



# U.S. Citizenship and Immigration Services

## RAIO DIRECTORATE – OFFICER TRAINING

### *RAIO Combined Training Course*

## REFUGEE DEFINITION

### TRAINING MODULE

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

## **REFUGEE DEFINITION**

### **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.

#### **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. Explain the elements necessary to establish that an individual is a refugee.
2. Explain eligibility issues raised by facts presented in a case.
3. Describe how to determine nationality, if any, of an applicant.

#### **INSTRUCTIONAL METHODS**

- Interactive Presentation
- Discussion
- Group and individual practical exercises

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

- Multiple-choice exam

#### **REQUIRED READING**

1. [INA §101\(a\)\(42\)](#)

[Division-Specific Required Reading - Refugee Division](#)

[Division-Specific Required Reading - Asylum Division](#)

[Division-Specific Required Reading - International Operations Division](#)

#### ADDITIONAL RESOURCES

1. [UNHCR Handbook](#)

[Division-Specific Additional Resources - Refugee Division](#)

[Division-Specific Additional Resources - Asylum Division](#)

[Division-Specific Additional Resources - International Operations Division](#)

#### CRITICAL TASKS

SOURCE: The Tasks listed below are from the Asylum Division's 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

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

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**SCHEDULE OF REVISIONS**

<b>Date</b>	<b>Section (Number and Name)</b>	<b>Brief Description of Changes</b>	<b>Made By</b>
12/12/2012	Entire Lesson Plan	Published	RAIO Trng
01/20/2015	Throughout document	Fixed links; minor edits and additions of recent case law	RAIO Trng
04/29/2016	Section 3.4 (Statelessness)	Modified to reflect OCC guidance on “last habitual residence”	RAIO Trng

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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

In order to be granted either asylum or refugee status, U.S. law requires that an applicant satisfy the definition of refugee under the Immigration and Nationality Act (INA).<sup>1</sup> This module provides an overview of the refugee definition and the legal requirements an applicant must meet in order to establish that he or she is a refugee, and is the first in a series of modules on the elements of the refugee definition.

It is important to note that while there are multiple other eligibility determinations that must be made when adjudicating claims for asylum or refugee status, both adjudications are predicated on a determination that the individual satisfies the refugee definition. These other eligibility determinations in the asylum context include, for example, the applicability of mandatory bars and the exercise of discretion. In the refugee context, a determination of admissibility and whether the applicant is of special humanitarian concern and has proper access to the U.S. Refugee Admissions Program must be made. Subsequent modules discuss these and other requirements for asylum and refugee eligibility, including:

- The definition of persecution and eligibility based on past persecution (*Definition of Persecution and Eligibility Based on Past Persecution*);
- 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 Protected Grounds and Nexus – Particular Social Group*);
- The burden of proof and evidence (*Evidence*);
- The role of discretion (*Discretion*);

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<sup>1</sup> [INA § 207](#) and [§ 208](#).

- Participation in the persecution of others on account of a protected ground (*Analyzing the Persecutor Bar*); and
- Entry into and permanent status in a third country (*Firm Resettlement*).

Additionally, for asylum adjudications, the RAIO module, *Mandatory Bars to Asylum* discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO module, *Overview of Inadmissibility Grounds, Mandatory Bars, and Waivers* discusses reasons an applicant may be inadmissible to the United States and waiver availability, and the *Access, Processing Priorities & Case Composition* module discusses available means to access the U.S. Refugee Admissions Program.

## **2 BASIC DEFINITION OF “REFUGEE”**

The INA provides that an applicant may be granted asylum or refugee status, in the exercise of discretion, if the applicant is a refugee within the meaning of section 101(a)(42) of the INA.<sup>2</sup> Therefore, a firm understanding of the definition of refugee is critical to determine whether an alien is eligible for asylum or refugee status.

### **2.1 Section 101(a)(42)(A) & (B) of the INA**

The term “refugee” as defined at INA section 101(a)(42) includes two subparagraphs—section 101(a)(42)(A) and (B). Subparagraph (A) provides the broad definition of “refugee,” whereas subparagraph (B) provides for so-called “in-country” overseas refugee processing in certain special circumstances. Specifically, under INA section 101(a)(42)(A), a refugee is:

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.<sup>3</sup>

INA section 101(a)(42)(B) provides for in-country processing under special circumstances as specified by the President for:

any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of

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<sup>2</sup> [INA § 208](#); Note that INA § 207, the statute governing the annual admission of refugees to the U.S., is written in such a way that it assumes a refugee status determination has already been made prior to the actual admission.

<sup>3</sup> [INA § 101\(a\)\(42\)\(A\)](#).

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>4</sup>

For both subparagraphs (A) and (B), the refugee definition “does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>5</sup> This exclusion from the definition is known as the “persecutor bar,” and is the subject of a separate module, *Analyzing the Persecutor Bar*.

Finally, the statute specifically includes provisions dealing with coercive population control in the refugee definition, stating:

a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.<sup>6</sup>

For more information on coercive population control claims, see ASM Supplement – Coercive Population Control in RAIO module, *Nexus and the Protected Grounds*.

## 2.2 Comparison with Convention Definition

As explained in previous modules, the U.S. definition of refugee was derived from the definition of refugee in the 1951 Convention relating to the Status of Refugees (1951 Convention, Refugee Convention, or Convention), as amended in the 1967 Protocol Relating to the Status of Refugees (1967 Protocol or Protocol). The 1951 Convention definition of refugee, as amended, is:

Any person who ... owing to 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.<sup>7</sup>

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<sup>4</sup> [INA § 101\(a\)\(42\)\(B\)](#).

<sup>5</sup> [INA § 101\(a\)\(42\)](#); [INA § 208\(b\)\(2\)](#)

<sup>6</sup> [INA § 101\(a\)\(42\)](#).

<sup>7</sup> UN General Assembly, [Convention Relating to the Status of Refugees](#), 28 July 1951, United Nations Treaty Series, Vol. 189.

While the U.S. definition of refugee, which was codified by the Refugee Act of 1980 and subsequently modified by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), is derived from the Convention definition, there are several key differences between the two. These differences are explained below.

### 2.2.1 Past Persecution

Unlike the Convention definition, which requires a well-founded fear of future persecution, inclusion in the U.S. refugee definition may be based on either past persecution or a well-founded fear of future persecution.<sup>8</sup>

The regulations implementing USCIS's discretionary authority to grant asylum, however, 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.<sup>9</sup> In order to rebut the presumption of well-founded fear, the officer must either establish that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or establish that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality. 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 they may face upon return.<sup>10</sup>

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.<sup>11</sup>

In contrast, the UN refugee definition focuses primarily on having a well-founded fear, not past persecution. The cessation clauses of the 1951 Convention, however, do provide

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<sup>8</sup> [INA § 101\(a\)\(42\)](#).

<sup>9</sup> [INA § 208](#); [INA § 101\(a\)\(42\)](#); [8 C.F.R. § 208.13\(b\)\(1\)](#).

<sup>10</sup> [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 modules, *Discretion and Definition of Persecution and Eligibility Based on Past Persecution*.

<sup>11</sup> Nonetheless, as a matter of policy, refugee officers must still elicit testimony regarding both past persecution and well-founded fear of future persecution. 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, e.g. the applicant is found not credible on past persecution, but demonstrates a credible, well-founded fear of future persecution. See RAIO Lesson Plan, *Credibility*.

that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.<sup>12</sup>

### 2.2.2 Coercive Population Control

Unlike the Convention, the INA specifically incorporates language dealing with coercive population control stating that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.”<sup>13</sup> There is no provision in the Convention definition dealing with coercive population control.

### 2.2.3 Location of Individual

Generally, to meet the Convention definition of “refugee,” an individual must be outside of his or her country of nationality or, if stateless, country of last habitual residence.<sup>14</sup>

The U.S. definition of refugee at section 101(a)(42)(B), however, permits the President to specify circumstances under which in-country refugee processing is allowed. For example, the U.S. Refugee Admissions Program conducts in-country processing of certain nationals of the former Soviet Union in Moscow, certain Cubans in Havana, Cuba, certain Iraqis in Baghdad, Iraq, and certain minors in Honduras, El Salvador, and Guatemala.<sup>15</sup> In accordance with the President’s determination, any U.S. Ambassador may also refer an individual to the program for in-country processing.<sup>16</sup>

### 2.2.4 Persecution of Others

The U.S. definition explicitly excludes from the refugee definition anyone who has participated in the persecution of others on account of a race, religion, nationality, membership in a particular social group, or political opinion.<sup>17</sup>

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<sup>12</sup> 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.

<sup>13</sup> [INA § 101\(a\)\(42\)](#). Coercive Population Control (CPC) scenarios, while possible, are less prevalent in overseas refugee processing as they are in asylum processing. For more information on coercive population control claims, see ASM Supplement – *Coercive Population Control* in RAIO module, *Nexus and the Protected Grounds*.

<sup>14</sup> [UNHCR Handbook](#), para. 88.

<sup>15</sup> In the [Presidential Determination for FY 2016 Refugee Admissions](#), in-country processing was designated for persons in Cuba, Eurasia and the Baltics, Iraq, Honduras, Guatemala, El Salvador, and, in exceptional circumstances, persons identified by a U.S. embassy in any location.

<sup>16</sup> *Id.*

<sup>17</sup> See [INA § 101\(a\)\(42\)](#). For additional information, see RAIO module, *Analyzing the Persecutor Bar*.

In contrast, the Refugee Convention excludes from refugee status any person who has “committed a crime against peace, a war crime, or a crime against humanity, as defined in international instruments.”<sup>18</sup> The United Nations High Commissioner for Refugees (UNHCR) advises that an adjudicator must first determine whether a person meets the definition of refugee and only then determine whether the person is subject to the exclusion clause as not deserving of international protection.<sup>19</sup>

### 2.3 Elements of the Refugee Definition

For asylum and refugee adjudication purposes, the following are the pertinent elements of the refugee definition:

1. Is outside his or her country of nationality (or if stateless, the country of last habitual residence), and
  - is *unable or unwilling* to return to, and
  - is unable or unwilling to avail himself or herself of the protection of the country of nationality (or if stateless, the country of last habitual residence), or
  - in the context of in-country, overseas processing, whether the applicant is a national or habitual resident within the country of processing;<sup>20</sup>
2. Because he or she
  - i. has suffered *past persecution*,
  - or
  - ii. has a *well-founded fear of persecution*;
3. *On account of* race, religion, nationality, membership in a particular social group, or political opinion.

An applicant must establish all three elements (1, 2, and 3) to meet the definition of a refugee.<sup>21</sup> The applicant can establish that he or she is a refugee by demonstrating either actual past persecution or a well-founded fear of future persecution, but does not need to establish both.<sup>22</sup>

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<sup>18</sup> UN General Assembly, [Convention Relating to the Status of Refugees](#), 28 July 1951, Article 1F(a), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

<sup>19</sup> [UNHCR Handbook](#), Chapter II – Inclusion Clauses, Chapter IV – Exclusion Clauses.

<sup>20</sup> [INA §§ 101\(a\)\(42\)\(A\) and \(B\)](#).

<sup>21</sup> [INA § 101\(a\)\(42\)\(A\)](#).

<sup>22</sup> [8 C.F.R. § 208.13\(b\)](#).

### 3 DETERMINING COUNTRY OF NATIONALITY OR, IF STATELESS, COUNTRY OF LAST HABITUAL RESIDENCE

#### 3.1 Definition of Nationality

For purposes of the first part of the refugee definition – “outside any country of such person’s nationality” – nationality, in most cases, refers to “citizenship.”<sup>23</sup>

Contrast this with the definition of “nationality” in the second part of the refugee definition – “on account of ... nationality.” In the second part of the definition, “nationality” is not to be understood only as “citizenship,” but also refers to ethnic or linguistic groups, and may overlap with the term “race.”<sup>24</sup>

The INA defines “national” as a “person owing permanent allegiance to a state.”<sup>25</sup> The U.S. Court of Appeals for the Second Circuit has noted that “[n]ationality is a status conferred by a state, and will generally be recognized by other states provided it is supported by a ‘genuine link’ between the individual and the conferring state.”<sup>26</sup>

#### 3.2 Identifying Nationality

##### 3.2.1 Passports

###### Presumption of Nationality

Possession of a passport creates a presumption that the holder is a national of that country, unless the passport states otherwise.<sup>27</sup>

###### Overcoming the Presumption of Nationality

There may be reliable information that a travel document or passport does not establish nationality, but is a so-called “passport of convenience.”<sup>28</sup> You must consider the circumstances under which the applicant obtained the passport and available information on whether a country issues passports to non-nationals. Some countries have issued passports to non-nationals for the sole purpose of allowing these individuals to leave the country issuing the passport. Some applicants have obtained passports through misrepresentation or payment of bribes.

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<sup>23</sup> [UNHCR Handbook](#), para. 87.

<sup>24</sup> [UNHCR Handbook](#), para. 74.; see also, RAI0 module, *Nexus and the Five Protected Grounds*, (section on *Nationality*).

<sup>25</sup> [INA § 101\(a\)\(21\)](#).

<sup>26</sup> *Dhoumo v. BIA*, 416 F.3d 172, 175 (2d Cir. 2005).

<sup>27</sup> [UNHCR Handbook](#), para. 93.

<sup>28</sup> *Id.*

The presumption of nationality may be rebutted by, for example, an assertion that a passport is a travel document only, combined with information from the issuing country that it has issued such passports to non-nationals for travel purposes only. If information from the issuing authority cannot be obtained, the applicant's consistent and detailed explanation of the circumstances could rebut the presumption of nationality established by the passport.<sup>29</sup>

When determining whether the presumption of citizenship created by the presentation of a passport is overcome, you must weigh all of the available evidence, including the applicant's testimony.<sup>30</sup>

### 3.2.2 Inability to Establish Nationality

An applicant is not required to establish nationality in order to be eligible for asylum or refugee status, but the issue of the applicant's nationality is a threshold matter that you must address.<sup>31</sup> Documentary evidence is not necessarily required for an applicant's nationality to be established; in some circumstances, you may find the applicant's credible testimony alone to be sufficient to resolve this issue.<sup>32</sup> If nationality cannot be clearly established, you should determine asylum or refugee status based on the country of the applicant's last habitual residence. See the [discussion of statelessness](#), below.

There is no precedent case law directly on point describing the standard of proof required to establish nationality. The UNHCR Handbook indicates that when an applicant cannot clearly establish his or her nationality, the country of his or her former habitual residence must be taken into account.<sup>33</sup> UNHCR does not appear to be speaking to a standard of proof in this paragraph, but to the issue of analyzing well-founded fear of a person who cannot clearly establish his or her nationality.

In general, the evidentiary standard to establish a fact in asylum and refugee adjudications is preponderance of the evidence. If the adjudicator finds upon consideration of all available evidence that it is more likely than not that a fact is true, then the fact is established. Therefore, for purposes of asylum and refugee adjudications, nationality must be established by a preponderance of the evidence.

## 3.3 Multiple Nationality

### 3.3.1 Eligibility

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<sup>29</sup> *Id.*

<sup>30</sup> See *Palavra v. INS*, 287 F.3d 690, 694 (8th Cir. 2002).

<sup>31</sup> See *Dulane v. INS*, 46 F.3d 988 (10th Cir. 1995); *Wangchuck v. DHS*, 448 F.3d 524, 528 (2d Cir. 2006).

<sup>32</sup> *Urgen v. Holder*, 768 F.3d 269, 273 (2d Cir. 2014).

<sup>33</sup> [UNHCR Handbook](#), para. 89.

The refugee definition provides that the applicant must be unable or unwilling to return to “any country of such person’s nationality ... ”<sup>34</sup> A dual citizen must establish persecution or a well-founded fear of persecution in both countries of nationality to be eligible for asylum or refugee status.<sup>35</sup>

You must evaluate asylum or refugee eligibility with respect to any country of which the applicant is a citizen<sup>36</sup> or national.<sup>37</sup>

For example, an applicant is a citizen of country X and lived there from birth until coming to the United States. She is a citizen of country Y through her mother. To be eligible for asylum or refugee status, she would need to establish persecution or a well-founded fear of persecution in both country X and country Y.

### **3.3.2 Distinction between Issue of Multiple Nationality and Firm Resettlement**

An applicant may have resided in a third country before entering the United States, but after fleeing his or her country of nationality. Residence alone does not necessarily confer citizenship or nationality.

Permanent residence in a third country may indicate that the applicant was firmly resettled in that country. Firm resettlement is a bar to asylum and to refugee resettlement and is a distinct issue from multiple nationality.<sup>38</sup>

### **3.3.3 Citizens of North Korea**

Section 302 of the North Korean Human Rights Act provides that asylum applicants from North Korea are not ineligible for asylum in the United States on account of “any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea.”<sup>39</sup> Based on this law, you may not treat a citizen of North Korea as a dual national of South Korea, unless the applicant is a former North Korean citizen who has already availed him or herself of the rights of citizenship in South Korea.

## **3.4 Statelessness**

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<sup>34</sup> [INA § 101\(a\)\(42\)\(A\)](#); UN General Assembly, [Convention Relating to the Status of Refugees](#), 28 July 1951, Article I A(2); [UNHCR Handbook](#), para. 106.

<sup>35</sup> [Matter of B-R-](#), 26 I&N Dec. 119 (BIA 2013) (holding that a dual citizen of Venezuela and Spain could not meet the definition of a refugee where he had no fear of persecution in Spain).

<sup>36</sup> [UNHCR Handbook](#), para. 106.

<sup>37</sup> [INA § 101\(a\)\(21\)](#).

<sup>38</sup> For additional information, see RAIO module, *Firm Resettlement*.

<sup>39</sup> [North Korean Human Rights Act of 2004](#), H.R. 4011, P.L. 108-333 (Oct. 18, 2004), 118 Stat. 1287; and Memorandum from Joseph E. Langlois, Director, USCIS Asylum Division, to Asylum Office Directors, et al., [North Korean Human Rights Act of 2004](#), (HQASM 120/9) (22 October 2004).

If stateless, the applicant must establish persecution or a well-founded fear of persecution in the country of his or her last habitual residence.<sup>40</sup> The fact that an applicant is stateless is not itself sufficient to establish eligibility for asylum or refugee status.<sup>41</sup> On the other hand, if a state divests an applicant of citizenship and renders him or her stateless on account of a protected ground, the applicant's denaturalization may constitute persecution in some circumstances.<sup>42</sup>

### 3.4.1 Definition

The UN has defined "stateless person" as "a person who is not considered as a national by any State under the operation of its law."<sup>43</sup> The INA defines "national" as a person owing permanent allegiance to a State.<sup>44</sup> Both definitions should be considered when determining whether an individual is stateless for purposes of the asylum or refugee adjudication. Even if the applicant believes he or she owes allegiance to a State, if the State does not consider the applicant to be a national of that State, the applicant should be considered stateless.

### 3.4.2 Country Where Applicant Last Habitually Resided

#### General Definition

The INA does not define "last habitually resided" for purposes of asylum or refugee eligibility, and there is little case law discussing how to determine an applicant's last habitual residence. When you encounter a stateless applicant, you must determine the country of last habitual residence by considering relevant factors that may vary depending on the context and the facts of the case before you. ."

#### Determining the Country of Last Habitual Residence

A stateless person may have formerly resided in more than one country and may fear persecution in more than one of those countries.<sup>45</sup> However, eligibility for asylum or refugee status should be analyzed based on the country of last habitual residence only.<sup>46</sup> There can only be one country of last habitual residence. There is no case law addressing

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<sup>40</sup> [INA § 101\(a\)\(42\)](#).

<sup>41</sup> [Agha v. Holder](#), 743 F.3d 609, 618 (8th Cir. 2014); [Ahmed v. Keisler](#), 504 F.3d 1183, 1191 n.5 (9th Cir. 2007); [Najjar v. Ashcroft](#), 257 F.3d 1262, 1293 (11th Cir. 2001); [Ahmed v. Ashcroft](#), 341 F.3d 214, 218 (3d Cir. 2003); [UNHCR Handbook](#), para. 102.

<sup>42</sup> [Stserba v. Holder](#), 646 F.3d 964, 973 (6th Cir. 2011); [Haile v. Holder](#), 591 F.3d 572, 574 (7th Cir. 2010).

<sup>43</sup> UN General Assembly, [Convention Relating to the Status of Stateless Persons](#), Article I, para. 1, United Nations Treaty Series, No. 5158, Vol. 360.

<sup>44</sup> [INA § 101\(a\)\(21\)](#).

<sup>45</sup> [UNHCR Handbook](#), para. 104.

<sup>46</sup> [INA § 101\(a\)\(42\)](#).

the issue of how the refugee definition should be applied to stateless individuals who last habitually resided in territories that are not part of any recognized state (such as the West Bank, the Gaza Strip, or Western Sahara), but some courts have assumed without deciding that these claims should be analyzed by treating those territories as places of last habitual residence.<sup>47</sup>

In *Paripovic v. Gonzales*, one of the only precedent decisions addressing the issue of last habitual residence, the U.S. Court of Appeals for the Third Circuit considered an Immigration Judge's (IJ's) determination that a stateless asylum applicant last habitually resided in Serbia, where he had lived in a refugee camp for two years. The Court held that the IJ could apply INA § 101(a)(33), which defines "residence" as "the place of general abode; the ... principal, actual dwelling place in fact, without regard to intent" in the asylum context.<sup>48</sup> The Court also upheld the IJ's conclusion that the fact that the applicant did not intend to reside in the Serbian camp was not relevant in determining his country of last habitual residence.<sup>49</sup> Finally, the Court held that it was permissible for the IJ to consider the amount of time the applicant spent in Serbia in determining whether his residence there was "habitual." The Court therefore concluded that substantial evidence supported the IJ's determination that the applicant had last habitually resided in Serbia given that he had resided there, in a semi-permanent dwelling, for two years.<sup>50</sup>

The Court in *Paripovic* held that length of stay is an appropriate factor to consider in determining the applicant's country of last habitual residence.<sup>51</sup> This factor, however, may not always be the primary consideration in the analysis. The Court suggested that the nature of the applicant's stay may also be an important factor, indicating that if the applicant had been forced to stay in the country, his residence there would not have been "habitual."<sup>52</sup>

In the refugee processing context, the country of last habitual residence is usually determined to be the country from which the stateless applicant fled. The analysis may be more complicated, however, for stateless applicants born in refugee camps or in protracted urban refugee situations to parents who fled their countries of origin before their children's birth. For some stateless refugee populations, USCIS has determined that for discrete groups of stateless applicants who share a common history of last habitual

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<sup>47</sup> See, e.g.,; [Al Yatim v. Mukasey](#), 531 F.3d 584, 588 (8th Cir. 2008); [Jabr v. Holder](#), 711 F.3d 835, 838 (7th Cir. 2013).

<sup>48</sup> [INA § 101\(a\)\(33\)](#); see also [8 C.F.R. § 214.7\(a\)\(4\)\(i\)](#) (definition of habitual residence in the territories and possessions of the United States).

<sup>49</sup> [Paripovic v. Gonzales](#), 418 F.3d 240, 245 (3d Cir. 2005).

<sup>50</sup> *Id.*

<sup>51</sup> [Paripovic v. Gonzales](#), 418 F.3d 240, 245 (3d Cir. 2005).

<sup>52</sup> *Id.*

residence in a given country, that country may be found to be their country of last habitual residence by virtue of their membership in the group even individual applicants never personally resided there.<sup>53</sup>

### *Example*

A Bhutanese couple of Nepali ethnic origin fled persecution in Bhutan and entered Nepal in 1992. Their daughter, born in a refugee camp in Nepal in 1993, is stateless. She applied for refugee status in the United States in 2015. Because the stateless applicant is a member of a group – Bhutanese of Nepali ethnic origin – with a common history of residence in Bhutan, her country of last habitual residence is Bhutan<sup>54</sup>.

### **No Requirement of Firm Resettlement**

Last habitual residence is distinct from firm resettlement. An applicant may have habitually resided in a country, even if he or she has not been firmly resettled there.

### *Example*

A Palestinian born in the Israeli-occupied territories, who then moved to Kuwait where he worked legally but did not receive permanent residency rights, is stateless and the country of last habitual residence is Kuwait.

### **Case-by-Case Determination**

When the country of last habitual residence is not readily apparent, you should consult your supervisor. If your supervisor cannot provide an answer, the supervisor may contact Asylum HQ Quality Assurance or RAD Policy and Regional Operations if the issue requires further review.

## **4 UNABLE OR UNWILLING TO RETURN**

### **4.1 General Principles**

To meet the requirements of the refugee definition, the asylum or refugee status applicant must establish that he or she is unable or unwilling to return to his or her country because of past or feared persecution.<sup>55</sup> In most cases, the fact that the applicant applied for asylum or refugee status is evidence that the applicant is unwilling to return to that country.

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<sup>53</sup> See Memorandum from Molly Groom, Chief, Refugee and Asylum Law Division, Office of Chief Counsel, to Joseph Langlois, Associate Director, RAI0, “[Last Habitual Residence for Stateless Refugee Applicants](#)” (February 4, 2015).

<sup>54</sup> *Id.* at 1-2.

<sup>55</sup> [INA § 101\(a\)\(42\)](#).

There may be cases in which the applicant is willing to return, despite a risk, but is unable to do so. For example, the applicant may be stateless and the country of last habitual residence will not allow the applicant to return, or the country may have denied the applicant travel documents or refused to renew a passport and therefore the applicant cannot return.

## **4.2 Return to Country of Past or Feared Persecution**

An asylum or refugee applicant's return to a country of persecution or feared persecution may indicate that the applicant is willing and able to return, but does not in and of itself preclude establishment of eligibility.<sup>56</sup> You must evaluate the reasons that motivated the applicant's temporary visit, the circumstances surrounding that visit, any problems or lack of problems the applicant faced upon return, and any precautions the applicant took to determine if the applicant is unable or unwilling to return.

### **4.2.1 Does Return Indicate that the Applicant Is Able and Willing to Return?**

In evaluating whether an applicant's return to the country of claimed persecution may indicate that he or she is both willing and able to return, you must first consider the reason for the applicant's return. Circumstances may have compelled the applicant's return. For example, one of the applicant's immediate family members may have died or may have been in a grave situation that compelled the applicant to return. The applicant remained unwilling to return, but the death or illness compelled him or her to return. During the interview, you must elicit and evaluate information concerning the applicant's reasons for return and any precautions the applicant took to avoid harm. You should not conclude that a return due to compelling factors establishes that the applicant is able and willing to return.<sup>57</sup> [[ASM Supplement – 1](#)]

### **4.2.2 What Happened when the Applicant Returned?**

You must also elicit information to determine if harm or threats occurred after the applicant returned to the country of claimed persecution, if the applicant took precautions to avoid harm, or if circumstances have subsequently occurred that put the applicant at risk. Subsequent harm, threats, or risk, may establish that the applicant, while willing and able to return for the last visit, is no longer willing and able to return.<sup>58</sup>

## **5 UNABLE OR UNWILLING TO AVAIL ONESELF OF PROTECTION**

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<sup>56</sup> [8 C.F.R. § 208.8\(b\)](#).

<sup>57</sup> *De Santamaria v. US Att'y Gen.*, 525 F.3d 999 (11th Cir. 2008) (applicant who returned to Colombia to continue philanthropic and political activities and to be with her family was found eligible for asylum).

<sup>58</sup> For additional information, see RAIO module, *Well-Founded Fear*.

In most cases, an individual's application for asylum or refugee status is sufficient proof that he or she is unwilling to seek protection in the country from which he or she fled.<sup>59</sup> The definition of refugee requires that a refugee be unable *or* unwilling to avail him or herself of protection. An applicant is not required to prove both. Either proof of being unable or proof of being unwilling is sufficient for this part of the refugee definition.

Note that whether an applicant is unable or unwilling to avail himself or herself of the protection of the country from which he or she fled could be important to determining whether it would be reasonable for the applicant to internally relocate within that country. Whether there is a reasonable internal relocation option relates to whether the applicant has a well-founded fear of persecution and is discussed in the RAIO module, *Well-Founded Fear*.<sup>60</sup>

This concludes the basic overview of the refugee definition. Subsequent lessons on Past Persecution, Well-Founded Fear, Nexus, and the Persecutor Bar will delve further into the refugee definition, providing advanced instruction on the remaining elements of the refugee definition.

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<sup>59</sup> For additional information, see RAIO module, *Definition of Persecution and Eligibility Based on Past Persecution*, (section on *Identifying a Persecutor*).

<sup>60</sup> For additional information, see RAIO module, *Well-Founded Fear*, (section on *Internal Relocation*).

**PRACTICAL EXERCISES**

[**NOTE:** If there are no practical exercises, state “There are no Practical Exercises for this module.” If there is only one practical exercise, do not number it.]

**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**

<p style="text-align: center;"><b><u>RAD Supplement</u></b></p> <p style="text-align: center;"><b>Module Section Subheading</b></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 Training Module referenced in the subheading of the supplement text box.

#### REQUIRED READING

1. [8 CFR § 208.13](#)

#### ADDITIONAL RESOURCES

1. Memorandum from Joseph E. Langlois, Director, USCIS Asylum Division, to Asylum Office Directors, et al., [North Korean Human Rights Act of 2004](#), (HQASM 120/9) (22 October 2004).
2. 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).
3. 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).
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

#### **Does Return Indicate that the Applicant is Able and Willing to Return?**

##### **8 C.F.R. § 208.8(a) and (b):**

Procedurally, asylum applicants who leave the United States without first obtaining advance parole [a type of re-entry document] are presumed to have abandoned their asylum applications. 8 C.F.R. § 208.8(a).

Asylum applicants who leave the United States with advance parole documents, but who return to their country of claimed persecution, are presumed to have abandoned their asylum application absent "compelling reasons" for their return. 8 C.F.R. § 208.8(b).

An applicant can overcome the presumption of abandonment by a preponderance of the evidence indicating that he or she did not abandon the asylum application. Appearance at the asylum office by an applicant, generally, is substantial evidence that he or she has not abandoned his or her asylum application. This factor must be weighed along with other evidence relating to the reasons for the return and events that occurred during the return.

For applicants who leave the United States without advance parole documents, the presumption of abandonment is rebuttable. Applicants who leave the United States with advance parole documents and return to their country of claimed persecution may overcome the presumption of abandonment if there are compelling reasons for the applicant's return to that country.

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 or her country could be the basis for a new claim.

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.

**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;"><b><u>IO Supplement</u></b></p> <p style="text-align: center;"><b>Module Section Subheading</b></p>
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