In addition to completing the reading assignments, you will participate in Webinars with instructors, read supplemental training materials, take quizzes, and complete exercises that you will upload onto the ECN.

Procedures for Completing the RAIO CT Distance Training:

This document contains information you will need to complete the [Distance Training](#) for the RAIO CT. Officers are also required to follow the guidance in the Handbook with respect to all aspects of the Distance Training, including leave and attendance policies, etc. The syllabus for the RAIO CT Distance Training follows this introduction, in section 3 of the Workbook. Please follow these instructions to complete the DT:

- Using the 'Projected Completion Date' column, plan when you expect to complete each topic using the time allocated for each subject. Account for breaks and leave when arranging your schedule. Please note, the projected completion dates are only for your internal planning purposes and do not need to match the actual completion date. Depending on your Division and office, your Division's training coordinators and local management may provide additional instructions about how best to schedule your training.
- Complete each topic and its corresponding assignments using the allotted time for that topic; RAIO Training suggests that you complete each topic in the order listed, although you may complete them out of order.
- When you have completed a topic, initial and date the corresponding box to indicate that you have completed the work required for the topic.

- Once you have completed half of the Distance Training, or approximately 40 hours of work, you and the coordinating Supervisor or Training Officer from your office must sign and date the Midpoint Attestation Form, found in section 3 of this Workbook.
- If you did not yet complete a topic at the midpoint, leave those boxes unchecked and unsigned.
- Print, scan and email a copy of all pages of the RAIO CT Distance Training Syllabus and Midpoint Attestation to the RAIO Training mailbox (RAIO.Training@uscis.dhs.gov) and your Division's training coordinators using the contact information provided part B, above. **Title your email and attachment as follows:**

Last Name, First Name - RAIO CT DT – Midpoint Attestation

- Once you have completed all of Distance Training, you and the coordinating Supervisor or Training Officer from your office must sign and date the Completion Attestation form and verify your completion of all topics.
- If you did not complete any topic, leave those boxes unchecked and unsigned and attach an explanation of why those topics were not completed.
- Print, scan and email a copy of all pages of the RAIO CT Distance Training Syllabus and Completion Attestation to the RAIO Training mailbox (RAIO.Training@uscis.dhs.gov) and your Division's training coordinators using the contact information provided part B, above. **Title your email and attachment as follows:**

Last Name, First Name - RAIO CT DT – Completion Attestation

- **Completion of the Distance Training is valid for a period of one year.** This period begins tolling with the completion of the first topic of the Distance Training. Training participants must travel and attend the Face-to-Face component of the RAIO Combined Training within this one year period. If the time frame between completion of the first topic and travel to Face-to-Face will exceed one year, RAIO Training must be notified.

Time Allocated for Topics:

The current DT model was designed to be a flexible and self-directed program of study. This design was implemented in response to feedback from the Divisions regarding competing obligations that often arise during the employee on-boarding process and the redundancy of certain activities required for both DT and other on-boarding activities,

such as in-house certification programs. This flexible approach allows RAIO officers to incorporate other on-boarding or administrative tasks into their schedule while they complete the DT assignments, in cooperation with their local management and Division training coordinators.

Because you are in your offices during the Distance Training (DT) rather than at a “Face-to-Face” classroom training, you will need to make a clear distinction between your office work and the time you spend on this training. **For this reason, you must use all of the allotted time to complete each respective topic** (i.e. – you cannot finish individual topics or the training early)—just as if you were at a Face-to-Face training. For those of you who may finish a topic and have extra time, there are additional assignments for you to complete in the Workbook. Additional information on how to use your time can be found below in section 2 – How to Use this Workbook, item 9.

The time allocated for each topic includes time to read the materials, take the quizzes, and complete and upload the exercises. Participant feedback from prior DTs overwhelmingly reflected that the time allocated for each topic was appropriate. A few of the participants, however, especially those who had prior immigration experience or who had attended in-house training in their offices, stated that too much time was given. A few other participants, particularly those with no background in refugee or asylum work, stated that they needed more time. Anticipating that there will be participants with a range of backgrounds, we have kept the required reading and exercises at a level that should allow all participants to complete the assignments.

Division-Specific Distance Training:

This Workbook only covers the requirements for the RAIO CT component of Distance Training. Your Division may have additional DT requirements and assignments which are part of its Division-specific training, or it may postpone your Division-specific training requirements until after RAIO CT has been completed.

Supplemental information about the Distance Training requirements for each Division (Refugee Affairs, Asylum, and International Operations) can be found at the end of this Workbook. The Asylum Division, for example, has its own Distance Training component which takes approximately **30 hours** to complete ([click here](#) to view the Asylum Division’s DT materials). Please look at your Division’s DT requirements, if any, and take this time into account when planning your schedule (see section 2 – How to Use this Workbook, below).

Please contact your local training officer(s) or your Division’s training coordinators as instructed in part B, above, with any questions about your Division-specific training assignments.

F. Relationship between DT and the Face-to-Face Training

The topics covered at DT will be reinforced during the residential, Face-to-Face component that follows DT. Because you will have read the materials and completed exercises, you are expected to come to class with at least a basic knowledge of the topics and be prepared to actively participate in the discussions and exercises. Instructors will approach the Face-to-Face classes with this in mind. The instructors will not simply lecture in class on the information in the lesson plans. Rather, instructors will help you apply the information and concepts in the lesson plans through practical exercises, case studies, discussions with subject matter experts, and problem-solving activities.

It is important that you complete the required DT reading and assignments because:

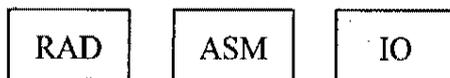
- The assignments will form the basis of Face-to-Face classroom activities.
- You will be expected to know and apply the material during the mock interviews at CT and division-specific trainings.
- The information for the exams given during CT and division-specific trainings will be taken from the lesson plans and will test both your knowledge of the content of the lesson plans and your ability to apply that knowledge.

G. Lesson Plans

The RAIO Lesson Plans consist of:

- The main body of the Lesson Plan
- Other materials (e.g., glossaries, lists of cases)
- Division-specific Supplements (information specific to the divisions)

DT consists of a list of assigned topics. You are required to read the body of the Lesson Plans for each of these topics as well as the supplement for your division (Refugee Affairs, Asylum, or International Operations). Supplements are located after the lesson plan and are color-coded by division:



H. Webinars

Wherever you see a reference to a Webinar in the syllabus, please refer to the [Distance Training page](#) on the RAIO Training home page to find information about upcoming Webinars. Some Webinars may be pre-recorded so that local training officers can present them on a periodic basis, while others may require all RAIO officers participating in the DT to attend on a specified date and time. Any live, interactive

presentations will be held with all DT participants at the same time, unless otherwise noted.

We will use the Adobe Connect Webinar platform for some Webinars and the AT&T Connect platform for others. You will receive an email invitation prior to any live Webinar sessions with instructions on how to join the Webinar, including a telephone number and a “participant code.” Please accept the invitation. You should dial in 10 to 15 minutes before the call is scheduled to begin. You will be given additional information on how to join before each Webinar.

I. Feedback

We request that you give feedback about each topic covered during the DT so we can make improvements to the Distance Training. We have provided links to brief feedback surveys at the end of each module in section 4 of the Workbook which should take a minimal amount of time to complete. Your feedback should address the following:

- Time allotment – too much, too little, just right
- What worked well and **why?**
- What should be changed and **why**; also **how** do you suggest it be changed to improve the training?

We appreciate any comments and suggestions you may have. We are especially interested in the “why” of your feedback.

J. Presenters at the DT

The instructors who will facilitate the Webinars or other interactive sessions for DT are listed on the Webinar schedule, which will be available on the ECN. Their biographical information can be accessed either through the [Distance Training page](#) or the [Instructor Library](#) on the RAIO Training home page.

K. Evaluation/Exams

As noted in the Handbook and the Student Information Memo, you will be tested during the Face-to-Face residential training on your knowledge of the material covered during the Combined Training. Note the following about the exams:

- No exams during the Distance Training (however, there are quizzes during the DT that serve as comprehension checks and are not graded)
- Two Multiple Choice Exams during the Face-to-Face residential training

- Exam topics include lesson plans covered during both the Distance Training and the residential training (e.g., includes Case Law and Sources of Authority which are addressed during the DT but not during the Face-to-Face)
- All questions relate to the objectives listed in the beginning of each lesson plan.
- Divisions will provide information regarding Division-specific exams, which will also utilize foundational materials from DT.

2. How to Use this Workbook

For each topic:

- 1. Plan your DT schedule.** Check the syllabus in section 3 – Distance Training Syllabus and Attestation Forms, for a list of your assignments. Check the date and time for any Webinars on the ECN so that you do not miss them. Create a proposed schedule, using the 'Projected Completion Date' column in the Distance Training Syllabus and Attestation Forms. When creating your projected schedule, take into account the number of hours you need to complete the DT assignments (for both RAIO CT and your Division) and any pre-approved leave or other tasks that you have to accomplish during this time period. Indicate your projected completion date for each topic on the syllabus. While your projected completion dates may change, and do not need to be set in stone, this should provide a general guideline for you and your supervisor to ensure that you have sufficient time to finish your DT assignments before your Face-to-Face training is scheduled to begin. Keep in mind that you must complete **all** of the required DT assignments in order to be eligible to proceed to the Face-to-Face component.
- 2. Read the body of the Lesson Plans and the Supplements for your division.** The reading assignments are listed below in section 3 – Distance Training Syllabus and Attestation Forms, with additional instructions in section 4 – Content. Lesson Plans are on the RAIO Training ECN site; there are links in section 4 of this Workbook to each Lesson Plan. You may also want to bookmark the Lesson Plans library on the ECN so that you can refer to them as needed in your work. When accessing Lesson Plans, click to open as “read only” if prompted.
- 3. Complete any corresponding assignment(s) (e.g., exercises, quizzes)** located in this Workbook in section 4 – Content. There are links to the exercises and quizzes as appropriate. Please consult the Content section on a regular basis to see instructions for each topic listed in the syllabus.

Exercises: Some Lesson Plans contain practical exercises; do NOT complete them. You need to refer only to this Workbook to know which exercises to complete. Model responses for some exercises will be posted on the ECN so that you can compare them with your responses. RAIO training staff will provide individualized written feedback on some of your exercises as a refresher, prior to the Face-to-Face component.

Quizzes: Each quiz consists of up to 10 multiple-choice or true/false questions; they serve as a comprehension check on your understanding of what you have read in the

Lesson Plan on the topic. These quizzes are not graded; however, instructors will review your responses when preparing to teach at the Face-to-Face component.

Choose the one best answer to each question unless the quiz you are taking instructs otherwise. An answer key will be provided immediately after you submit your answers, or else it will be posted on the ECN. If you missed any questions, please go back to the Lesson Plan and review the concepts addressed in those questions. Depending on time available during the Face-to-Face presentation on the relevant topic, your instructor may review the quiz in class to address any remaining concerns.

4. **Write down any questions you have about the content of the course.** You can ask them on a Webinar, if there is one for the topic, or at the Face-to-Face residential component of the training.

If you have questions about the DT process or procedures, send an email to RAIO Training following the instructions on page 3 of this document.

5. **Upload your work to the ECN,** if required in the instructions for the exercise. You will be asked to upload certain exercises to a drop box created for you on the ECN. You will be given individualized feedback on some of these exercises as a refresher before the start of your Face-to-Face training. Drop boxes can be located on the Distance Training page on the RAIO Training ECN site. These drop boxes will also be accessible to you on your individual class home pages during your Face-to-Face training. Due to ECN storage limits, please only upload documents to your drop box when specifically instructed in the Workbook.
6. **Print and bring your work with you to the Face-to-Face class** if instructed in the Workbook.
7. **Be prepared to ask your questions and discuss your responses** to the exercises during the appropriate DT Webinar or at the Face-to-Face component of the training.
8. **Complete the feedback survey for each topic.** You can access the feedback survey for each topic on its respective topic page in the Workbook. If a topic does not have its own page in the Workbook, for example, the Westlaw webinar, the link for providing feedback will be made available on the ECN site along with the information for accessing the webinar.
9. **Use your time wisely.** The schedule lists the topics you should cover and the required amount of time to spend on each topic. How you use your work time to complete the listed assignments is at your discretion, in conjunction with the guidance of your local office management and your Division's training coordinators. However you structure your time, **all assignments must be completed and the**

Midpoint and Completion Attestations must be submitted to RAIO Training as instructed above in section I, part E, prior to the start of Face-to-Face training. The flexible schedule is designed to allow time for administrative tasks in addition to your DT assignments. **If you finish your assignments in less than the allotted amount of time, use any extra time to:** complete the feedback surveys for each module, review your exercises, or review any topics in the Lesson Plans for which you may have missed an answer on a quiz. Once you have finished these tasks, use any extra time in the following manner to the extent possible:

- Read the materials listed under the “Required Readings” and “Additional Resources” in the lesson plans.
- Complete the additional activities suggested in the Workbook.
- Read the cases cited in the lesson plans.
- Draft three to five review questions, including an answer key, for the topic. Your questions may be used during the Face-to-Face Training for exam review purposes. (Example: Q: When an applicant is stateless, persecution and well-founded fear are analyzed with respect to what country? A: Country of last habitual residence. You could also have a true/false question, a scenario-based question, a multiple-choice question, etc.)
- Draft a practical exercise for the assigned topic. An effective practical exercise includes precise instructions to the students and focuses on an important issue that is covered by the lesson plan. Please see the exercises in this Workbook for examples. Your practical exercise may be incorporated into future trainings.
- If you draft review questions or a practical exercise, clearly name and save the documents to indicate the topic and the type of exercise. For example, “International Human Rights Law – Review Questions.” Email these documents to RAIO.Training@uscis.dhs.gov for review and consideration for use in future trainings.

3. Distance Training Syllabus and Attestation Forms

See below, 4. Content, for detailed instructions and links.
[Click here](#) for a printer-friendly version of these forms.

Topic	Time Allocated	Projected Completion Date	Initial & Date Upon Completion
<u>DT Orientation: reading + activity.</u>	1.5 hours		
Welcome View welcome video by Jennifer Higgins, Deputy Associate Director, RAIO click here	10 minutes		
View USCIS Celebrates Immigrant Heritage Month 2016 video by León Rodríguez, USCIS Director click here	5 minutes		
<u>RAIO Directorate Handbook and Memorandum: reading + quiz</u>	45 minutes		
<u>Core Values and Guiding Principles for RAIO Employees: reading + exercise</u>	30 minutes		
<u>Sources of Authority: reading + exercise</u>	1.75 hours		
<u>Reading and Using Case Law: reading + exercise</u>	2.75 hours		
Sources of Authority & Reading and Using Case Law: Webinar click here for schedule	1 hour		

Topic	Time Allocated	Projected Completion Date	Initial & Date Upon Completion
<u>International Human Rights Law:</u> <i>reading + quiz</i>	<i>1.5 hours</i>		
<u>UNHCR Overview:</u> <i>reading</i>	<i>1.5 hours</i>		
<u>Refugee Definition:</u> <i>reading + quiz</i>	<i>2 hours</i>		
<u>Persecution:</u> <i>reading + quiz</i>	<i>2.25 hours</i>		
Refugee Definition; Persecution: Webinar <i>click here for schedule</i>	<i>1.5 hours</i>		
<u>Interviewing – Intro to the Non-Adversarial Interview:</u> <i>reading + exercises</i>	<i>2.5 hours</i>		
<u>Nexus and the Protected Grounds (minus PSG):</u> <i>reading + exercises + quiz</i>	<i>3.5 hours</i>		
<u>Nexus – PSG:</u> <i>reading + quiz</i>	<i>4 hours</i>		
<u>Well-Founded Fear:</u> <i>reading + quiz</i>	<i>2.5 hours</i>		
<u>Interviewing – Survivors of Torture:</u> <i>reading</i>	<i>1 hour</i>		
<u>Interviewing – Note Taking:</u> <i>reading</i>	<i>1 hour</i>		
<u>Mock Interview Transcript:</u> <i>reading + exercise</i>	<i>1 hour</i>		
<u>Interviewing – Eliciting Testimony:</u> <i>reading + exercises</i>	<i>2 hours</i>		

Topic	Time Allocated	Projected Completion Date	Initial & Date Upon Completion
<u>Interviewing – Working with an Interpreter:</u> reading	1 hour		
<u>Detecting Possible Victims of Trafficking:</u> reading + online training	2.5 hours		
<u>Cross-Cultural Communication:</u> reading	45 minutes		
<u>Evidence:</u> reading + quiz	2 hours		
SUBMIT MIDPOINT ATTESTATION			
<u>Credibility:</u> reading + exercise + quiz	3 hours		
<u>Fraud and FDNS Overview:</u> reading	2.5 hours		
<u>International Religious Freedom Act (IRFA):</u> reading + quiz	2 hours		
<u>Persecutor Bar:</u> reading + quiz	2 hours		
<u>Mass Atrocities and Genocide Awareness:</u> reading	30 minutes		
<u>LGBTI Claims:</u> reading + quiz	2 hours		
<u>Gender-Related Claims:</u> reading + quiz	1.75 hours		
<u>Children’s Claims:</u> reading + quiz	3.5 hours		
<u>National Security:</u> reading + quiz	5 hours		

Topic	Time Allocated	Projected Completion Date	Initial & Date Upon Completion
<u>Researching and Using Country of Origin Information (COI) in RAIO Adjudications: reading + exercise</u>	1.5 hours		
<u>Firm Resettlement: reading + quiz</u>	1.25 hours		
<u>Discretion: reading</u>	30 minutes		
<u>Decision-Making: reading + exercise</u>	1.5 hours		
<u>Interview Observations</u> *(HQ-located staff to observe at ZAR-ZAC – includes 1 hour for return travel to HQ if needed; Refugee Officers will watch a recorded refugee interview; other sites determined by Divisions)	2 to 4 hours*		
<u>Well-Founded Fear Documentary: viewing + exercise/discussion</u>	3 hours		
RAIO Library: Webinar <i>click here for schedule</i>	1 hour		
Office of Security & Integrity (OSI) and Significant Incident Reporting: Webinar <i>click here for schedule</i> <i>click here to access the PowerPoint</i>	1 hour		
Westlaw Overview: Webinar <i>click here for schedule</i>	1 hour		
<u>End of Course Feedback</u>	15 minutes		

RAIO CT DISTANCE TRAINING MIDPOINT ATTESTATION

I hereby attest by my signature below that approximately half (or 40 hours) of the RAIO CT Distance Training assignments, initialed and dated in the preceding pages, have been duly completed by me according to the requirements of the RAIO CT Distance Training guidelines.

Printed Name of Training Participant

Signature of Training Participant

Date

I hereby attest by my signature below that the above-named officer has been allotted the required time for completion of approximately half (or 40 hours) of the RAIO CT Distance Training lesson units, according to the requirements of the RAIO CT Distance Training guidelines.

Training Officer or Local Office Management – Printed Name and Title

Training Officer or Local Office Management – Signature

Date

RAIO CT DISTANCE TRAINING COMPLETION ATTESTATION

I hereby attest by my signature below that all of the RAIO CT Distance Training assignments, initialed and dated in the preceding pages, have been duly completed by me according to the requirements of the RAIO CT Distance Training guidelines.

Printed Name of Training Participant

Signature of Training Participant

Date

I hereby attest by my signature below that the above-named officer has been allotted the required time (approximately 80 hours) for completion of all of the RAIO CT Distance Training lesson units, according to the requirements of the RAIO CT Distance Training guidelines.

Training Officer or Local Office Management – Printed Name and Title

Training Officer or Local Office Management – Signature

Date

4. Content

DT Orientation

Read in the Workbook (1) "Introduction" and (2) "How to Use this Workbook." Look through the rest of the Workbook to become familiar with the DT process and schedule.

Read the "Intro to ECN for CT Webinar PowerPoint" and "Intro to ECN for Combined Training Course" on the Distance Training page on the RAIO Training ECN site (see "Links For: Classroom use" on the right side of the page – click the "+" symbols to expand the list).

Have you finished reading the above documents? *If yes, your task now is to:*

Complete the **RAIO Training Certification Statement**, if you have not done so already, and have it signed by your Director. The RAIO Training Certification Statement can be located on the Distance Training page under "Links For: Official Admin."

Follow the instructions on slides 12-13 of the "Intro to ECN" PowerPoint to attach your completed RAIO Training Certification Statement to your Student Questionnaire (NOTE: Do NOT upload it to your Dropbox). *Ignore the instructions on slide 15 of the PowerPoint regarding the VPN Access Request Form.*

Plan your DT Schedule. Take a few minutes to read through the DT syllabus in section 3, above. Now fill in a projected completion date for each of the DT topics, taking into account the number of hours required for DT assignments (approximately 80 hours for RAIO CT, plus any Division-specific assignments), plus any pre-approved leave or other tasks you need to accomplish. Consult with your local training coordinator or supervisor to make sure that all of your responsibilities during this time period have been considered and that your proposed schedule will allow you to complete all assignments before you travel to Face-to-Face training.

Complete this survey ([click on survey](#))

Please click on the link above to answer a few questions about this module on the ECN. You must complete this step to register your initiation of the DT course.

[Click here to navigate up to the Distance Training Syllabus](#)

Sources of Authority

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this Exercise

Imagine you are at a reunion or dinner with your extended family. Your uncle asks about your new job as an officer at RAIO. You mention that you will be interviewing people who are seeking refugee or asylum status. Your uncle becomes visibly irritated and responds, "Well, what basis do you have for letting these people into our country? It sounds like you've become the radical liberal in this family. If it's just up to each officer, we could be letting anyone into the U.S.!"

What sources of authority would you mention to your uncle to explain why the program exists, and the criteria for meeting eligibility requirements? Please write out your answer.

- *Complete the exercise as instructed on a separate Word document and save your document. Please upload your work into your drop box using the below file naming convention:*

LastName, FirstName – Sources of Authority

- *Be prepared to discuss your answers during the Webinar presentation.*

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to provide feedback for the Sources of Authority & Reading and Using Case Law Webinar](#)

[Click here to see the PowerPoint for the Sources of Authority & Reading and Using Case Law Webinar](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Reading and Using Case Law

Have you finished reading the [lesson plan](#)?

If yes, your task now is to:

Complete this Exercise

Read the attached case, [Matter of Mogharrabi](#), 19 I&N Dec. 439 (BIA 1987).

Summarize the facts, the sources of authority, the decision, and the reasoning behind the decision in [Matter of Mogharrabi](#) by completing the linked [exercise form](#).

- *Fill out the form and save your document. Please upload your work into your drop box in order to receive written feedback prior to your Face-to-Face training. Use the below file naming convention to save your work:*

LastName, FirstName – Case Law Form

- *If you receive a pop-up box prompting you for a password when you access the exercise form, please select “Read Only.” After the exercise form opens, you will then need to “Save As” in order to save it to your personal drive while you complete the form. Once complete, please upload it to your drop box.*
- *Be prepared to discuss your answers during the Webinar presentation.*
- *Model responses will be posted on the [Distance Training page](#) so that you can review your work prior to getting written feedback.*

If you finish this assignment early, use your extra time to read [Matter of Acosta](#), 19 I&N Dec. 211 (BIA 1985) – a seminal case in asylum law. (**Note:** this is not a required activity.)

[Click here to provide feedback for this topic](#)

[Click here to provide feedback for the Sources of Authority & Reading and Using Case Law Webinar](#)

[Click here to see the PowerPoint for the Sources of Authority & Reading and Using Case Law Webinar](#)

[Click here to navigate up to the Distance Training Syllabus](#)

International Human Rights Law

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on [quiz](#))

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed in SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of the RAIO Combined Training.*

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

UNHCR Overview

Have you finished reading the lesson plan?

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Refugee Definition

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- Be prepared to discuss your answers during the Refugee Definition/Persecution Webinar in the DT and at the Face-to-Face component of this course.
- During the Refugee Definition and Persecution Webinar, you will be asked to complete a Practical Exercise located here: [RAIO CT – Persecution - SIMPLE](#). Please pull it up on your computer before the Webinar begins.

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to provide feedback for the Refugee Definition; Persecution Webinar](#)

[Click here to see the PowerPoint presentation for the Refugee Definition and Persecution Webinar](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Persecution

Have you finished reading the [lesson plan](#)?

If yes, your task now is to:

Complete this quiz (click on quiz)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Refugee Definition/Persecution Webinar in the DT and at the Face-to-Face component of this course.*
- *During the Refugee Definition and Persecution Webinar, you will be asked to complete a Practical Exercise located here: [RAIO CT – Persecution - SiMPLe](#). Please pull it up on your computer before the Webinar begins.*

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to provide feedback for the Refugee Definition; Persecution Webinar](#)

[Click here to see the PowerPoint presentation for the Refugee Definition and Persecution Webinar](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Interviewing – Introduction to the Non-Adversarial Interview

Have you finished reading the [lesson plan](#)?

If yes, your tasks now are to:

Complete these exercises

Exercise #1

Write a short phrase to describe two meanings of the term “non-adversarial.”

Exercise #2

Think about a television show or movie that took place in a courtroom. What kinds of “objections” did the opposing lawyers make to the judge? What was the judge’s response?

Exercise #3

Write out the introduction to your interview. The introduction should address all of the components listed in the lesson plan and your division-specific supplement. You will be practicing your introduction on a partner (yet to be determined) during the Face-to-Face component of the RAIO Combined Training.

- *Complete the exercises as instructed on a separate Word document and save your document.*
- *Be prepared to discuss this exercise during the Face-to-Face component of RAIO CT. Please upload your work into your drop box using the below file naming convention:*

LastName, FirstName – Non-Adversarial Interview

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Nexus and the Protected Grounds (minus PSG)

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed in SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your responses. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

Complete these exercises

Exercise #1

Read this article from August 6, 2012 about the [Sikh Temple Shooting in Wisconsin](#). You should also conduct online research to read other articles about this crime. Based on the evidence, what do you think was the motive for the attack, if any, and why? Please write at least one paragraph analyzing whether the evidence indicates this attack was on account of any protected characteristic(s). You must provide facts from the source to support your answer. Please cite any sources you use.

Exercise #2 (Note: This exercise is optional, please complete if you have time)

Read this article about the [Aurora Shooting in July 2012](#). Based on the evidence, what do you think was the motive for the attack, if any, and why? You must provide facts from the source to support your answer. (Note: You may also feel free to use facts from any other articles you have read about this crime to support your answer.)

- *Complete Exercise #1 as instructed on a separate Word document and save your document. Please upload your work into your drop box in order to receive written feedback prior to your Face-to-Face training. Use the below file naming convention to save your work:*

LastName, FirstName – Nexus Temple Shooting

- *Be prepared to discuss your answers to the exercise during the Face-to-Face component of RAIO CT.*
- *Model responses will be posted on the [Distance Training page](#) so that you can review your work prior to getting written feedback.*

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Nexus – PSG

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on quiz)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your responses. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of this course.*

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Well-Founded Fear

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Interviewing – Survivors of Torture

Have you finished reading the lesson plan?

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Interviewing – Note Taking

Have you finished reading the lesson plan?

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Mock Interview Transcript

Print out a copy of the transcribed interview.

Complete this exercise

Please read the transcription of the mock interview of Tatyana Alieva. Indicate on the transcription:

- questions that you think are particularly good, and why
- whether you would have asked some questions differently
- if you would have asked additional questions to elicit more information on the same topic, or moved on to a new topic

You do not have to post your observations on the ECN. However, **please be sure to bring your notes to the Face-to-Face class**. The exercise may be the basis of discussion during certain sessions.

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Interviewing – Eliciting Testimony

Have you finished reading the lesson plan?

If yes, your task now is to:

Complete these exercises

Exercise #1

Label each of the following 10 questions as one of the following question types: open-ended (O); closed-ended (C); multiple choice (M); or leading (L).

- “How were you threatened?”
- “How many times did they threaten you?”
- “Why did they threaten you?”
- “What makes you think that was the motive for the threat?”
- “Did they actually say anything about your religion when making the threat?”
- “And on that occasion, did they threaten you in person, by letter, by phone or some other way?”
- “Are you Christian?”
- “Did you leave your house after the first threat or after the second threat?”
- “Is your religion written on any of your documents?”
- “You said earlier that you were threatened 2 times, correct?”

Exercise #2

Think back to an interview or conversation you have had that was adversarial. What effect did that have on the parties involved? What was the outcome? Write a short paragraph in response to these questions.

Exercise #3

Think back to an interview or conversation you have had that was difficult, but remained non-adversarial. What helped it remain non-adversarial? What was the outcome? Write a short paragraph in response to these questions.

Exercise #4

Think of broadcasters, journalists, or other professionals you know from the media, law enforcement, or other professions. Who is an example of an adversarial interviewer, and why? Who is an example of an effective non-adversarial interviewer, and why? Jot down notes regarding your two examples.

- *Complete the exercises as instructed on a separate Word document and save your document. Please upload your work into your drop box using the below file naming convention:*

LastName, FirstName – Eliciting Testimony

- *Be prepared to discuss your answers during the Face-to-Face component of the RAIO Combined Training.*

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Interviewing – Working With an Interpreter

Have you finished reading the [lesson plan](#)?

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Detecting Possible Victims of Trafficking

Have you finished reading the [lesson plan](#)?

If yes, your tasks are now to:

- **Complete this online course: “Human Trafficking Awareness for DHS Personnel”**

You can access this course by logging into PALMS, the USCIS learning management system: <https://etms.uscis.dhs.gov/WarningDisclaimer.aspx>

Please contact your local training officer if you have problems logging onto PALMS.

- **Click here to read a message from the Director of USCIS, León Rodríguez, regarding the fight to combat human trafficking:**

President Obama proclaimed January 2017 as National Slavery and Human Trafficking Prevention Month to raise awareness and fight modern day slavery. DHS created the Blue Campaign in 2010 to serve as the Department’s unified voice to combat human trafficking.

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Cross-Cultural Communication

Have you finished reading the lesson plan?

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Evidence

Have you finished reading the lesson plan?

If yes, your task is now to:

Complete this quiz (click on quiz)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAI0 CT.*

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Credibility

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on quiz)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission or print the answer key and use the link provided above to review your answers. If you plan on using your computer to check your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

Complete this exercise

- Copy and paste the following page (Plausibility PE) into a separate Word document. Respond to the questions and save your document. Please upload your work into your drop box using the below file naming convention:

LastName, FirstName – Plausibility

- Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Plausibility PE

Read the following fact patterns. For each example, determine whether the statement is **plausible** or **implausible** and briefly explain what objective facts you rely upon to reach your determination. We will discuss in the Face-to-Face component of the training.

1. The applicant claimed that, although she was detained at the county jail two miles from her brother's home, she watched, unaided by technology, from a jail window as the police entered her brother's home and arrested him.

Plausible or implausible? _____

Explain:

2. The applicant's claim indicated that she was pregnant with the same child for 16 months. When confronted with the implausibility of this, the applicant explained: "That is how we do it in my country."

Plausible or implausible? _____

Explain:

3. The applicant claimed that the Stalinist Courts in Switzerland had persecuted him.

Plausible or implausible? _____

Explain:

4. A prison guard risked a government career by accepting a bribe of a gold bracelet.

Plausible or implausible? _____

Explain:

5. The applicant claimed that "the Moroccan government commonly forced political dissidents to leave the country and to sign a document promising never to return (or, at least not for ten years)." A report from the State Department indicated that "[t]here are no known instances of enforced exile in Morocco and that the government offered self-imposed exiles amnesty starting in 1994."

Plausible or implausible? _____

Explain:

6. A university-educated man said he spoke Punjabi, Hindi, Bengali, and English, could not read or write Punjabi, although he claimed to have lived in Punjab and operated a business there for eight years.

Plausible or implausible? _____

Explain:

Fraud and FDNS Overview

Have you finished reading the lesson plan?

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

International Religious Freedom Act (IRFA)

Have you finished reading the lesson plan?

If yes, your task is now to:

Complete this quiz (click on quiz)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of this course.*

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Persecutor Bar

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on quiz)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your responses. If you plan on using your computer to check your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Mass Atrocities and Genocide Awareness

Read the Presidential Study Directive on Mass Atrocities (PSD-10), released August 4, 2011 (click here).

It is important for all officers to become aware of the history and content of PSD-10, which calls for the creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review.

DHS is in the process of publishing a lesson plan that will provide a general overview on mass atrocities and genocide awareness for DHS personnel, focusing primarily on the requirements of PSD-10. Additional training will be provided on procedures as they are developed to implement those requirements.

Read this report from NPR's *Morning Edition* about the work of the Human Rights Violators and War Crimes Unit at Immigration and Customs Enforcement (ICE).

If you finish this assignment early, use your time to read *Matter of Vides Casanova*, 26 I&N Dec. 494 (BIA 2015), the recent BIA case referenced in the NPR report.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

LGBTI Claims

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your responses. If you plan on using your computer to check your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Gender-Related Claims

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your responses. If you plan on using your computer to check your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Children's Claims

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

National Security

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

On the ECN, click on “Respond to this Survey.” Choose the one best answer to each question unless instructed otherwise. Print the quiz and circle your answers in order to review your responses. After you finish, click the following link to check your answers: [National Security Quiz – Answer Key](#).

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

[Click here to provide feedback for this topic](#)

On the ECN, click on “Respond to this Survey” to provide your feedback.

[Click here to navigate up to the Distance Training Syllabus](#)

Researching and Using Country of Origin Information (COI) in RAIO Adjudications

Have you finished reading the lesson plan?

If yes, your task is now to:

Complete this exercise

Country Conditions Information Research Exercise

PURPOSE:

- (1) You will become familiar with new sources of country conditions information and Research Unit resources for accessing country conditions information.
- (2) You will practice citing country conditions information that supports factual determinations that they make in the course of adjudicating claims and explaining the relevance of the source cited.

Complete the exercises as instructed on a separate Word document and save your document. Please upload your work into your drop box using the below file naming convention:

LastName, FirstName – COI Research

PART 1: Visit the RAIO Research Unit ECN homepage. Familiarize yourself with the Country-specific resource guides, under the heading **Country Pages** on the RU ECN homepage. Familiarize yourself with the Encyclopedia of Internet Resources and other **Guides to Online Research and Internet Sources**. (You may wish to bookmark one or more of these guides, along with the RAIO Research Unit ECN homepage, in your web browser.)

PART 2: Complete the following exercises using sources that you discovered on the Research Unit ECN. For each exercise, one or more factual issues will be identified. For each issue, cite a source or two that addresses the specific issue identified. Explain how the text you cited is relevant to the issue raised and, if applicable, what further information you would like to have in order to adequately adjudicate the issue.

(Use the answer in the EXAMPLE EXERCISE below as a model.)

EXAMPLE EXERCISE: A 15-year old female asylum applicant from Mali expressed a fear that she would be subjected to female genital cutting against her will if she were returned to her country.

Issue: What is the likelihood that a 15-year-old Malian girl would be subjected to female genital cutting (FGC) in her country of origin?

Answer: The Department of State's Country Reports on Human Rights Practices for 2014 says the following about FGC in Mali (emphasis added):

Female Genital Mutilation/Cutting (FGM/C): FGM/C is legal in the country and, **except in certain northern areas**, was practiced widely across all religious and ethnic groups, **particularly in rural areas**. While the government took steps to raise awareness about the harmful health effects of FGM/C and successfully lowered the percentage of girls excised in at least one region of the country, the government has not criminalized FGM/C, although FGM/C was prohibited in government-funded health centers. **FGM/C generally was performed on girls between the ages of six months and nine years**. The most common types of FGM/C were Type I and Type II. **The 2014 UNHCR report on FGM/C indicated 85 percent of girls and women ages 15 to 49 were excised, and 74 percent of girls and women in the same age group had a daughter who was excised**. Government information campaigns regarding the dangers of FGM/C reached citizens throughout the country, and human rights organizations reported decreased incidence of FGM/C among children of educated parents.

DOS considers there to be reliable evidence that the vast majority of Malian girls are subjected to FGC, which tends to support the applicant's claim to have a well-founded fear. However, the applicant is quite a bit older than the usual age at which FGC is performed in Mali. Is she from an urban area or from northern Mali, where DOS indicates that FGC is less common?

EXERCISE ONE:

A Bangladeshi refugee status applicant says that she was attacked by police and supporters of the governing Awami League in May 2016 because of her support for the rival Bangladesh Nationalist Party (BNP). She is also afraid that she may be attacked by "religious fanatics" because she is a *hijra*.

Issue One: What does country conditions information indicate about the extent of violence between the Awami League and the Bangladesh Nationalist Party (BNP)?

Issue Two: Is there evidence that dangers *hijra* may face in Bangladesh exist countrywide? That the danger is greater in some parts of the country than in others?

EXERCISE TWO:

A 50-year-old male asylum applicant from Indonesia claims to have been attacked by Aceh's police and Indonesian military forces on account of participation in an April 2015 rally in support of the Free Aceh Movement (GAM) in Banda Aceh, the provincial capital.

Issue One: Does the evidence indicate that the Free Aceh Movement is or has been involved in violent activities?

Issue Two: What sorts of harms, if any, are faced by supporters of the Free Aceh Movement today?

EXERCISE THREE:

An asylum applicant from China's Xinjiang Province, an ethnic Tajik, became a Christian while attending a university the United States. She has not been back to China since her conversion. She says that she is afraid to return because the Chinese government persecutes house-church Christians.

Issue One: Identify two different sources of information pertaining to the treatment of Christians in Xinjiang province. Explain how they apply to this applicant's claim. For each source, what are its strengths and weaknesses as a citation in for this particular case?

PART 3: Take stock of the country conditions sources that you have used in these exercises. Bookmark any that you may wish to refer to in the future. In addition, please bookmark the following useful sites so that you can easily refer to them for future research:

UNHCR Refworld

Open Source Center (register for an account now so that you will have access during the Face-to-Face portion of training)

Jane's Terrorism and Insurgency Centre (accessed through DHS Libraries' online journal collection)

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Firm Resettlement

Have you finished reading the [lesson plan](#)?

If yes, your task is now to:

Complete this quiz (click on *quiz*)

Please click on the link above to take the quiz on SurveyMonkey; choose the one best answer to each question unless instructed otherwise. An answer key will be displayed on SurveyMonkey immediately after you complete the quiz. In order to compare your responses to the answer key, you will either have to print the quiz and circle your answers prior to submission **or** print the answer key and use the link provided above to review your answers. If you plan on using your computer to review your answers, please note:

- 1) You **must** use the same computer you used to take the quiz to see your previous answers.
- 2) You **cannot** clear or delete your browser history, temporary files, cookies, saved passwords, or other web form information – or your answers may no longer be accessible.

How did you do? If you missed any questions, please go back to the lesson plan and review the concept addressed in the question.

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Discretion

Have you finished reading the lesson plan?

If you finish this assignment early, use your extra time as suggested in Section 2, "How to Use This Workbook," item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Decision-Making

Have you finished reading the lesson plan?

If yes, your task is now to:

Complete this exercise

- Read the instructions and fact pattern provided here.
- Complete the exercise form as instructed and save your document. Please upload your work into your drop box using the below file naming convention:

LastName, FirstName – Decision Making

- *Be prepared to discuss your answers during the Face-to-Face component of RAIO CT.*
- *Model responses will be posted on the Distance Training page so that you can review your work.*

If you finish this assignment early, use your extra time as suggested in Section 2, “How to Use This Workbook,” item 9.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Interview Observations

Your task is to:

Observe a RAIO interview

Each asylum office will make the appropriate arrangements for this activity and will follow the local procedures that are in place for interview observations. Depending on the workload of each office, you may observe a credible fear or reasonable fear interview instead of an asylum interview. If you are not an asylum officer, you may either travel to a nearby asylum office or view a videotaped mock interview. Refugee Officers and IO staff will watch a recorded refugee interview (please see your Division's training coordinators for additional information). For HQ staff located in DC, please contact RAIO Training using the contact information provided in section I, part B, above, to help coordinate an interview observation for you at ZAR or ZAC.

- You will be asked to complete the following RAIO CT DT interview observation form. Please review the form before your observation so you have an idea of what information you will need to take note of.
- After your observation, complete and save the interview observation form. *Please upload your work into your drop box using the below file naming convention:*

LastName, FirstName – Interview Observation

If your home office is unable to schedule an interview observation for you prior to the Face-to-Face component of RAIO CT, you may complete the interview observation form for an interview you observed prior to starting DT.

[Click here to provide feedback for this topic](#)

[Click here to navigate up to the Distance Training Syllabus](#)

Well Founded Fear – A documentary film

Your task is to:

View the documentary, *Well Founded Fear*

- The training staff in your office will set up the film for you to view. There is enough time allotted to allow for a break after watching the first hour of the film and for discussion.
- Please read this introduction before viewing the film

During 1997 and 1998 filmmakers Michael Camerini and Shari Robertson were granted permission to collect hundreds of hours of footage of the activities of the Newark and New York Asylum Offices, including asylum interviews and the issuance of asylum decisions. The resulting film depicts, through the eyes of the producers, asylum officers' efforts to gather information in various interview settings and struggle with unique legal challenges.

The producers were allowed complete editorial freedom. All asylum personnel and asylum applicants who agreed to be filmed signed personal release forms, allowing for the producers to use the videotaped material of themselves, and waiving any right to edit the film. The film originally aired on the PBS documentary series, Point of View (POV).

When viewing the documentary, please keep in mind that in general, filmmakers have a particular idea of what they wanted to portray in a film. Filmmakers edit their work in order to raise particular issues and to make statements that convey what the filmmakers have in mind. Because of this, it is important to refrain from making judgments regarding the officers in the film; the entire story of what they considered when adjudicating the case(s) in question may not be reflected in the film.

Whether or not you agree with the filmmaker's portrayal of the asylum program or particular officers, the film is a unique tool for generating discussion on a number of issues that are central to the adjudication of refugee and asylum claims.

After viewing, **complete this exercise**, which raises issues for consideration and discussion.

- Please note, the exercise is just for your consideration and discussion – it does not need to be uploaded into your drop box.

Click here to provide feedback for this topic

Click here to navigate up to the Distance Training Syllabus

Congratulations!

You have finished the Distance Training component of the RAIO CT.

Please complete this End of Course Feedback Survey to help us improve the Distance Training.

Thank you for your participation and for your feedback.

Don't forget . . .

Make sure you have also completed the Distance Training assignments for your Division.

(see section 5 – Division-Specific Supplements, below)

5. Division-Specific Supplements

The Division-specific DTs vary in length and format. You will receive information from your Division (Refugee Affairs, Asylum, or International Operations) regarding your Division-specific DT schedule, if any, as well as any materials and exercises for your Division-specific training.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

No Division Supplement

SUPPLEMENT B – ASYLUM DIVISION

The Asylum Division's DT course requires approximately **30 hours** to complete.

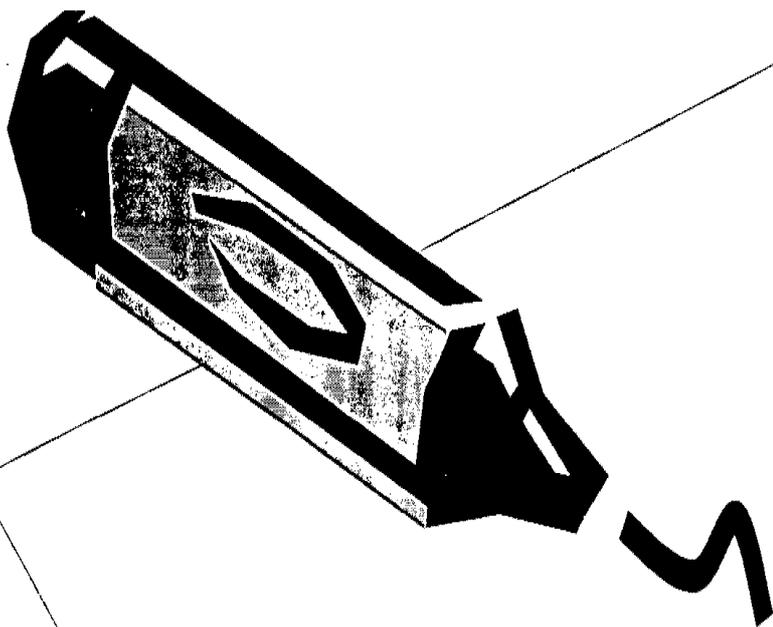
[Click here](#) to view the Asylum Division's DT Syllabus and Attestation Forms.

Please contact Asylum's training coordinators at asylumtraining-coordinators@uscis.dhs.gov with any questions regarding their DT materials or requirements.

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The International Operations Division's DT course requires approximately **16 hours** to complete.

Please contact IO's training coordinators at uscisioqatc@uscis.dhs.gov with any questions regarding their DT materials or requirements.



Children's Claims

RAIO CTP - 703 & 704

February 23 & 24, 2017

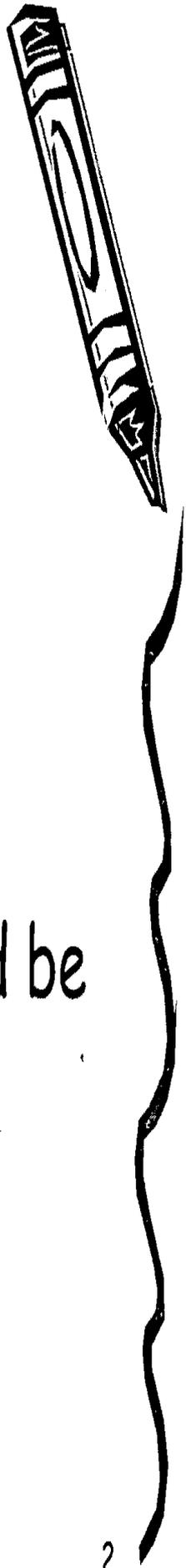
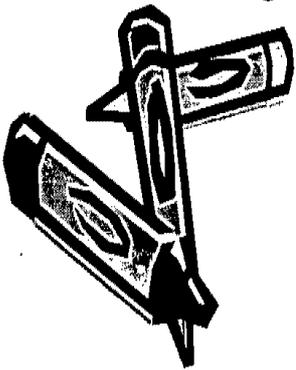
Jane Kochman

RAIO Asylum Division, HQ Officer



Topics

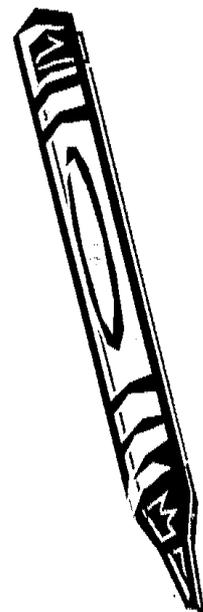
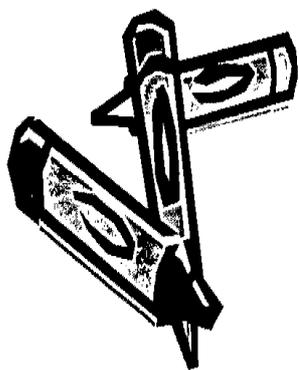
- International Guidance
- Cultural & Developmental Factors
- Interview Considerations
- Legal Analysis:
 - Describe how persecution should be analyzed; and
 - Identify issues of nexus in children's asylum claims.



International Guidance

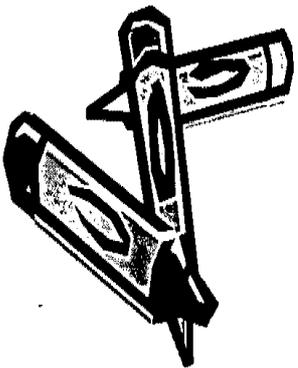
- Universal Declaration of Human Rights
- Convention on the Rights of the Child
- UNHCR ExCom Conclusions # 47, 59, and 107
- UNHCR Policies and Guidelines.

"Best interests of the child" principle in international guidance



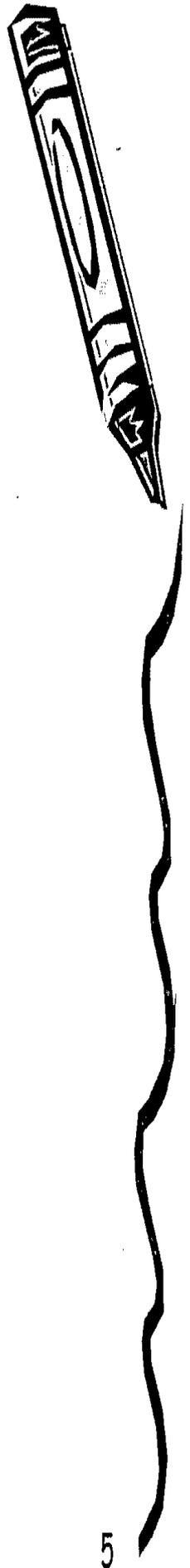
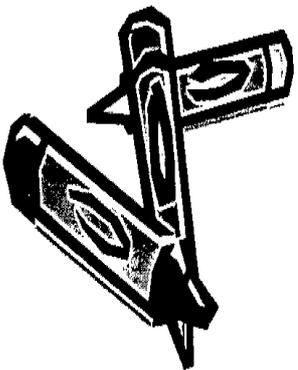
Influential Factors in Child Development

- Chronological age
- Physical and emotional health
- Psychological development
- Societal status and cultural background
- Cognitive processes
- Language ability



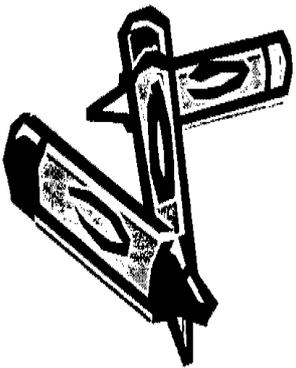
Factors that Accelerate or Stunt Development

- Chaotic social conditions
- Experience with forms of violence
- Lack of protection and caring by significant adults
- Nutritional deficits
- Physical and mental disabilities



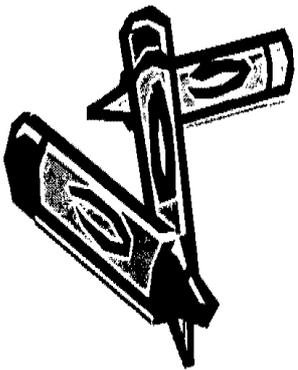
Children's Preconceptions

- All governments are corrupt
- Others still at home will be harmed
- He or she should feel guilty for fleeing
- Others will be privy to the testimony



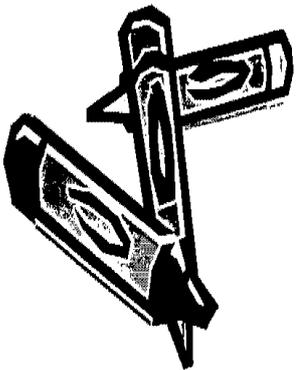
Procedural Considerations

- Determining capacity to apply
 - Capacity to understand what applying for?
 - Objective basis for ignoring parents' wishes?
 - Who has legal authority to speak for the child?



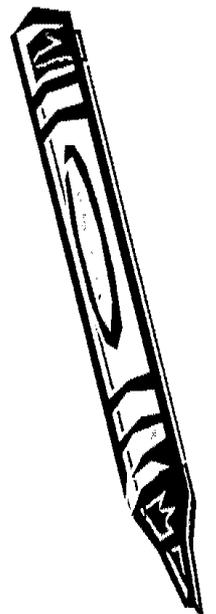
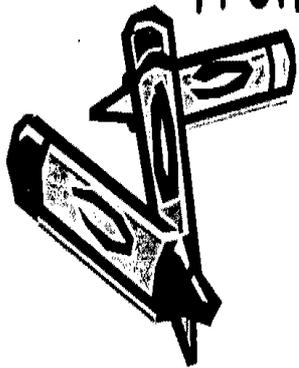
Presence of a Trusted Adult or Child Advocate

- Familiar and trusted source of comfort
- Not a substitute for an attorney or representative
- Not a coach, but may be allowed to help the child explain things



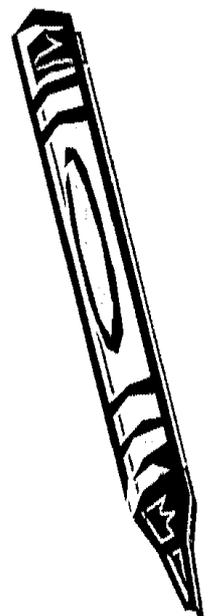
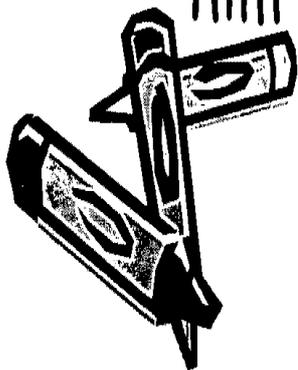
Building Rapport

- Non-adversarial is crucial
- Officer's position of authority - a likely obstacle
- Start with an interest in the child as an individual
- Discuss neutral topics
- Consider asking about child's interests from attending adult beforehand



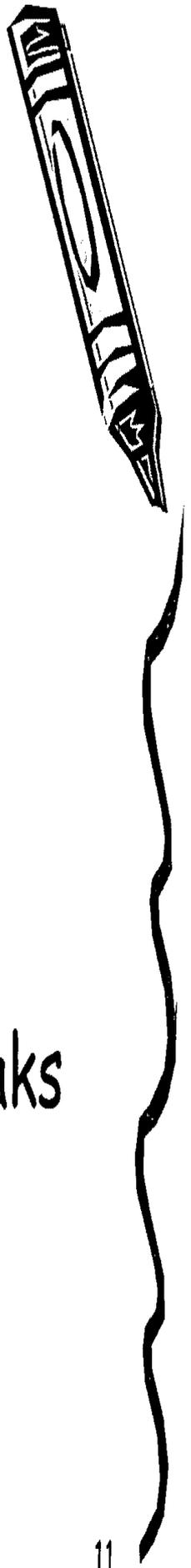
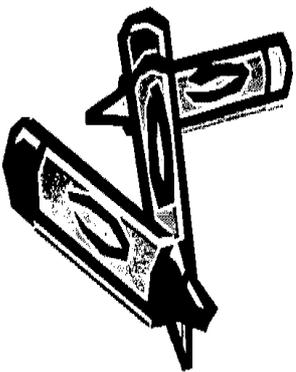
Opening Statement

- Given once child appears comfortable
- Should explain roles of persons present
- Should reassure child that embarrassing or traumatic experiences will not be shared with others
- Should reassure child that it's okay to say "I don't understand" or "I don't know"
- Should reassure child that it's okay for him or her to ask questions

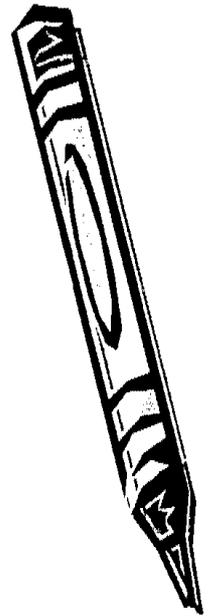


General Interview Considerations

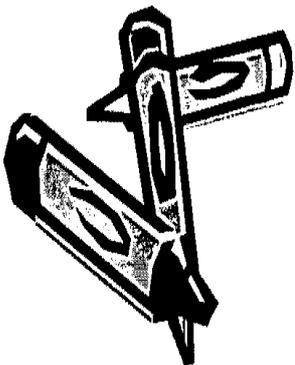
- Watch for non-verbal cues
- Offer verbal reassurances
- Shift the focus when necessary
- Take the initiative to suggest breaks



Child-Sensitive Questioning and Listening Techniques

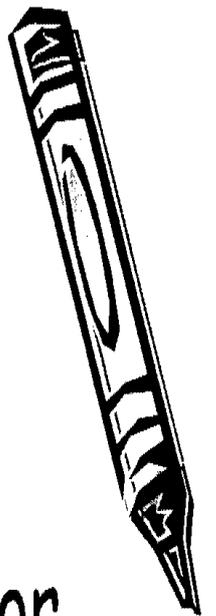
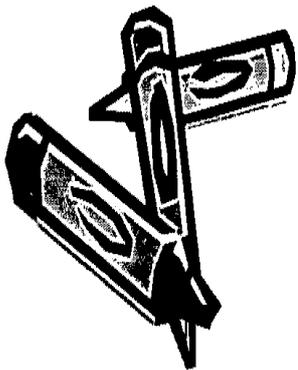


- Use short, age-appropriate questions
- Avoid leading questions
- Explain any repetition of questions
- Never coerce a child into answering a question



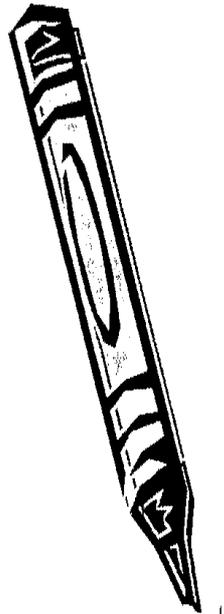
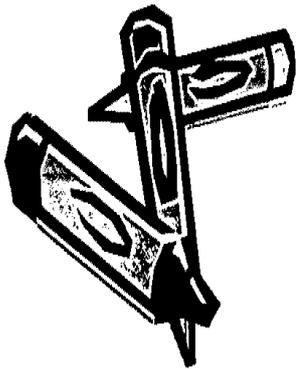
Questioning and Listening Techniques (cont'd.)

- Ask child to define terms that he or she uses, then use those terms
- Use easy words; active voice
- Allow a narrative without interruption
- Tolerate pauses



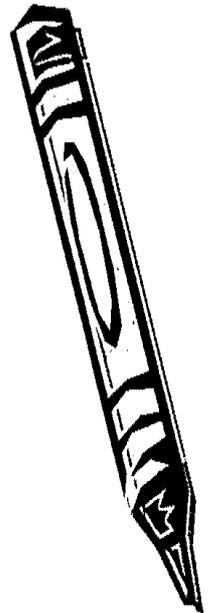
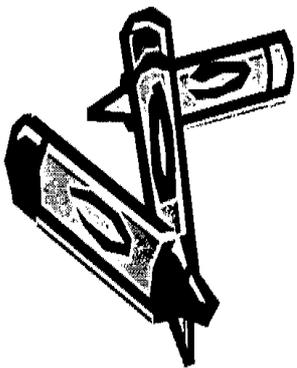
Children's Credibility Considerations

- AO must consider child's age, relative maturity, ability to recall events, and psychological factors
- Demeanor: culture plays a prominent role
- Trauma: manifests itself differently among children; don't misinterpret



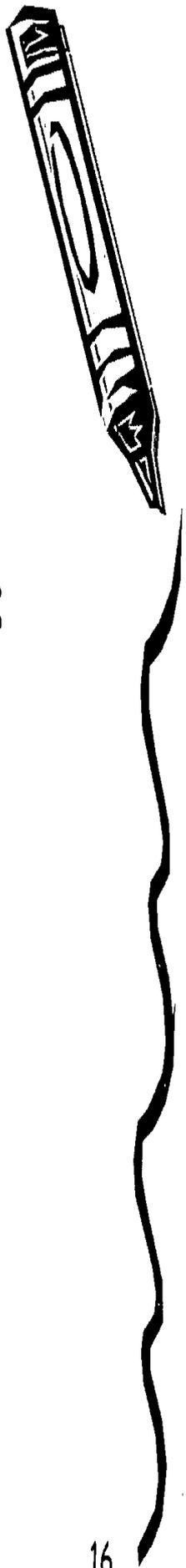
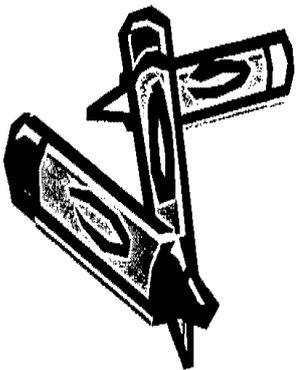
Other Credibility Considerations

- Age and development: at time of events and retelling
- Impact of time lapse
- Limited knowledge of circumstances
- Role of others in preparing the child for interview



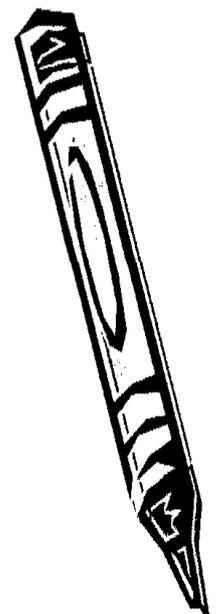
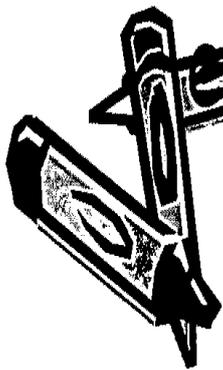
Evidence

- Testimony alone may be sufficient.
- Corroborating evidence may come from:
 - testimony from family and community members
 - evidence from medical personnel, teachers, psychologists
 - country conditions evidence of those similarly situated



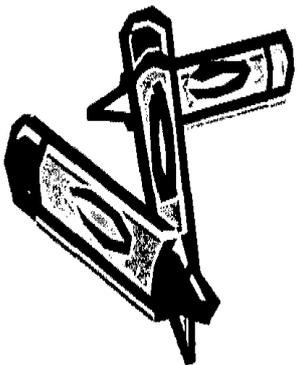
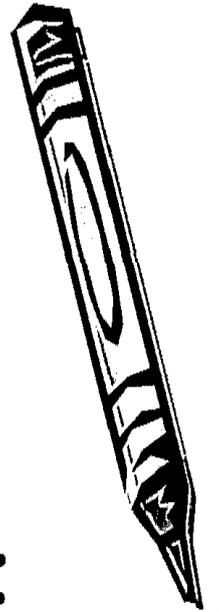
Legal Analysis: Definition of a Refugee

- Definition applies to all individuals regardless of age
- Nonetheless, particular regard should be given to a child's stage of development, possible limited knowledge of conditions, and special vulnerability
- "Best interests of child" does not replace definition in determining eligibility



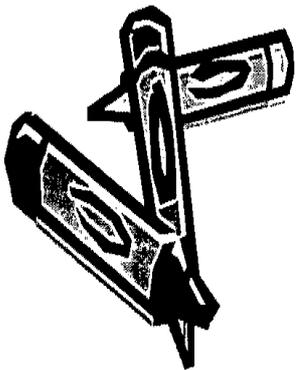
Persecution: level of harm

- Harm that rises to the level of persecution for a child may not be serious enough to rise to the level of persecution for an adult.



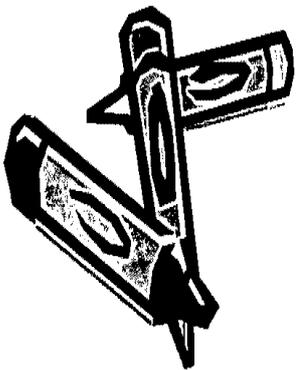
Persecution: whether harm rises to persecution

- Consider non-physical harm
- Even with calibrating the analysis based on age, harm may not constitute persecution



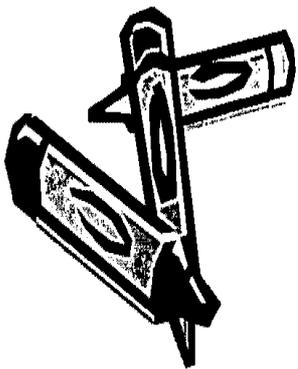
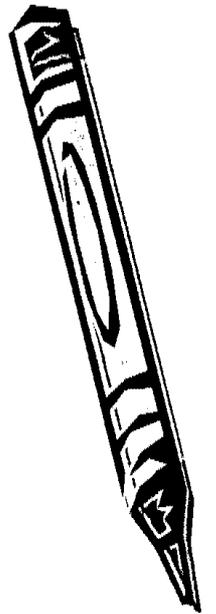
Types of harm to children

- Types of harm that may befall children are varied
- Cultural practices that target young people may constitute persecution
- May often involve non-state actors



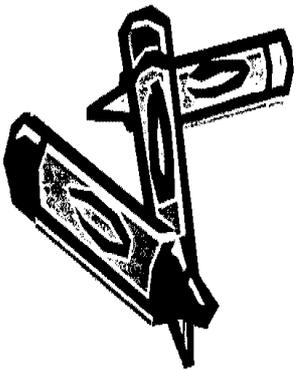
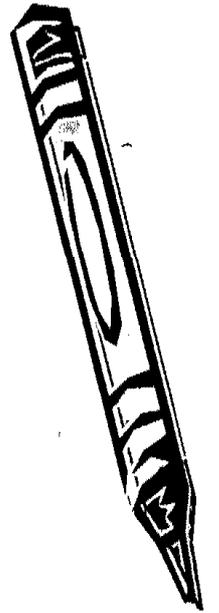
Well-founded fear

- May need to give more weight to objective circumstances
- Family members may be seen as “similarly situated”
- Family’s intentions in sending child abroad may be relevant
- Circumstances of child’s arrival may provide clues



Nexus Issues

- Adults may inflict harm on children without viewing it as such
- Political opinion - cannot be discredited because of age
- Imputed political opinion - family may play a key role
- Particular social group - issues of family membership, age and gender likely to arise



Gender-Related Claims

Presented by:

Corey Cappelloni
HQ Asylum Division

Thea Lay
Office of the Chief Counsel

February 21-22, 2017

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Overview

1. Types of Gender-Based Harm
2. Factors Related To Gender That Must Be Considered
3. Factors That May Inhibit An Applicant's Ability to Present Fully a Gender- Related Claim
4. Effective Interviewing Techniques To Fully Elicit Sensitive Issues

(continued on next slide)



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Overview (cont.)

5. Factors Related To Gender That Must Be Considered In Evaluating Credibility
6. Evidentiary Considerations
7. Factors Related To Gender That May Affect An Ability To Relocate
8. Applying Appropriate Legal, Policy, Procedural, And International Guidance



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Examples of Gender-Based Harm

* Sexual Violence

* Domestic Violence

* Female Genital Mutilation
(FGM)

* Human Trafficking

* Forced and Early Marriage

* Honor Crimes

* Forced Abortion

* Sexual Slavery



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Sexual Violence

* “Any act of a sexual nature which is committed on a person under circumstances which are coercive.”

* Examples include rape, sexual slavery, sexual mutilation

* Rape can be used on mass scale to terrorize but individual claims don't mean it's purely personal harm (look to case facts and country condition information)

* For rape, consider harm of act AND social harm/stigma as a consequence



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Female Genital Mutilation (FGM)

* Females of _____ nationality or ethnicity who are subject to gender-related cultural traditions

* **What are types of FGM?**

- * circumcision
- * excision
- * infibulation

* **What are short and long term consequences of FGM?**

- * Short: Without anesthesia, often at home (unsanitary, non-medical personnel); bleeding, shock, infection
- * Long: Chronic infections, painful menstruation, child birth, HIV risk, psychological problems, sexual dysfunction



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FGM PSG Reformulation

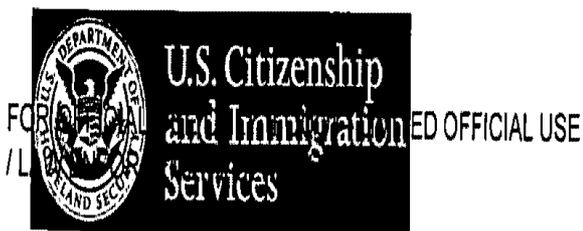
Females of X nationality or ethnicity who are subject to gender-related cultural traditions.

* Previously articulated as women of X nationality/ethnicity who have not undergone FGM as practiced in that culture.



FGM PSG continued

- * *Kasinga* is still good law.
- * In *Matter of A-T-*, both the AG and BIA acknowledged that the future harm need not take the identical form as the past harm of FGM in order for the presumption that the applicant will be persecuted in the future on the basis of the original claim.
- * The LP PSG formulation generally permits a presumption of well-founded fear where the applicant suffered past persecution in the form of FGM and fears future persecution in the form of forced marriage.



FGM Exercise



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Forced and Early Marriage

* *What are some possible reasons*

- * poverty
- * settling debt
- * “punishment” for rapist

* *What are some of the questions to distinguish between arranged and forced marriage*

- * Level of coercion
- * Ability to avoid the marriage
- * Consequences for refusing to submit



Domestic Violence

* (Nationality) women unable to leave a domestic relationship
– Matter of A-R-C-G; or

* (Nationality) women viewed as property because of their
position within a domestic relationship – DHS brief in Matter
of L-R.

* Consider ability to leave the relationship at the time that the harm
occurred

Additional Considerations

- * Fear of arrest
- * Social stigma
- * Inability to support oneself + children



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Human Trafficking

What is the difference between smuggling and trafficking?

Smuggling:

“the importation of people into the United States involving deliberate evasion of immigration laws”

Trafficking:

“The recruitment, harboring, transportation, or obtaining of a person (regardless of citizenship or immigration status) for forced labor or commercial sex.



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Honor Crimes

* Carried out to “restore” a family’s honor

* Including: stoning, abduction, imprisonment, rape, poisoning, acid attacks, disfigurement, forced marriage, murder, or attempts to coerce the victim to commit suicide

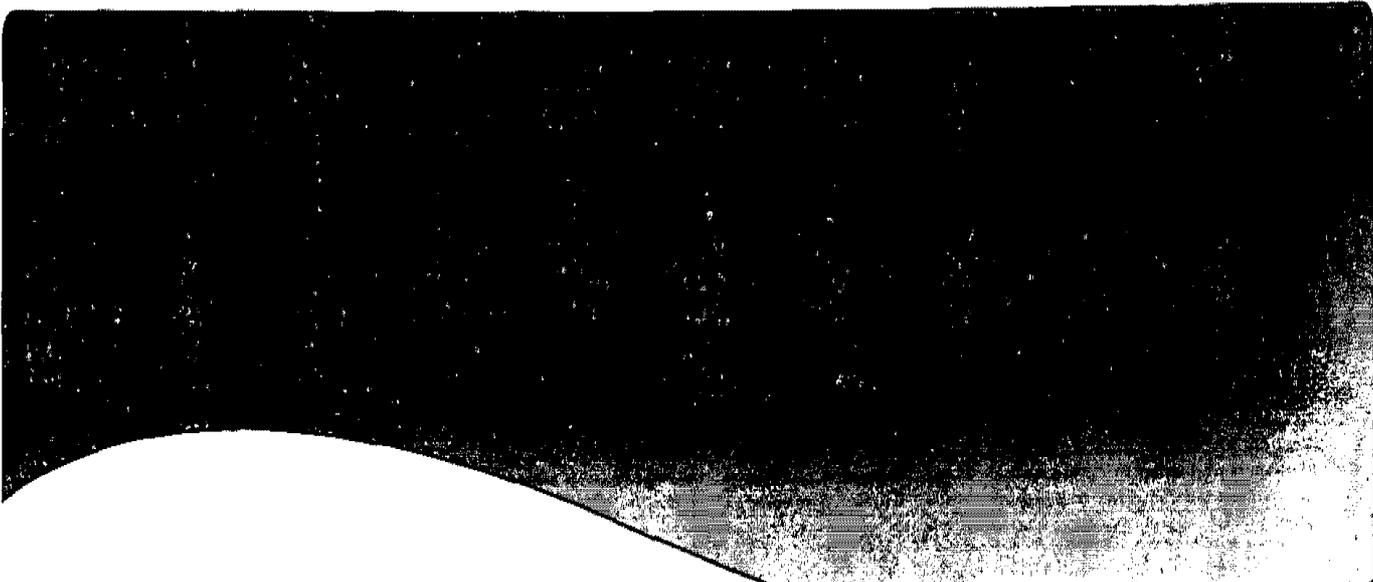


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Nexus

- * The persecutor is motivated to persecute the applicant because the persecutor perceives the applicant to possess a protected characteristic
- * Determining whether the abuser believes he has the authority to abuse and control the victim "on account of" her status in the relationship
- * Where other evidence shows that the persecutor harms the victim because of her status within the relationship, the absence of a motivation to harm others with that trait does not undermine a finding of nexus
- * Issues with mixed motives (one central reason)





Factors That May Inhibit an Applicant's
Ability
to Fully Present a
Gender- Related Claim



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Inhibiting Factors During Interview

Pre-Interview File Review: consult with supervisor about interviewer of same sex

Considerations Related to Gender and Culture: Shame, feelings of responsibility and blame

The presence of relatives or the interpreter

- * Men who end up “speaking” for the women
- * Men present may be the persecutor
- * The interpreter who may substitute the word “harm” for “rape”
- * Ask applicant’s preference, when possible in the absence of others

One year rule – consider changed circumstances (new threats) and extraordinary circumstances (PTSD)



Effective Interviewing Techniques

Suggested Interview Techniques

- * Emphasize confidentiality
- * Begin with easy topics
- * Pause if the applicant becomes upset
- * Acknowledge how difficult it may be for the applicant

Examples of Questions to Elicit Sensitive Information

- * Open ended questions



Factors When Evaluating Credibility

Assess Credibility in least invasive way possible

- * Applicant may be able to provide sufficient detail about certain parts of the claim to establish credibility, without providing minute detail on particularly sensitive topics.
- * Elicit testimony about before and after (instead of act itself)
- * An applicant may initially characterize the attack as motivated by sexual desire, but you should make efforts to elicit any evidence that the assault occurred on account of a protected ground
- * Detail (is it already in written documents, education level, gender roles)
- * Consistency
- * Plausibility (culturally specific)
- * Demeanor (impossible to know)



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Factors Related to Gender That Must Be Considered



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Reporting, Law Enforcement, and Access to State Protection

- * Law enforcement officials and government entities often lack the sensitivity, professionalism and training to handle complaints of violence against women, and may use informal justice systems or cultural pressure to encourage women to return to an abusive situation rather than undertake serious investigations
- * In many countries, a woman's testimony in court is not accorded the same legal weight as a man's testimony
- * The law may also criminalize female victims of violence, e.g., rape victims may be detained and prosecuted as adulterers and victims of trafficking may be prosecuted as prostitutes.
- * *What sort of questions do you need for non-state actors?*



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Evidentiary Considerations

- * Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable

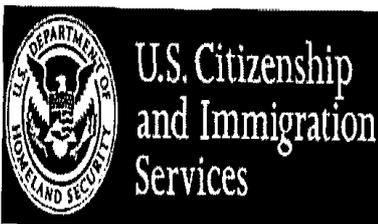
- * In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection

- * Lack of documents; reluctance to file police reports due to stigma



Ability To Relocate

- * Whether relocation would be reasonable under all the circumstances
- * Groups operating countrywide that the government is unable or unwilling to control
- * Ability to Travel (e.g., Saudi Arabia and driving)
- * Economic Circumstances (ability to survive, support children, have bank account, own property)
- * Social Circumstances



Applying Appropriate Guidance

- * (UNHCR) specifically addresses the need for special training on gender-related issues. (UNHCR Executive Committee Conclusion No. 98 (LIV) (2003))
- * UNHCR also provides guidelines for those adjudicating refugee protection claims
- * However, gender claims are not different in their analysis of harm and persecution
- * Consult country conditions information



Exercise 2



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Questions?



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Nexus: Particular Social Group (PSG)

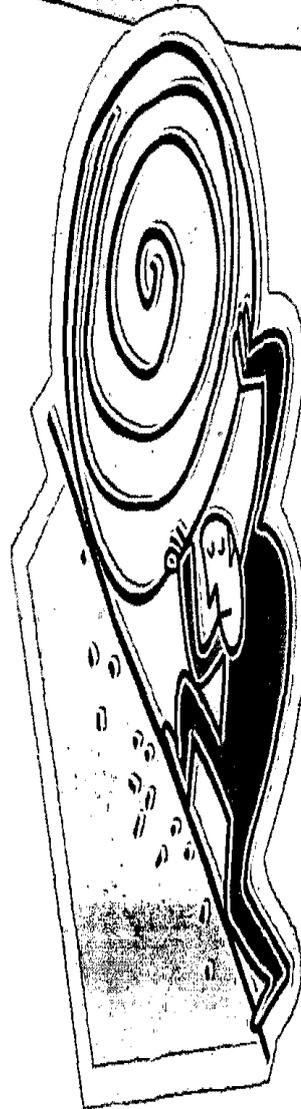
Corey Cappelloni, HQ Asylum Division,

Thea Lay, Office of the Chief Counsel

February 21-22, 2016

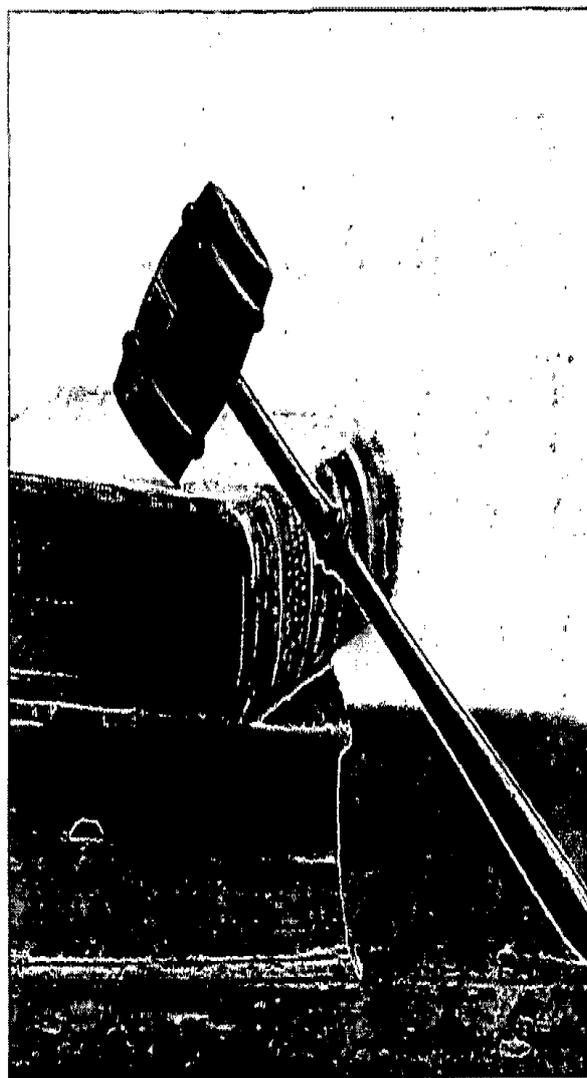
Agenda

- * Basics – Definition of PSG
- * Three-Step Process
- * PSG Examples
- * Practical Exercises



Particular Social Group - 3-part test

- 1) **Immutability:** Comprised of individuals who share a common, immutable characteristic that members cannot change or should not be required to change. *Acosta*
- 2) **Social distinction:** “[T]hose with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” *M-E-V-G-*
- 3) **Particularity:** “characteristics that provide a clear benchmark for determining who falls within the group.” *M-E-V-G-; W-G-R-*



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Matter of Acosta

19 I&N Dec. 211 (BIA 1985)

- * Eiusdem generis – Latin for “of the same kind”

- * BIA looked at other four grounds (race, religion, nationality and political opinion) to determine the meaning of PSG

- * BIA noted that each of the other four is:
 - ✓ An immutable characteristic:
 - * Beyond the power of the individual to change, or
 - * Fundamental to the individual’s identity or conscience

Matter of Acosta

19 I&N Dec. 211, 233 (1985)

“...we interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share an common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience, such as former military leadership or land ownership...”

Matter of Acosta

19 I&N Dec. 211, 233 (1985)

The particular kind of group characteristic that will qualify under this construction remains to be determined on a case by case basis . . . Whatever the common characteristic of the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”

Characteristic

Defined as:

“A distinguishing trait, quality or property.”
Webster’s

Note: The applicant must possess or be perceived as possessing the characteristic.

Characteristic may include:

- ✓ Social status
- ✓ Physical trait
- ✓ Voluntary association
- ✓ Past experience
- ✓ Cultural Identity

Immutable Characteristic

*Unchangeable

or

*Fundamental to Identity or
Conscience

Fundamental

Generally consider:

Also consider:

- ✓ Applicant's personal circumstances
- ✓ Impact giving up characteristic would have on applicant's:
 - Identity
 - Conscience
- ✓ Human rights norms – is there a fundamental right to retain the characteristic?
- ✓ Voluntary assumption of extraordinary risk may be evidence of the fundamentality

Social Distinction

Matter of M-EV-G-, 26 I&N Dec. 227 (BIA 2014)-Holding:

- ✓ Renames “social visibility” as “social distinction” and clarifies that social distinction **does not require** “**outwardly observable characteristics**” or actual visibility.

M-E-V-G- is binding on all Asylum Officers, including in the 3rd and 7th Circuits. This case clarifies social distinction/visibility.

The Board clarified that social distinction relates to society’s, not the persecutor’s, perception.

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Social Distinction

✓ Those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.

* Members of a social group may seek to hide their characteristic to avoid persecution, and may not be ocularly visible

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Social Distinction Continued

- * Must be evaluated on case-by-case and society-by-society basis
- * Officers' duty to elicit information to develop the record

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Evidence of Social Distinction

*Testimony

*Country conditions information

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Social Distinction - Society

- Group is defined by perception of society in question.
 - ✓ Does society view group as distinct?
- Society may include:
 - ✓ the entire country
 - ✓ a region of the country
 - ✓ a town within the country
 - ✓ must be more than just the persecutor's view
- Group cannot be defined by perception of persecutor alone.
 - ✓ Must separate the social group from the nexus (on account of).
 - ✓ A group cannot be defined exclusively by the fact that its members have been subjected to harm.

Particularity

In Plain Language of INA – “*particular-social group*”

To meet *particularity* requirement, group must:

- * Have a clear benchmark for determining who falls within the group.
- * Be discrete, with definable boundaries.
- * Not be overbroad or subjective.
- * Address outer limits of group's boundaries.

Particularity

- * Does the group's size matter?
- * Does the ability to identify members matter?
- * Does cohesiveness matter?
- * Must members associate voluntarily?
- * Society's perspective (W-G-R-).

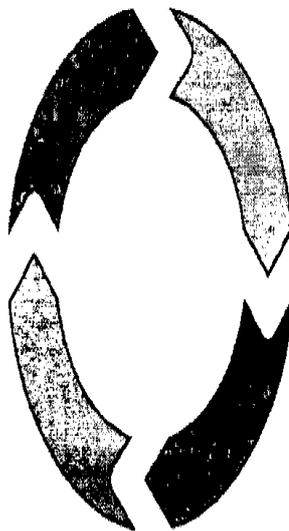
Are these groups “particular”?

- * The wealthy
- * Lawyers
- * Ranchers
- * Young women
- * Widows

Other Requirements

- * A social group cannot be defined by terrorist, criminal, or persecutory activity or association, past or present

- * Avoid Circular Reasoning



On Account Of

- * Do not conflate membership with nexus.
- * Remember that even if an applicant establishes that she is a member of a cognizable particular social group, she must still establish that she was persecuted, or has a well-founded fear of persecution, on account of her membership in the group.

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On Account Of

- * **Motive** is critical.

- * *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

- * The “**motivation of the persecutors** involves questions of fact, and the burden **can be met by testimonial evidence.**”

- * *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).

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Imputed Membership

- * As with any protected ground, membership in a PSG can be imputed.
- * Persecutor falsely believes that an applicant is a member of the PSG.
- * Do not include “imputed” in the PSG definition; instead, it is the applicant’s PSG *membership* that is imputed.

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Exercise 1

Domestic Violence PSGs

Claims re violence within spousal-like relationship:

1. (Nationality) women unable to leave a domestic relationship – *Matter of A-R-C-G-*
2. (Nationality) women viewed as property because of their position within a domestic relationship – DHS brief in *Matter of L-R-*;

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Domestic Violence PSGs

Claims re violence to children within the domestic relationship:

- * Children viewed as property because of their position within a domestic relationship.
- * Reformulation of PSG involving children lacking effective familial protection.
- * First time the LP articulates the PSG.

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Domestic Violence PSGs

Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014).

- * Did not analyze but accepted the PSG of “Chinese daughters who are viewed as property by virtue of their position within a domestic relationship.”
- * Found a fundamental change in circumstances.

Exercise 2

Exercise 3

Family PSGs Involving Gang Targeting

Courts finding a nexus:

- * Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015).
- * Cordova v. Holder, 759 F.3d 332 (4th Cir. 2014).
- * Aldana-Ramos v. Holder, 757 F.3d 9 (1st Cir. 2014).

Court finding no nexus:

- * Perlera-Sola v. Holder, 699 F.3d 572 (1st Cir. 2012).

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Exercise 4

Law Enforcement Assistance

Matter of C-A-

- * Non-criminal informants generally not socially visible or particular, but there may be social visibility for those informants discovered because they appear as witnesses or otherwise come to the cartel's attention.
- * In *M-E-V-G-*, BIA acknowledged C-A- "language highlighting... ocular visibility" and clarified that it's not required.

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Witnesses

Cases recognizing witness PSGs:

- * *Garcia v. Att’y Gen. of U.S.* (3d Cir. 2011).
 - * “[c]ivilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Guatemala”
- * *Gashi v. Holder* (2d Cir. 2012).
 - * cooperating witnesses [who met with war crimes investigators]
- * *Henriquez-Rivas* (9th Cir. 2013).
 - * witnesses “who testified in court against gang members” in El Salvador

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SENSITIVE

Law Enforcement Assistance: Lack of Consistent Precedent

- * Proposed PSGs involving youth who report gang threats or gang beatings:
 - * *Garcia v. Holder* (8th Cir. 2014).
 - * *Zelaya v. Holder* (4th Cir. 2012).
- * Those courts only examined the proposed PSG formulations put forward by the applicants, and rejected them.

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SENSITIVE

Law Enforcement Assistance: Lack of Consistent Precedent

- * *Carvalho-Frois v. Holder* (1st Cir. 2012).
 - * Woman who received threats from two men leaving a neighbor's home where a murder occurred did not establish membership in a valid PSG.
- * *Escobar v. Holder* (7th Cir. 2011).
 - * Upheld PSG of truckers who refused to cooperate with FARC and collaborated with law enforcement.

Law Enforcement Assistance

- * “[Nationality] who assist law enforcement by reporting a serious gang-related crime”
- * No bright line rule re proposed PSG. Elicit information re persecutor’s motive, circumstances of threats received, & similarly situated individuals. Review COI.
- * If a valid proposed PSG exists, then examine nexus.

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Law Enforcement Assistance in the U.S.

- * Several circuits have rejected claims involving informants who help U.S. law enforcement.
 - * *Martinez-Galarza v. Holder* (8th Cir. 2015).
 - * *Costa v. Holder* (1st Cir. 2013).
- * The courts decided those cases based on the record evidence. AOs should examine the specific facts of the case at hand to determine if an informant to U.S. law enforcement officials may be able to establish eligibility.

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SENSITIVE

Exercise 5

FGM PSG Reformulation

Will be covered during gender presentation.

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FGM PSG continued

Will be covered during gender
presentation.

FGM Exercise

Will be covered during gender presentation.

Former Gang Members

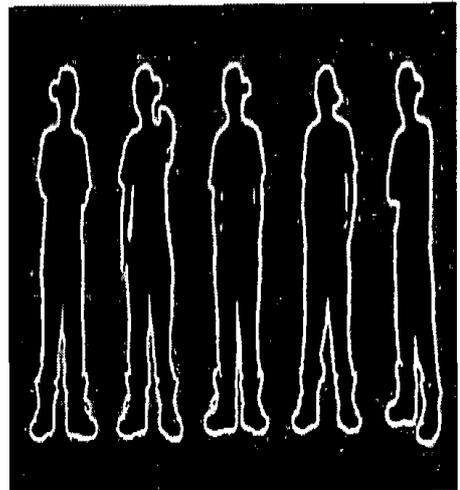
Fourth, Sixth and Seventh Circuits

- * Sixth and Seventh – Former gang membership can form the basis for a PSG

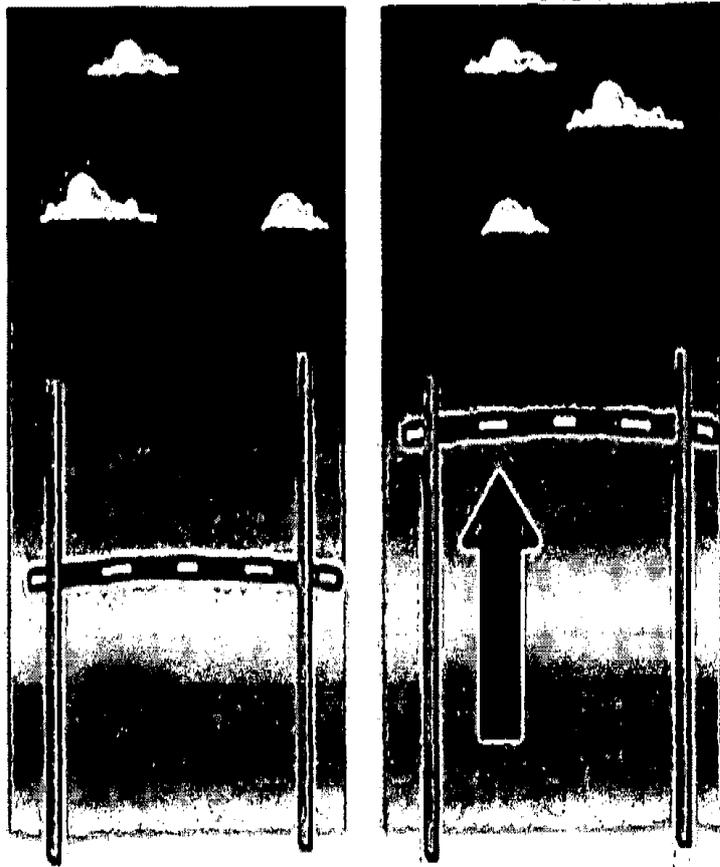
- *Urbina-Mejia v. Holder*
(6th Cir. 2010) and *Benitez
Ramos v. Holder* (7th Cir.
2009).

- * Fourth – former gang membership is immutable, remanded for application of other criteria.

- *Martinez v. Holder*,
(4th Cir. 2014).



CF/RF vs. Affirmative



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Review: Road Map for PSG Claims

Ask

Avoid

* Is there a common, immutable characteristic?

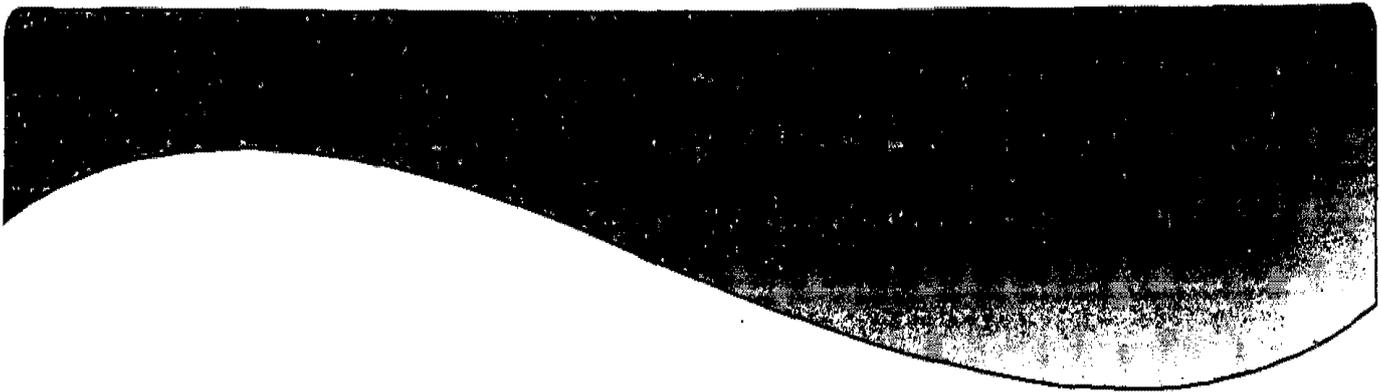
* Does the society in question distinguish people with the characteristic?

* Is the group defined with particularity?

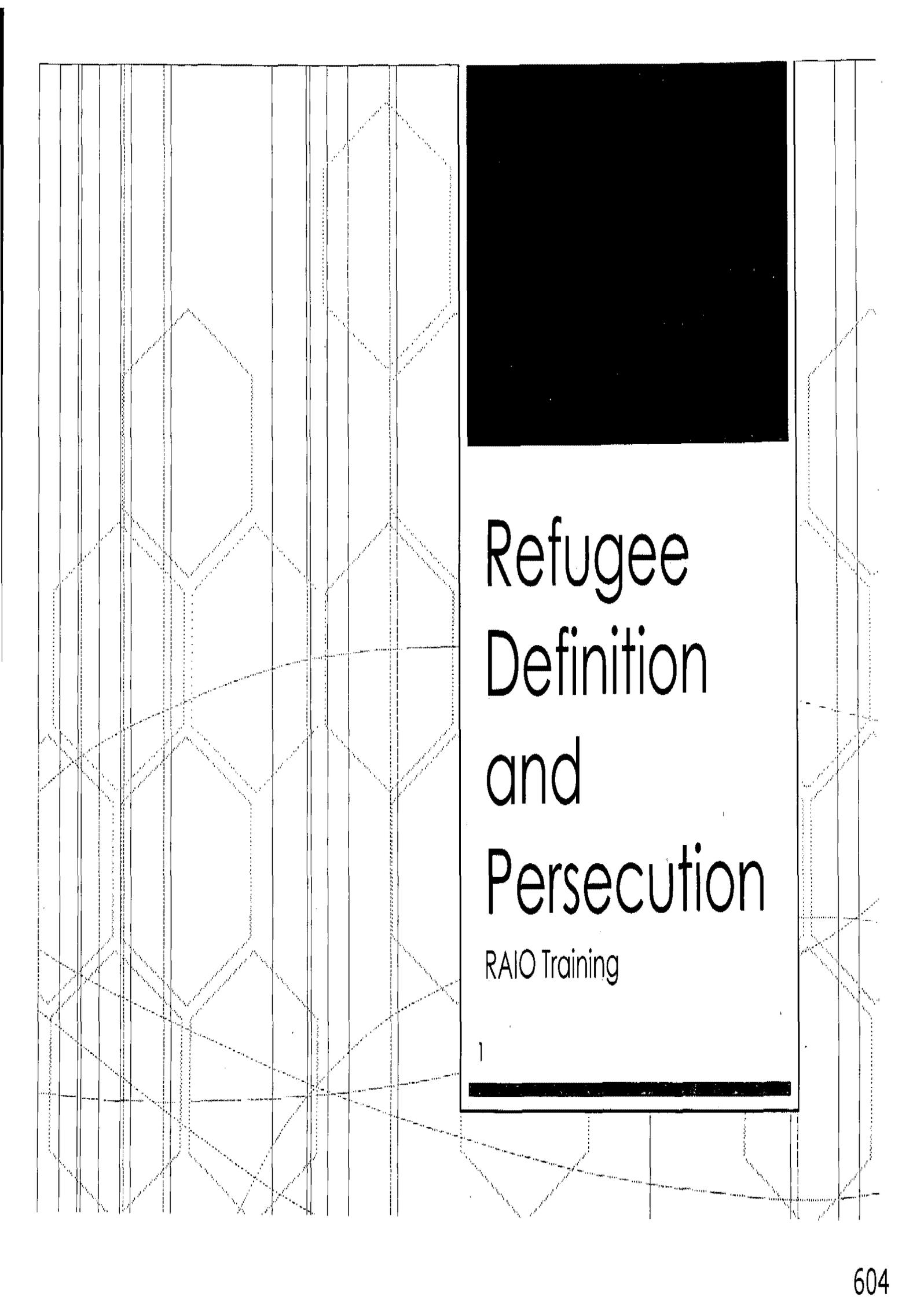
* Claims based on past criminal, terrorist or persecutory activity

* Circular reasoning





Questions?



Refugee
Definition
and
Persecution

RAIO Training

1

Agenda for Today

4 SiMPLe Components of the Legal Definition of Persecution

Seriousness

Why does this component matter?

Harm must be sufficiently serious to rise to the level of persecution- not mere harassment or discrimination.

What was the harm?

Ask yourself:

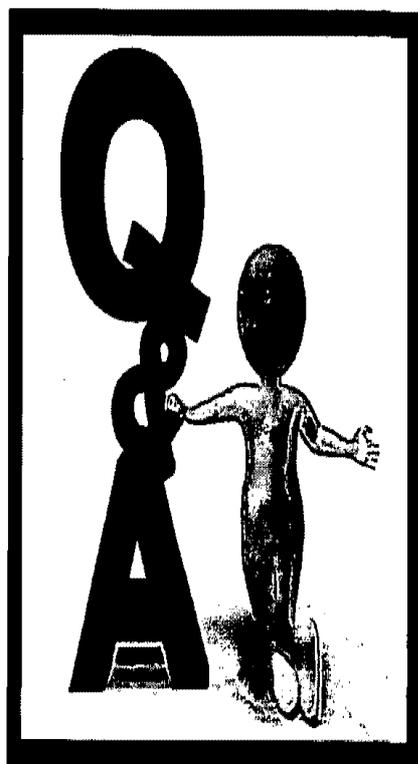
Cumulatively and taking into consideration the applicant's individual circumstances, was the harm suffered serious enough to rise to the level of persecution?

Yes No

Motivation



Agenda for Today



❖ Type answer into Q and A box

Definition of Refugee



www.google.com

**Search: Refugee vs.
Migrant**

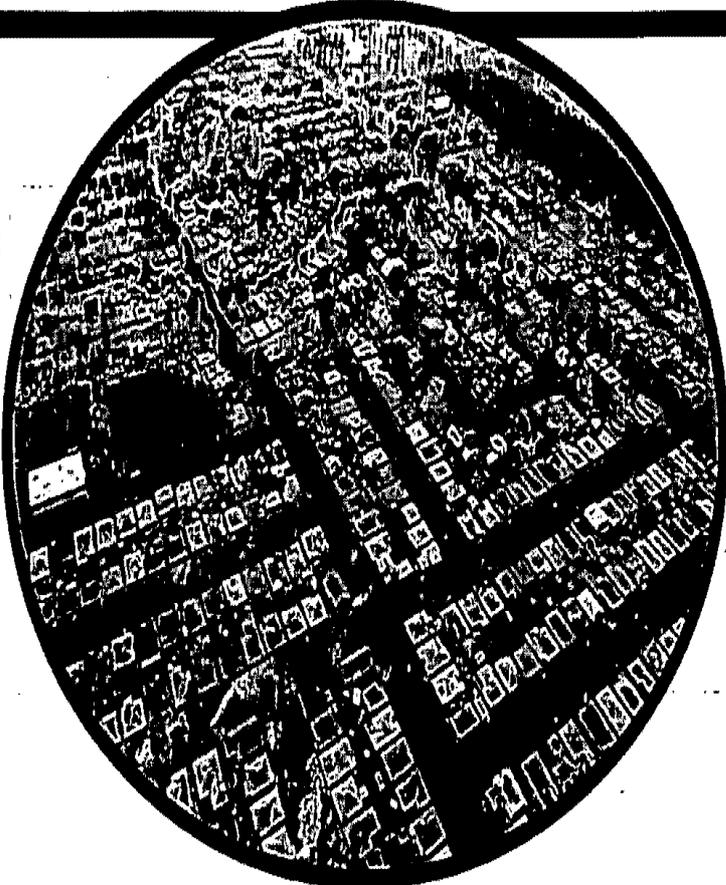
Definition of Refugee



Compare Search terms ▾

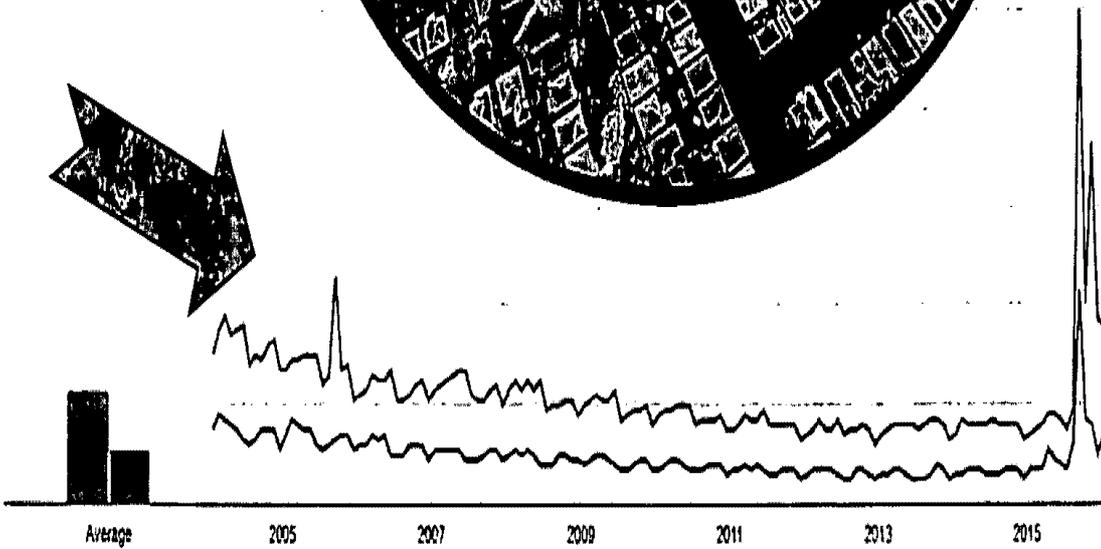
refugee
Search term

migrant
Search term

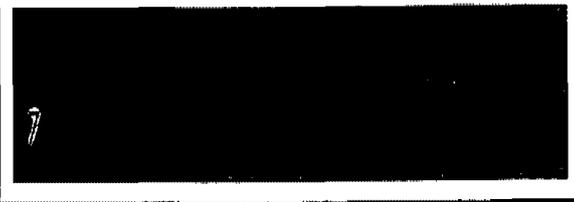


Interest over time ⓘ

Forecast ⓘ



What event caused this spike in searches for 'refugee' in Sept. 2005 ?



Definition of Refugee



1951 Convention Definition

- As a result of events occurring before 1 January 1951
- and owing to a well-founded fear of being persecuted
- for reasons of race, religion, nationality, membership of a particular social group or political opinion
- is outside the country of his nationality
- and is unable, or owing to such fear is unwilling to avail himself of the protection of that country

1951 Convention Definition

- States may interpret “events after 1 January 1951” to apply only in Europe



1967 Protocol

Removed the time and geographic limitations from Article 1

Incorporated articles 2 to 34 of Convention into Protocol

U.S. Definition



INA § 101(a)(42)

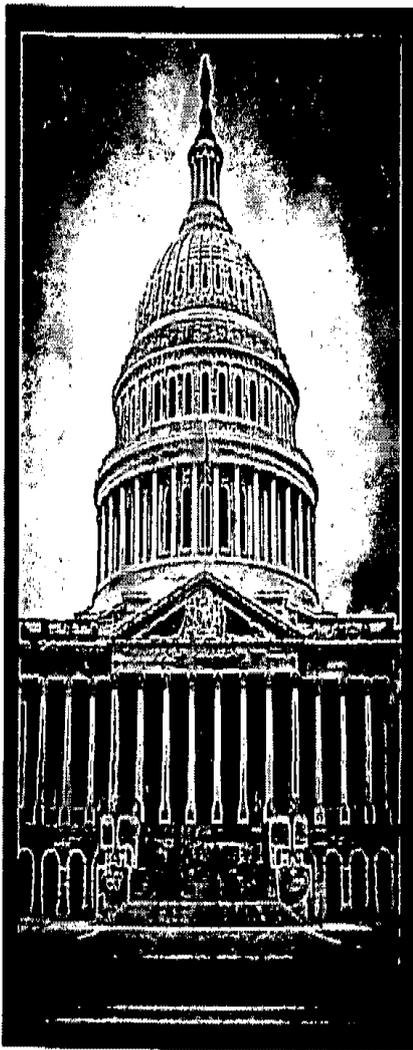
Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Plain Language Version

Any person who:

- ✓ is outside his or her country of nationality or, if stateless, his or her country of last habitual residence
- ✓ is unable or unwilling to return
- ✓ because of persecution or a well-founded fear of persecution
- ✓ on account of
- ✓ race, religion, nationality, membership in a particular social group or political opinion.

US Additions to Refugee Definition



- Past Persecution
- Location
- Coercive
Population Control
- Persecution of
Others Bar

Coercive Population Control

1. A person who has been forced to:
 - ✓ abort a pregnancy
 - ✓ undergo involuntary sterilization

2. A person who has been persecuted for:
 - ✓ failure or refusal to undergo such a procedure
 - ✓ for other resistance to a coercive population control program

Shall be deemed to have been persecuted on account of ?

Coercive Population Control

1. A person who has been forced to:

- ✓ abort a pregnancy
- ✓ undergo involuntary sterilization

2. A person who has been persecuted for:

- ✓ failure or refusal to undergo such a procedure
- ✓ for other resistance to a coercive population control program

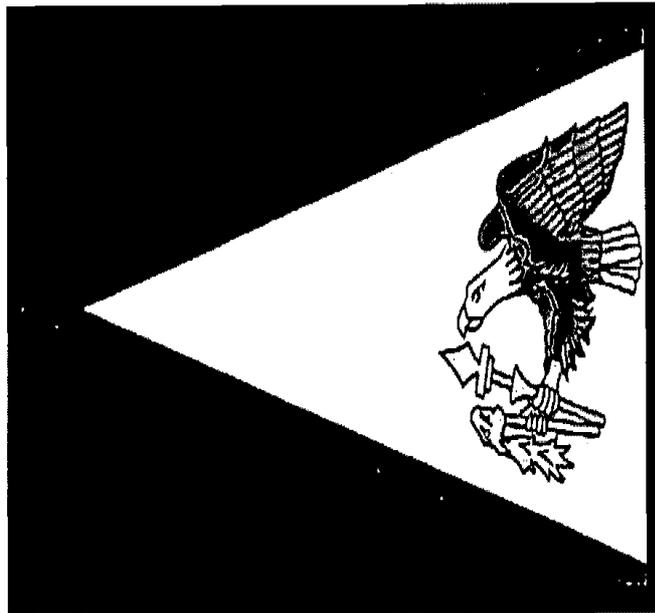
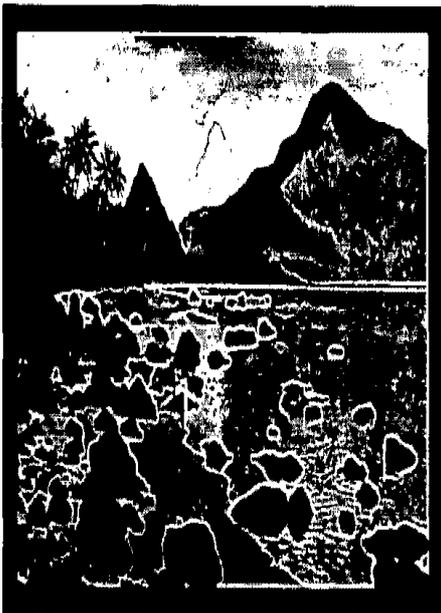
Shall be deemed to have been persecuted on account of **political opinion**.

Nationality

persecution
 INA § 101(a)(42): "...on account of race, religion, nationality, membership in a particular social group or political opinion."
 unable
 country
 nationality
 or
 person's
 a particular social group
 or political opinion."
 outside
 person
 unwilling
 particular
 herself
 group
 return
 Any
 account
 INA § 101(a)(42): "...on
 founded well
 person who is outside any
 account of race, religion,
 country of such person's
 nationality, membership in
 nationality or, in the case
 or
 person's
 a particular social group
 of a person having no
 or political opinion."
 nationality, is outside any
 opinion
 country in which such
 fear
 avail
 case
 protection
 person last habitually
 political
 resided...
 outside
 habitually
 having
 membership

Definition of "National" INA 101(a)(21)

"The term 'national' means a person owing a permanent allegiance to a state."

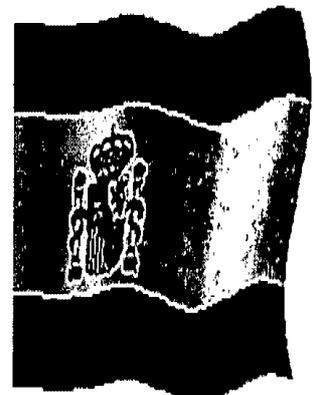


Matter of B-R-

26 I&N Dec 119 (BIA, May 3, 2013)



- o On appeal **Applicant** did not contest that he **was a native and citizen of Venezuela and a citizen of Spain** by virtue of his father's Spanish citizenship.
- o **Applicant argued** that he **only** needed to show a well-founded fear in **Venezuela**.
- o **BIA held** that refugee definition requires that applicant have a fear of persecution in **each country of citizenship or nationality**.



North Koreans



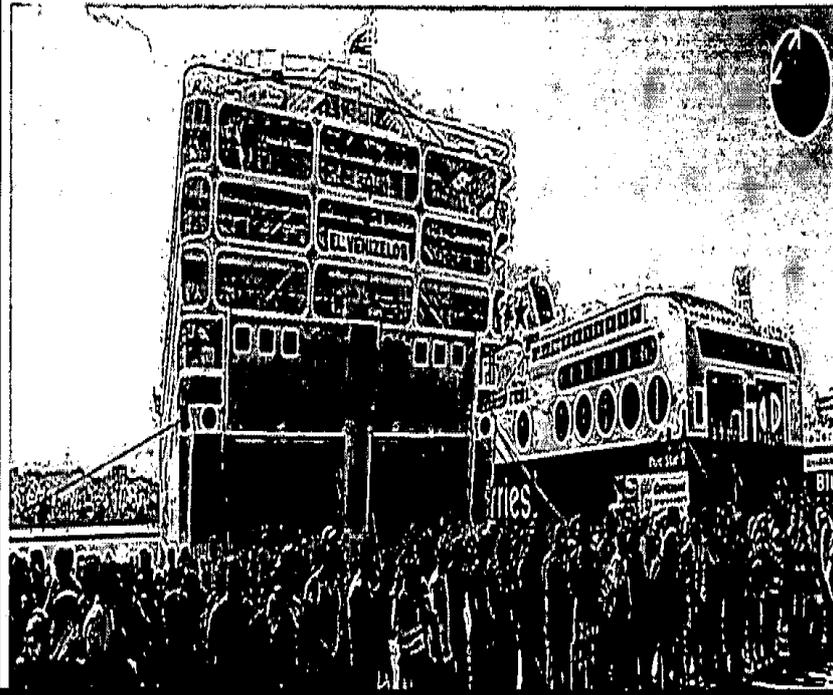
- o Even though **North Koreans** might be entitled to South Korean citizenship do **not** treat as a **dual national unless** the individual already availed himself or herself of the rights of citizenship in South Korea



Concern over burgeoning trade in fake and stolen Syrian passports

Preferential treatment Syrians receive in Germany and Sweden has turned their passports into desired documents

Def
Pas



port
n of

ence

When Mohamed paid an Afghan smuggler several hundred euros to drive him and his friends from Thessaloniki to the Greek-Macedonian border in July, he thought the money was all the smuggler would want. Instead, once on road the driver feigned a problem with the engine and persuaded the Syrians to leave the car on the pretext of avoiding detection by the police. "And then he stole our passports," said Mohamed.

Mohamed and his friends are the latest victims of a burgeoning trade in Syrian identity documents. Though most European nations have been slow to welcome more than a few Syrian refugees, the well-known preferential treatment Syrians receive within the German and Swedish asylum system has turned their passports into desired accessories for other immigrants who otherwise would not be likely qualify as refugees.

The head of the European border agency, Frontex, said this week that Arabs from outside Syria were buying counterfeit Syrian passports. Fabrice Leggeri told a French television channel that the appeal to buyers lay in how "they know Syrians get the right to asylum in all the member states of the European Union".

- Firm Resettlement

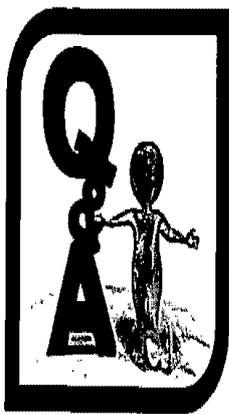
- Citizenship

Permanent residence in a country does not necessarily confer citizenship. But firm resettlement bar may apply.

Citizenship requires applicant to demonstrate persecution or well-founded fear.

Statelessness

- Definition – “a person who is **not considered a national by any State** under the operation of its law.” – Convention on Status of Stateless Persons
- Contrast with US definition of national – person owing a **permanent allegiance** to a State.



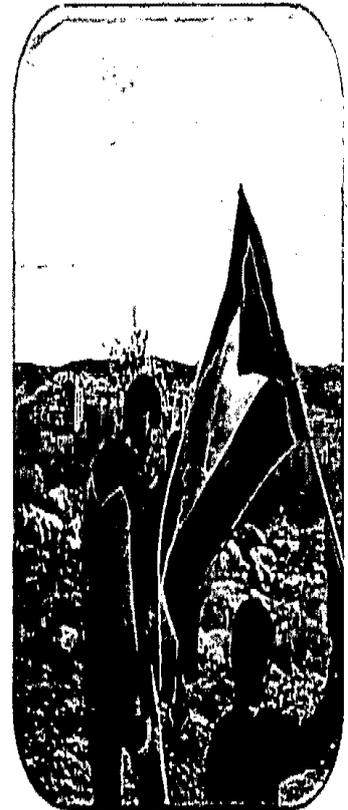
Approximately how many people worldwide are stateless?

Statelessness



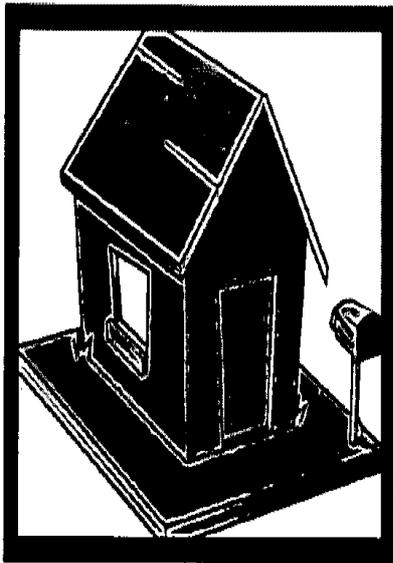
Approximately how many people worldwide are stateless?

UNHCR cannot provide definitive statistics on the number of stateless people around the world, but we estimate that **the total was up to at least 10 million**. That included 3.5 million in the 64 countries for which there were reliable statistics.



"Last Habitual Residence"

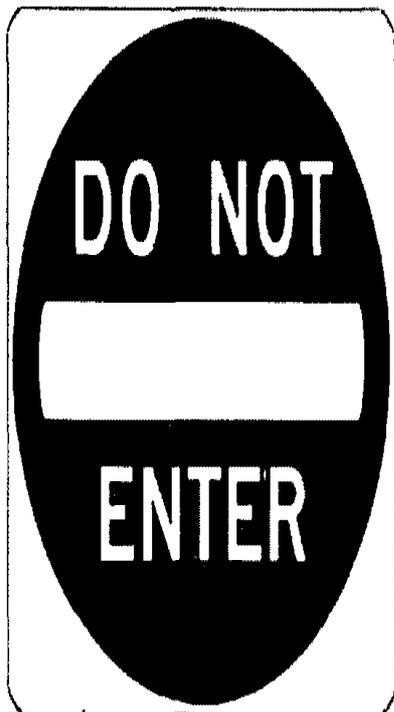
Place of General Abode



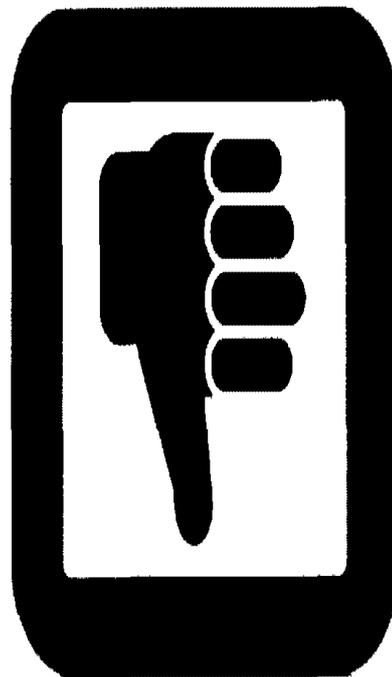
- **Principal, actual, dwelling place** in fact, without regard to intent
- Length of **time** can be a factor (Paripovic v. Gonzales)
- Can habitually reside somewhere even though **not** firmly resettled
- There is **only one country of last habitual residence** in your adjudication of a claim

Unable or Unwilling to Return

Unable

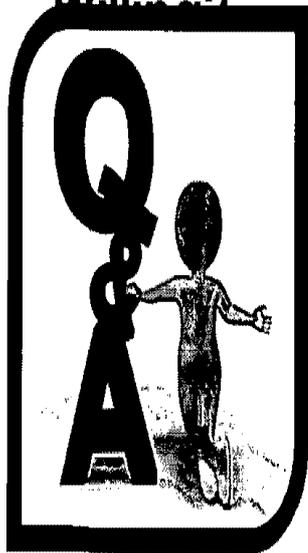


Unwilling



Return to Home Country

o Able and
willing?



Consider –

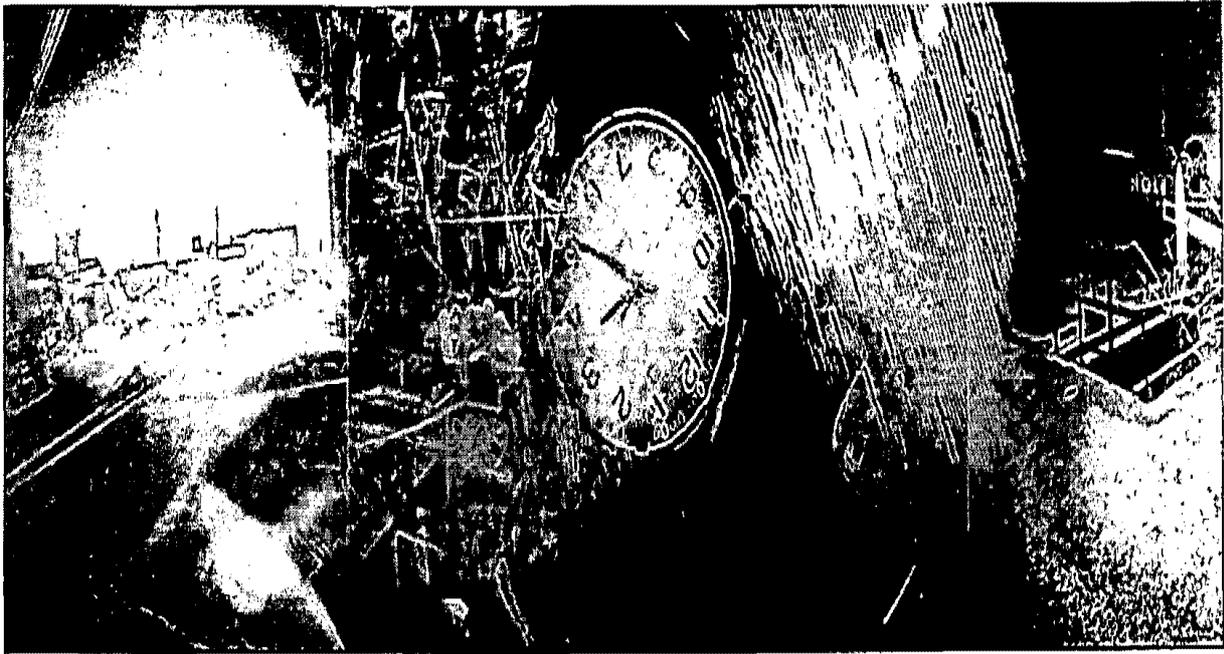
If the applicant has **left and then**

1. **Reasons for return**
returned to his or her home
2. **Country does this return**
manner of return
automatically mean the
3. **Precautions taken upon**
applicant does **not** meet the part
of the **refugee definition** that
4. **requires an applicant to be**
unwilling or unable to return?
applicant, if anything

Unable or Unwilling to Avail Oneself of Protection of Home Country

- Usually refugee request or asylum application alone is proof of being unable or unwilling

Persecution - Term of Art



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Oxford English Dictionary

***persecute*, v**

***trans.* To seek out and subject (a person, group, organization, etc.) to hostility or ill-treatment, esp. on grounds of religious faith, political belief, race, etc.; to torment; to oppress**

Etymology – from classical Latin *persequi* to seek out, to pursue, to follow with hostility or malignity, **to harass**, to chase, hunt, to examine, follow up, to go through with or persist in . . .

Legal Definition



Four Components

- Seriousness
- Motivation
- Persecutor
- Location

A Mnemonic Device – “Simple”

S *i* **M** **P** **L** *e*

Seriousness

Motivation

Persecutor

Location

Seriousness



Motivation



What must be motivating the persecutor?

Mixed Motivation

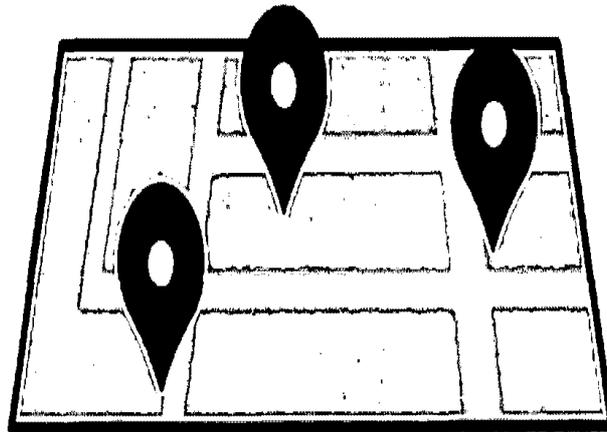


Persecutors



Who must the persecutor be?

Location



Where must the harm be suffered or feared?

Practical Exercise

- More than a decade ago, Akbar Gholami, 42, was imprisoned for 45 days in his native Iran for his political activities on behalf of Kurdish rights. Mr. Gholami has been living in Athens since 2004.
- <https://www.youtube.com/watch?v=r24q2W5yW28&index=12&list=PLD11D1DD6D2DF49F9>

Practical Exercise

- **S** – 45 day detention, beatings with heavy stick leading to a broken rib, broken skull and cut finger, psychological harm from being held in a colorless room, placed in coffin (implied death threat)
- **M** – not explicit but he states he's a member of a democratic political party. I've given it to you in the description that he was imprisoned on account of his political activities on behalf of Kurdish rights. **Nexus: Political opinion**
- **P** – Iranian government
- **L** – Iran (place of nationality)



Practical Exercise

Any person who:

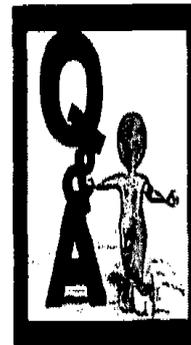
- ✓ is outside his or her country of nationality or, if stateless, his or her country of last habitual residence
- ✓ is unable or unwilling to return
- ✓ because of persecution or a well-founded fear of persecution
- ✓ on account of
- ✓ race, religion, nationality, membership in a particular social group or political opinion.

Definition of Persecution

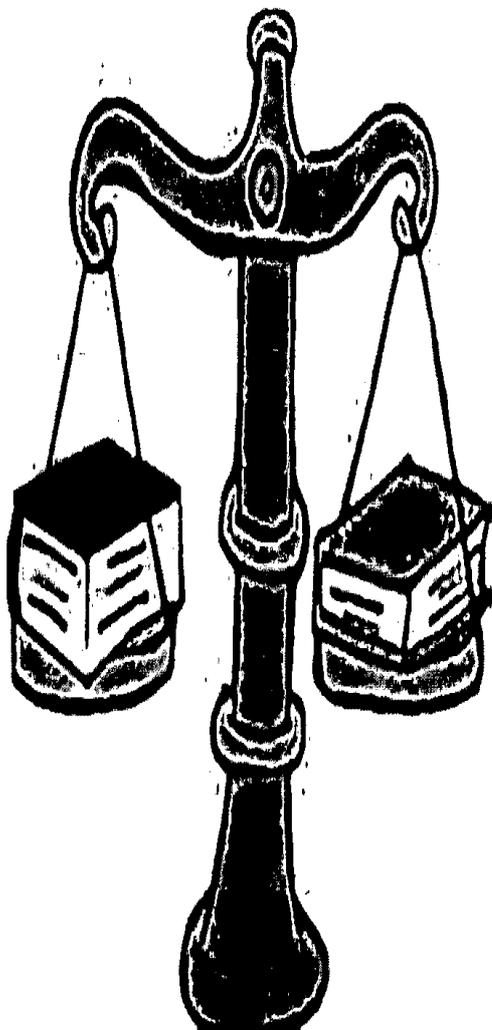
Not defined in statute: INA

Not defined in regulations:

8 CFR



**Where do we find the
definition of persecution?**



Definition of Persecution

- Supreme Court
- Federal Appellate Court Decisions
- Board of Immigration (BIA) Appeals Decisions
- Agency Guidance
- UNHCR Handbook

Matter of Acosta – "harm or suffering inflicted in order to

punish an individual for possessing a belief or characteristic."

No Intent to Harm Needed

- *Kasinga* – FGM – punitive or malignant intent not required
- *Pitcherskaia* – Electroshock treatments

“Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as ‘curing’ or ‘treating’ the victims.”

A sampling

- A threat to life or freedom or other serious violation of human rights (*UNHCR Handbook*).
- "Infliction of harm or suffering upon those who differ in a way regarded as offensive" (9th Cir., *Kovac*)
- "The use of significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force, or nonphysical harm of equal gravity" (7th Cir., *Stanojkova*)

No Set Number of Acts or Incidents Needed

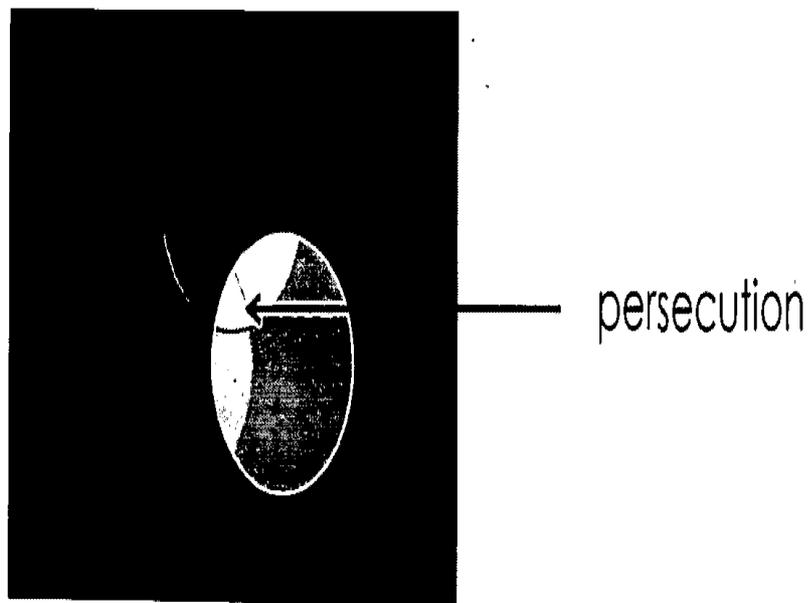
- o **One** act alone may be enough



Cumulative Effect

- Acts which separately \neq persecution, cumulatively may = persecution

(UNHCR Handbook and *Matter of O-Z- & I-Z-*)



Non-Physical Harm Can Amount to Persecution

- Severe economic disadvantage
- Deprivation of essentials of life, such as
 - Liberty
 - Food
 - Housing
 - Employment
- Psychological harm
- Inability to practice religion

Economic Harm=Persecution if

- Deliberately imposed
- Severe
- Economic disadvantage or deprivation of essentials of life
- Factors considered in *Matter of T-Z-*, included:
 - Loss of housing
 - Loss of health benefits
 - Loss of food rations
 - Confiscation of property

Psychological Harm

- Alone, may amount to persecution
- Look at psychological characteristics of applicant
- Age and past trauma suffered are relevant

Examples of mental harm amounting to torture – if caused by

- Infliction or threatened infliction of severe physical pain
- Administration or threatened administration of mind altering substances
- Threat of imminent death (e.g. mock execution = torture)
- Threat that another person will be subjected to death or physical pain or suffering / mind altering substances

Harm to a Third Person

- Harm to a third party may be intended to harm applicant emotionally
- Look to intent of persecutor

<https://www.youtube.com/watch?v=6vgVfq5HqhQ>



What was the harm suffered?

Threats Alone

To Determine if a Threat or Threats Rise to Level of Persecution, ask about:

- Nature of threat
- Attempts to act on threat
- Attempts to harm in other ways
- Harm to family or others similarly situated
- Emotional harm suffered from threats

Example

"Notice - In 48 hours all Jewish men and women must wear on the left side of their chest the Jewish star (two superimposed triangles) made of yellow cloth, each side to be 6 cm. long. Only those who don the military uniform in the service of the army are exempt./Those who are not in compliance after this date will be arrested and turned over to the police and the military command./July 4, 1941/Police chief/Sub-inspector I. Cuptor."

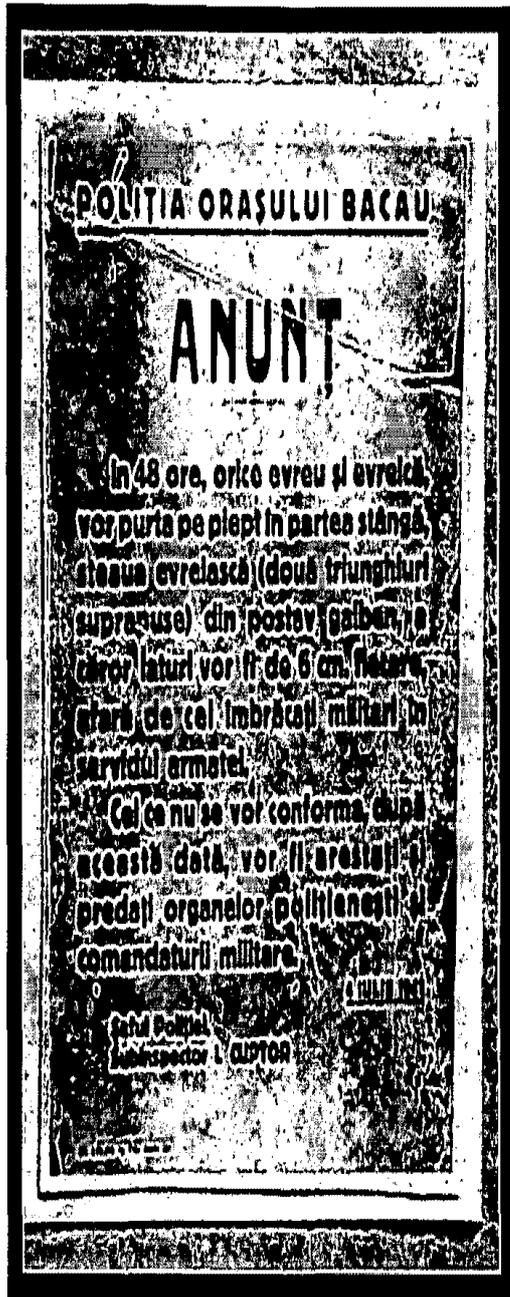


Photo Credit: US Holocaust Memorial Museum



Photo Credit: US Holocaust Memorial Museum



Photo Credit: Shah Mirai/AFP

Department of State Report, Taliban's War on Women (2001)

- "The Taliban enforced the wearing of the burqa with threats, fines, and on-the-spot beatings. Even the accidental showing of the feet or ankles was severely punished. No exceptions were allowed."

Individual Circumstances

- Age
- Feelings
- Opinions
- Physical Characteristics
- Psychological Characteristics



Photo Credit: Gabriel Galwak/IRIN

Fundamental Human Rights Violations

- Arbitrary deprivation of life
- Slavery
- Torture
- Prolonged detention without opportunity to contest grounds for detention
- Rape and other forms of severe sexual violence

Sexual Harm

- Rape
- Other Severe Forms Sexual Abuse
- Female Genital Mutilation (FGM)

Discrimination / Harassment

- May rise to level of persecution if they accumulate or increase in severity
- Consider –
 - ✓ how long did the harassment or discrimination last?
 - ✓ which human rights were affected?
 - ✓ how was the applicant affected?
 - ✓ what was the cumulative effect?
 - ✓ was there an escalation over time?

Acts of Discrimination which May Amount, Cumulatively, to Persecution

- Restrictions on right to earn livelihood
- Restrictions on education
- Interference with privacy, family, home, correspondence
- Substandard housing
- Passport denial
- Constant surveillance
- Pressure to become informer
- Confiscation of property



Photo Credit: US Holocaust Memorial Museum

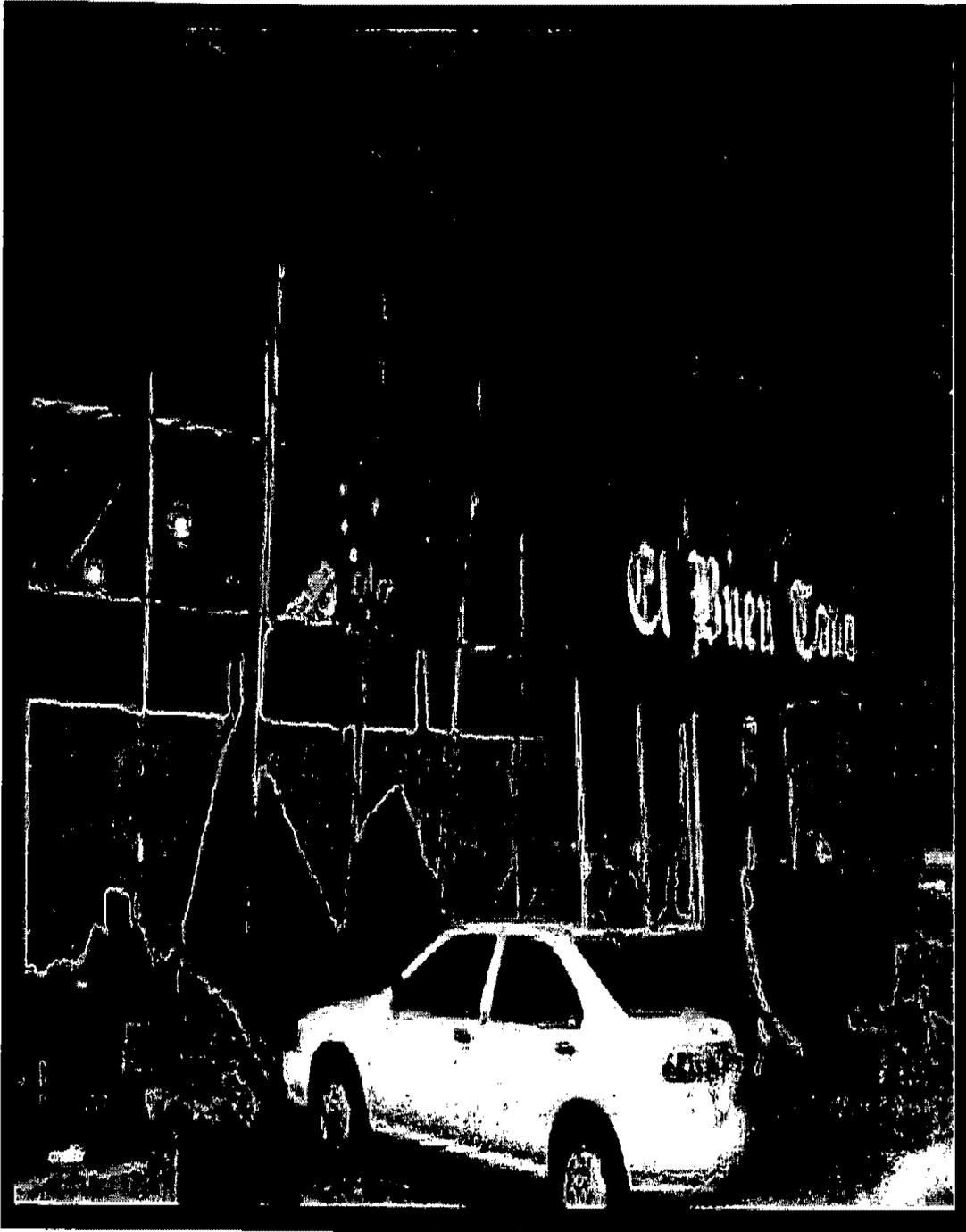


Photo Credit: Reuters

Arrests and Detention - factors

- Length of detention
- Legitimacy of government action
- Mistreatment during detention
- Judicial processes or due process rights accorded

Phommasoukha v. Gonzales (8th Cir. 2005)

Applicant served in the Laotian Royal Armed Forces from 1960 until the overthrow of the U.S.-backed Laotian government in 1975. During his service, he worked with the CIA to locate and monitor the Vietnamese.

After the overthrow, the applicant was sent to a "reeducation" camp where he was held in an underground cell, subjected to political indoctrination, required to perform forced labor, and denied contact with family or other prisoners. He was held for approximately 6 years.

Identifying the Persecutor

- Government actors
 - Must show on account of protected ground
 - Harm must rise to level of persecution
 - No need to inquire whether applicant sought protection from police
- Non-government actors
 - Gov't unable or unwilling to control
 - Look at country conditions / applicant's circumstances

Unable or Unwilling?

- Does government instigate acts?
 - Does government condone acts?
 - Is government helpless to stop acts?
- Look at –
- How widespread the actions are?
 - Any actions by law enforcement to stop the harm?

Past Persecution in Nutshell

Past persecution is a basis for asylum and refugee status – INA § 101(a)(42):

"The term "refugee" means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of **persecution** or a **well-founded fear of persecution** on account of race, religion, nationality, membership in a particular social group, or political opinion . . ."

Past Persecution

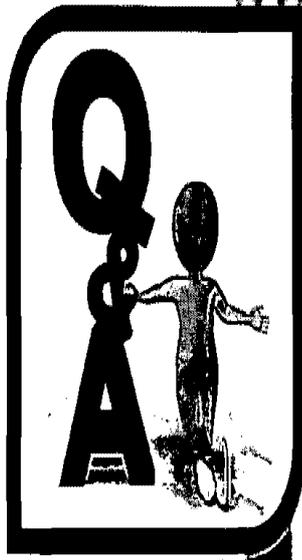
- o In **asylum** context – **rebuttable presumption of well-founded fear** – can be rebutted by **(1)** changed circumstances or **(2)** internal relocation

If no well-founded fear, exercise of discretion if

- Compelling reasons based on severity of past persecution
- Reasonable possibility of other serious harm

- o In **refugee** context – **no rebuttable presumption**, past persecution alone enough

Questions?



Please give at least one reason why people forced from their homes by Hurricane Katrina do not meet the refugee definition.

Writing Assignment – is this persecution?

- Due COB last day of RAIO CT Distance Training