U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Refugee, Asylum, and International Operations Directorate
Washington, DC 20529

U.S. Citizenship and Immigration Services

FEB 13 2017

HQRAIO 120/9.15b
HQRAIO 120/12.16b

Memorandum

TO: All Asylum Office Personnel

FROM: John Lafferty
Chief, Asylum Division

SUBJECT: Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans, *Credible Fear of Persecution and Torture Determinations*, and *Reasonable Fear of Persecution and Torture Determinations*

This memorandum announces the release of updated versions of the ADOTC Lesson Plans, *Credible Fear of Persecution and Torture Determinations*, and *Reasonable Fear of Persecution and Torture Determinations*.

The ADOTC lesson plans on credible fear and reasonable fear screenings have been revised, consistent with Executive Order 13767 of January 25, 2017, Border Security and Immigration Enforcement Improvements. Executive Summaries, included as attachments, describe the changes made to the Credible Fear Lesson Plan and the Reasonable Fear Lesson Plan.

Asylum Offices shall train all relevant staff on the revised lesson plans as soon as practicable, but no later than February 28, 2017. The lesson plans will be effective as of February 27, and will be used at ADOTC and other Asylum Division trainings.

If you have any questions, please contact the Asylum Division Quality Assurance Branch Chief and/or email the Asylum QA – Credible Fear mailbox or Asylum QA – Reasonable Fear mailbox.

Attachments:

1. ADOTC Lesson Plan, *Credible Fear of Persecution and Torture Determinations*.
2. ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations*.
3. Executive Summary of Changes to the Credible Fear Lesson Plan.
4. Executive Summary of Changes to the Reasonable Fear Lesson Plan.

Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Credible Fear of Persecution and Torture Determinations***
Rev. Date	February 13, 2017; *Effective as of Feb 27, 2017.*
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 statutory provisions, regulations, policies, and procedures that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.
Enabling Performance Objectives	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 *Convention Against Torture* 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 *Convention Against Torture* 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); 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*, (February 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 January 4, 2010).

11. Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 4769 (January 17, 2017).

12. Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (January 17, 2017).

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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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 § 235(b)(1)(A); 8 C.F.R. § 208.30.

INA. Pursuant to 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.

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

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.

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

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); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or*

Arriving by Sea, 82 Fed. Reg. 8431 (Jan. 25, 2017).

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.6. 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); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 8431 (Jan. 25, 2017).

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); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in*

Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 8431 (Jan. 25, 2017).

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

While Cuban citizens and nationals were previously exempt from expedited removal, the regulations at 8 C.F.R. § 235.3(b)(1)(i) were modified to remove the exemption. *See* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 4769 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 8353 (Jan. 25, 2017).

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. Persons granted asylum status under INA section 208

   8 C.F.R. § 235.3(b)(5)(iii).

3. Persons admitted to the United States as refugees under INA section 207

   8 C.F.R. § 235.3(b)(5)(iii).

   8 C.F.R. § 235.3(b)(5)(ii).

4. Persons admitted to the United States as lawful permanent residents

5. Persons paroled into the United States prior to April 1, 1997

6. 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

7. Persons denied admission on charges other than or in addition to INA Section 212(a)(6)(C) or 212(a)(7)

8. Persons applying for admission under INA Section 217, Visa Waiver Program for Certain Visitors ("VWP")

   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.

9. 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. § 235.3(b)(3).

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), 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: Apr. 28, 2000).

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.

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.

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

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 in the United States 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).

   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).

c. On January 17, 2017, DHS published a notice to apply the November 13, 2002 expanded application of expedited removal, and the August 11, 2004 expanded application of expedited removal, to Cuban citizens and nationals, who had previously been exempt.

Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 8431 (Jan. 25, 2017).

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.

INA § 235(b)(1)(B)(iii)(IV).

8 C.F.R. § 235.3(b)(2)(iii).

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

Bo Cooper, *Procedures for Expedited Removal and Asylum Screening under the Illegal Immigration Reform and Immigrant*

through the expedited process."

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 RAIO 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.

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

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."

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).

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.**

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

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.

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. Cir. 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, including when there is reasonable doubt regarding the outcome of a credible fear determination.

3. 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.

8 C.F.R. § 208.30(e)(4).

4. 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

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

D. Identity

The applicant must be able to credibly establish his or her identity by a preponderance of the evidence. In many cases, an applicant will not have documentary proof of identity or nationality. However, credible testimony alone can establish identity and nationality. Documents such as birth certificates and passports are accepted into evidence if available. The

See RAIO Training Module, *Refugee Definition.*

officer may also consider information provided by ICE or Customs and Border Protection (CBP).

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).

The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

United States v. Cortez, 449 U.S. 411, 417 (1981).

The U.S. Supreme Court has held that to properly consider the totality of the circumstances, "the whole picture... must be taken into account." The Board of Immigration Appeals (BIA) has interpreted this to include taking into account the whole of the applicant's testimony as well as the individual circumstances of each applicant.

See RAIO Training Module, *Credibility*; *see also Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995); *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

B. Evaluating Credibility in a Credible Fear Interview

1. General Considerations

See RAIO Training Module, *Credibility*.

   a. The asylum officer must gather sufficient information to determine whether the alien has a credible fear of persecution or torture. The applicant's credibility should be evaluated (1) only after all information is elicited and (2) in light of "the totality of the circumstances, and all relevant factors."

   b. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The asylum officer's personal opinions or moral views regarding an applicant should not affect the officer's decision.

   c. The applicant's ability or inability to provide detailed descriptions of the main points of the claim is critical to the credibility evaluation. The applicant's willingness and ability to provide those descriptions

may be directly related to the asylum officer's skill at placing the applicant at ease and eliciting all the information necessary to make a proper decision. An asylum officer should be cognizant of the fact that an applicant's ability to provide such descriptions may be impacted by the context and nature of the credible fear screening process.

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

See RAIO Training Module, *Credibility*.

a. *Identifying Credibility Concerns*

In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the RAIO Modules: *Credibility* and *Evidence*.

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.

The amount of detail provided by an applicant is another factor that should be considered in making a credibility determination. In order to rely on "lack of detail" as a credibility factor, however, asylum officers must pose questions to the applicant regarding the type of detail sought.

While demeanor, candor, responsiveness, and detail provided are to be taken into account in the credible fear context when making a credibility determination, an asylum officer must also take into account cross-cultural factors, effects of trauma, and the nature of expedited removal and the credible fear interview process ~~in~~cluding detention, relatively brief and often telephonic interviews, etc.~~—~~when evaluating these factors in the credible fear context.

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 when Making a Credible Fear Determination

1. In assessing credibility, the officer must consider the totality of the circumstances and all relevant factors.

2. When considering the totality of the circumstances in determining whether the assertions underlying the applicant's claim are credible, 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 differences that may affect 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.

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 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

See RAIO Training Module, *Credibility.*

have been given an opportunity to address and explain all such concerns during the credible fear interview.

4. Generally, trivial or minor credibility concerns in and of themselves will not be sufficient to find an applicant not credible.

   Nonetheless, on occasion such credibility concerns may be sufficient to support a negative credible fear determination considering the totality of the circumstances and all relevant factors. Such concerns should only be the basis of a negative determination if the officer attempted to elicit sufficient testimony, and the concerns were not adequately resolved by the applicant during the credible fear interview.

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 when taking into account the totality of the circumstances and all relevant factors.

   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 a CBP official is taken when considering whether an applicant's later testimony is consistent with the earlier statement. For instance, the Seventh Circuit noted,"'airport interviews... are not always reliable indicators of credibility.'" In addition, the Fourth Circuit identified the different purposes of CBP's interview for the

   Moab v. Gonzales, 500 F.3d 656, 660 (7th Cir. 2007) (internal citations omitted).

sworn statement and the asylum process: "the purpose of these [sworn statement] interviews is to collect general identification and background information about the alien. The interviews are not part of the formal asylum process."

Qing Hua Lin v. Holder, 736 F.3d 343, 353 (4th Cir. 2013).

Some 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, e.g., Balasubramanrim v. INS, 143 F.3d 157 (3d Cir. 1998); *Lin Lin Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1279-80 (11th Cir. 2009); *c.f. Ye Jian Xing v. Lynch*, 845 F.3d 38, 44-45 (1st Cir. 2017) (while not requiring specifically enumerated factors for examining the reliability of the sworn statement, noting that an interpreter was used and Ye understood the questions asked); *Joseph v. Holder*, 600 F.3d 1235, 1243 (9th Cir. 2010) (in examining statements in a prior bond hearing, noting, "[w]e have rejected adverse credibility findings that relied on differences between statements a petitioner made during removal proceedings and those made during less formal, routinely unrecorded proceedings.");.

The Second Circuit has advised: "If, after reviewing the record of the [CBP] interview in light of these factors and any other relevant considerations suggested by the circumstances of the interview, the... [agency] concludes that the record of the interview and the alien's statements are reliable, then the agency may, in appropriate circumstances, use those statements as a basis for finding the alien's testimony incredible. Conversely, if it appears that either the record of the interview or the alien's statements may not be reliable, then the... [agency] should not rely solely on the interview in making an adverse credibility determination."

Ramsameachire v. Ashcroft, 357 F.3d 169, 179-81 (2d Cir. 2004) (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, given ample opportunity to explain his fear of persecution in a careful and non-coercive interview, and signed and initialed the typed record of statement).

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 credibility concerns, the officer finds that the applicant has provided a reasonable explanation, a positive credibility determination may be appropriate when considering the totality of the circumstances and all relevant factors.

If, however, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the applicant fails to provide an explanation, or the officer finds that the applicant did not provide a reasonable explanation, a negative credibility determination based upon the totality of the circumstances and all relevant factors 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

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

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.

   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 RAIO 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.

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.

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).

(ii) Second, the group must be defined with particularity; it "must be defined by characteristics that provide a clear benchmark for determining who falls within the group."

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

(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,

Id. at 238.

though the persecutor's perceptions may be relevant to social distinction

Id. at 242.

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.

See RAIO Training Module, *Persecution.*

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

   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

See Matter of Kasinga, 21

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.

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).

(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.

(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 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 RAIO 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 raises a fear with respect to another country, aside from the country of citizenship or nationality or the country of removal, the officer should memorialize it in the file to ensure that the fear is explored in the future should DHS ever contemplate removing the person to this other country.

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 with respect to any country of proposed removal. 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 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."

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

8 C.F.R. §§ 208.18(a)(1)-(8).

"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.

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 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;

   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

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).

   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:

8 C.F.R. § 208.18(a)(4).

   a. The intentional infliction or threatened infliction of severe physical pain or suffering;

   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 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

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

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

De La Rosa v. Holder, 598 F.3d 103, 110 (2d Cir. 2010).

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 can establish that it is more likely than not that he or she would be tortured. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in assessing

8 C.F.R. § 1208.16(c)(3)(ii).

whether there is a significant possibility that he or she is eligible for CAT withholding of removal or deferral of removal.

2. Under the Convention Against Torture, the burden is on the applicant to show, for CAT withholding of removal or deferral of removal, that it is more likely than not that he or she would be tortured, and one of the relevant considerations is the possibility of relocation. In deciding whether the applicant has satisfied his or her burden, the adjudicator must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal.

8 C.F.R. § 208.16(c)(3)(ii).

Maldonado v. Holder, 786 F.3d 1155 (9th Cir. 2015) (overruling *Hassan v. Ashcroft*, 380 F.3d 1114, 1164 (9th Cir. 2004) ("Section 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative. *See* § 1208.16(c)(3)(i)–(iv)... .Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof.").

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.

See e.g., *Comollari v. Ashcroft*, 378 F.3d 694, 697-98 (7th Cir. 2004).

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)(iv).

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

IX. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

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

A. No Bars Apply

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.

8 C.F.R. § 208.30(e)(5).

B. Asylum Officer Must Elicit Testimony

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.

INA § 208(b)(2); INA § 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;

INA § 208(b)(2)(B)(i).

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.

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.

Procedures Manual, Credible Fear Process (Draft); Joseph E. Langlois. Asylum Division, Refugee, Asylum and International Operations Directorate. *Revised Credible Fear Quality Assurance Review*

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

Categories and Procedures, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 Dec. 2008).

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

8 C.F.R. § 208.30(d)(4); Procedures Manual,

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.

Credible Fear Process (Draft).

C. Factual Summary

8 C.F.R. § 208.30(d)(6).

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant. At the conclusion of the interview, the asylum officer must review the summary with the applicant and provide the applicant with an opportunity to correct any errors therein. The factual summary and its review should be contemporaneously recorded at the end of the asylum officer's interview notes.

XIII. SUMMARY

A. Expedited Removal

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by the Department of Homeland Security, 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 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.

B. Function of Credible Fear Screening

The purpose of the credible fear screening process is to identify persons subject to expedited removal who might ultimately be eligible for asylum under section 208 of the INA or withholding of removal or deferral of removal under the Convention Against Torture.

C. Credible Fear Standard of Proof: Significant Possibility

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.

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.

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

The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

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.

Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Reasonable Fear of Persecution and Torture Determinations***
Rev. Date	February 13, 2017; *Effective as of Feb 27, 2017.*
Lesson Description	The purpose of this lesson is to explain when reasonable fear screenings are conducted and how to determine whether the alien has a reasonable fear of persecution or torture using the appropriate standard.
Terminal Performance Objective	When a case is referred to an Asylum Officer to make a "reasonable fear" determination, the Asylum Officer will be able to correctly determine whether the applicant has established a reasonable fear of persecution or a reasonable fear of torture.
Enabling Performance Objectives	1. Indicate the elements of "torture" as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6) 2. Identify the type of harm that constitutes "torture" as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6) 3. Describe the circumstances in which a reasonable fear screening is conducted.(APT2)(OK4)(OK6)(OK7) 4. Identify the standard of proof required to establish a reasonable fear of torture.(ACRR8)(AA3) 5. Identify the standard of proof required to establish a reasonable fear of persecution.(ACRR8)(AA3) 6. Examine the applicability of bars to asylum and withholding of removal in the reasonable fear context. (ACRR3)
Instructional Methods	Lecture, practical exercises
Student Materials/ References	United Nations. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (see RAIO Training Module, *International Human Rights Law)* *Ali v. Reno*; *Mansour v. INS*; *Matter of S-V-*; *Matter of G-A-*; *Sevoian v. Aschcroft; In re J-E-; Matter of Y-L-; Auguste v. Ridge; Ramirez Peyro v. Holder; Roye v. Att'y Gen. of U.S.* Reasonable Fear forms and templates (are found on the ECN website)
Method of Evaluation	Written test

Background Reading

1. Reasonable Fear Procedures Manual (Draft).

2. Martin, David A. Office of the General Counsel. *Compliance with Article 3 of the Convention against Torture in the cases of removable aliens,* Memorandum to Regional Counsel, District Counsel, All Headquarters Attorneys (Washington, DC: May 14, 1997), 5 p.

3. Lafferty, John, Asylum Division, *Updated Guidance on Reasonable Fear Note-Taking*, Memorandum to All Asylum Office Staff (Washington, DC: May 9, 2014), 2p. plus attachments.

4. Lafferty, John, Asylum Division, *Reasonable Fear Determination Checklist and Written Analysis*, Memorandum to All Asylum Office Staff (Washington, DC: Aug. 3, 2015), 1p. plus attachments.

5. Langlois, Joseph E. INS Office of International Affairs. *Implementation of Amendments to Asylum and Withholding of Removal Regulations, Effective March 22, 1999*, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, D.C.: March 18, 1999), 16 p. plus attachments.

6. Langlois, Joseph E. Asylum Division, Office of International Affairs. *Withdrawal of Request of Reasonable Fear Determination*, Memorandum to Asylum Office Directors, et al. (Washington, DC: May 25, 1999), 1p. plus attachment (including updated version of Withdrawal of Request of Reasonable Fear Determination form, 6/13/02 version).

7. Pearson, Michael *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 23, 2001), 7p. plus attachments.

8. Langlois, Joseph L. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries* (Washington, DC: February 22, 2001), 3p. plus attachments.

9. Langlois, Joseph E. Asylum Division, Office of International Affairs. *International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures*, Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.

10. Langlois, Joseph E. Asylum Division. *Reasonable Fear Procedures Manual*, Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

11. Langlois, Joseph E. Asylum Division. *Issuance of Updated Credible Fear and Reasonable Fear Procedures,* Memorandum for Asylum Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

12. Ted Kim, Asylum Division. *Implementation of Reasonable Fear Processing Timelines and APSS Guidance,* Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

13. Pearson, Michael *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 23, 2001), 7p. plus attachments.

14. Langlois, Joseph L. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries* (Washington, DC: February 22, 2001), 3p. plus attachments.

15. Langlois, Joseph E. Asylum Division, Office of International Affairs. *International Religious Freedom Act Requirements Affecting Credible Fear and Reasonable Fear Interview Procedures*, Memorandum for Asylum Office Directors, et al. (Washington, DC: April 15, 2002), 3p.

16. Langlois, Joseph E. Asylum Division. *Reasonable Fear Procedures Manual*, Memorandum for Asylum Office Directors, et al. (Washington, DC: January 3, 2003), 3p. plus attachments.

17. Langlois, Joseph E. Asylum Division. *Issuance of Updated Credible Fear and Reasonable Fear Procedures,* Memorandum for Asylum Office Directors, et al. (Washington, DC: May 14, 2010), 2p. plus attachments.

18. Ted Kim, Asylum Division. *Implementation of Reasonable Fear Processing Timelines and APSS Guidance,* Memorandum to All Asylum Office Staff, (Washington, DC: April 17, 2012), 2p. plus attachments.

CRITICAL TASKS

Knowledge of U.S. case law that impacts RAIO. (3)
Knowledge of the Asylum Division jurisdictional authority. (4)
Skill in identifying information required to establish eligibility. (4)
Skill in identifying issues of claim. (4)
Knowledge of relevant policies, procedures, and guidelines of establishing applicant eligibility for reasonable fear of persecution of torture. (4)
Knowledge of mandatory bars and inadmissibilities to asylum eligibility. (4)
Skill in organizing case and research materials (4)
Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence. (5)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)

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Presentation **References**

I. INTRODUCTION

This lesson instructs asylum officers on the substantive elements required to establish a reasonable fear of persecution or torture. More detailed instruction on procedures for conducting interviews and processing cases referred for reasonable fear determinations are provided in the Reasonable Fear Procedures Manual and separate procedural memos. For guidance on interviewing techniques to elicit information in a non-adversarial manner, asylum officers should review the RAIO Training Modules: *Interviewing – Introduction to the Non-Adversarial Interview; Interviewing – Eliciting Testimony; and Interviewing – Survivors of Torture and Other Severe Trauma.*

II. BACKGROUND

Federal regulations require asylum officers to make reasonable fear determinations in two types of cases referred by other DHS officers, after a final administrative removal order has been issued under section 238(b) of the Immigration and Nationality Act (INA), or after a prior order of removal, exclusion, or deportation has been reinstated under section 241(a)(5) of the INA. These are cases in which an individual ordinarily is removed without being placed in removal proceedings before an immigration judge.

8 C.F.R. § 208.31; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999).

Congress has provided for special removal processes for certain aliens who are not eligible for any form of relief from removal. At the same time, however, obligations under Article 33 of the *Refugee Convention relating to the Status of Refugees* and Article 3 of *the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* ("Convention Against Torture", "the Convention", or "CAT") still apply in these cases. Therefore, withholding of removal under either section 241(b)(3) of the INA or under the regulations implementing the Convention Against Torture may still be available in these cases. Withholding of removal is not considered to be a form of relief from removal, because it is specifically limited to the country where the individual is at risk and does not prohibit the individual's removal from the United States to a country other than the country where the individual is at risk.

The purpose of the reasonable fear determination is to ensure compliance with U.S. treaty obligations not to return a person to a country where the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition, or where

These treaty obligations are based on Article 33 of the *1951 Convention relating to the Status of Refugees*; and Article 3 of the Convention

the person would be tortured, and, at the same time, to adhere to Congressional directives to subject certain categories of aliens to streamlined removal proceedings.

Against Torture.

Similar to credible fear determinations in expedited removal proceedings, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly unmeritorious or frivolous claims.

III. JURISDICTION

See Reasonable Fear Procedures Manual (Draft).

A. Reinstatement under Section 241(a)(5) of the INA

1. Reinstatement of Prior Order

INA § 241(a)(5); 8 C.F.R. § 241.8.

Section 241(a)(5) of the INA requires DHS to reinstate a prior order of exclusion, deportation, or removal, if a person enters the United States illegally after having been removed, or after having left the United States after the expiration of an allotted period of voluntary departure, giving effect to an order of exclusion, deportation, or removal.

Once a prior order has been reinstated under this provision, the individual is not permitted to apply for asylum or any other relief under the INA. However, that person may apply for withholding of removal under section 241(b)(3) of the INA (based on a threat to life or freedom on account of a protected characteristic in the refugee definition) and withholding of removal or deferral of removal under the Convention Against Torture.

There are certain restrictions on issuing a reinstatement order to people who may qualify to apply for NACARA 203 pursuant to the Legal Immigration Family Equity Act (LIFE). The LIFE amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act."

Langlois, Joseph E. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries* (Washington, DC: February 22, 2001).

Pearson, Michael. *Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding*

Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries (Washington, DC: February 23, 2001).

In all cases, section 241(a)(5) applies retroactively to all prior removals, regardless of the date of the alien's illegal reentry. There are other issues that may affect the validity of a reinstated prior order, such as questions concerning whether the applicant's departure executed a final order of removal. An Asylum Pre-screening Officer (APSO) who is unsure about the validity of a reinstated prior removal order should consult the Reasonable Fear Procedures Manual, a supervisor, or the Headquarters Quality Assurance Branch.

See Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

Note: In the Fifth Circuit, an individual's departure from the U.S. after issuance of an NTA, but prior to the order of removal, does not strip an immigration judge of jurisdiction to order that individual removed; thus, that individual can be subject to reinstatement if previously ordered removed in absentia. *See U.S. v Ramirez-Carcamo*, 559 F.3d 384 (5th Cir. 2009).

2. Referral to Asylum Officer

If a person subject to reinstatement of a prior order of removal expresses a fear of return to the intended country of removal, the DHS officer must refer the case to an asylum officer for a reasonable fear determination, after the prior order has been reinstated.

8 C.F.R. §§ 208.31(a)-(b), 241.8(e).

3. Country of Removal

Form I-871, *Notice of Intent/Decision to Reinstate Prior Order* does not designate the country where DHS intends to remove the alien. Depending on which removal order is being reinstated under INA § 241(a)(5), that order may or may not designate a country of removal. For example, Form I-860, *Notice and Order of Expedited Removal*, does not indicate a country of removal, but an IJ order of removal resulting from section 240 proceedings does designate a country of removal. Regardless of which type of prior order is being reinstated, DHS must indicate where it proposes to remove the alien in order for the APSO to determine if the alien has a reasonable fear of persecution or torture in that particular country.

The asylum officer need only explore the person's fear with respect to the countries designated or the countries

proposed. For example, if the applicant was previously ordered removed to country X, but is now claiming to be a citizen of country Y, the asylum officer should explore the person's fear with respect to both countries. If the person expresses a fear of return to any other country, the officer should memorialize it in the file to ensure that the fear is explored should DHS ever contemplate removing the person to that other country.

B. Removal Orders under Section 238(b) of the INA (based on aggravated felony conviction)

1. DHS removal order

Under certain circumstances, DHS may issue an order of removal if DHS determines that a person is deportable under section 237(a)(2)(A)(iii) of the INA (convicted by final judgment of an aggravated felony after having been admitted to the U.S.). This means that the person may be removed without removal proceedings before an immigration judge.

INA § 238(b).

2. Referral to an asylum officer

If a person who has been ordered removed by DHS pursuant to section 238(b) of the INA expresses a fear of persecution or torture, that person must be referred to an asylum officer for a reasonable fear determination.

8 C.F.R. §§ 208.31(a)-(b), 238.1(f)(3). Note that regulations require the DHS to give notice of the right to request withholding of removal to a particular country, if the person ordered removed fears persecution or torture in that country. 8 C.F.R. § 238.1(b)(2)(i).

3. Country of Removal

The removal order under section 238(b) should designate a country of removal, and in some cases, will designate an alternative country.

IV. DEFINITION OF "REASONABLE FEAR"

Regulations define "reasonable fear of persecution or torture" as follows:

8 C.F.R. § 208.31(c).

> The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the

bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

A few points to note, which are discussed in greater detail later in the lesson, are the following:

1. The "reasonable possibility" standard is the same standard required to establish eligibility for asylum (the "well-founded fear" standard).

8 C.F.R. § 208.31(c); Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

2. Like asylum, there is an "on account of" requirement necessary to establish reasonable fear of *persecution*: the persecution must be on account of a protected characteristic in the refugee definition.

3. There is no "on account of" requirement necessary to establish a reasonable fear of *torture*.

4. Mandatory and discretionary bars are not considered in a determination of reasonable fear of *persecution* or reasonable fear of *torture*.

V. STANDARD OF PROOF

See RAIO Training Modules, *Well-Founded Fear* and *Evidence*.

The standard of proof to establish "reasonable fear of persecution or torture" is the "reasonable possibility" standard. This is the same standard required to establish a "well-founded fear" of persecution in the asylum context. The "reasonable possibility" standard is lower than the "more likely than not standard" required to establish eligibility for withholding of removal. It is higher than the standard of proof required to establish a "credible fear" of persecution. The standard of proof to establish a "credible fear" of persecution or torture is whether there is a significant possibility of establishing eligibility for asylum or protection under the Convention Against Torture 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, the precedent for the Circuit in which the applicant resides is used in determining whether the applicant has a reasonable fear of persecution or torture. Note that this differs from the credible fear context in which the Circuit interpretation most favorable to the applicant is used.

VI. IDENTITY

The applicant must be able to credibly establish his or her

identity by a preponderance of the evidence. In many cases, an applicant will not have documentary proof of identity or nationality. However, credible testimony alone can establish identity and nationality. Documents such as birth certificates and passports are accepted into evidence if available. The officer may also consider information provided by Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP).

See RAIO Training Module, *Refugee Definition*.

VII. PRIOR DETERMINATIONS ON THE MERITS

An adjudicator or immigration judge previously may have made a determination on the merits of the claim. This is most common in the case of an applicant who is subject to reinstatement of a prior order. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination on the merits that the applicant was ineligible.

The APSO must explore the applicant's claim, according deference to the prior determination unless there is clear error in the prior determination. The officer should also inquire as to whether there are any changed circumstances that would otherwise affect the applicant's eligibility.

VIII. CREDIBILITY

A. Credibility Standard

In making a reasonable fear determination, the asylum officer must evaluate whether the applicant's testimony is credible.

The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

The U.S. Supreme Court has held that to properly consider the totality of the circumstances, "the whole picture… must be taken into account." The Board of Immigration Appeals (BIA) has interpreted this to include taking into account the whole of the applicant's testimony as well as the individual circumstances of each applicant.

United States v. Cortez, 449 U.S. 411, 417 (1981).

See RAIO Training Module, *Credibility*; *see also Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995) and *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

B. Evaluating Credibility in a Reasonable Fear Interview

1. General Considerations

See RAIO Training Module, *Credibility*.

a. The asylum officer must gather sufficient information to determine whether the alien has a reasonable fear of persecution or torture. The applicant's credibility should be evaluated (1) only after all information is elicited and (2) in light of "the totality of the circumstances, and all relevant factors."

b. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The asylum officer's personal opinions or moral views regarding an applicant should not affect the officer's decision.

c. The applicant's ability or inability to provide detailed descriptions of the main points of the claim is critical to the credibility evaluation. The applicant's willingness and ability to provide those descriptions may be directly related to the asylum officer's skill at placing the applicant at ease and eliciting all the information necessary to make a proper decision. An asylum officer should be cognizant of the fact that an applicant's ability to provide such descriptions may be impacted by the context and nature of the reasonable fear screening process.

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

a. *Identifying Credibility Concerns*

In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the RAIO Modules: *Credibility* and *Evidence*.

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.

The amount of detail provided by an applicant is another factor that should be considered in making a credibility determination. In order to rely on "lack of detail" as a credibility factor, however, asylum

officers must pose questions regarding the type of detail sought.

While demeanor, candor, responsiveness, and detail provided are to be taken into account in the reasonable fear context when making a credibility determination, an adjudicator must take into account cross-cultural factors, effects of trauma, and the nature of the reasonable fear interview process—including detention, relatively brief and often telephonic interviews, etc.—when evaluating these factors in the reasonable fear context.

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 reasonable 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 Reasonable Fear when Making a Reasonable Fear Determination

1. In assessing credibility, the officer must consider the totality of the circumstances and all relevant factors.

2. When considering the totality of the circumstances in determining whether the assertions underlying the applicant's claim are credible, 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;

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 particular social group, or political opinion are not used as interpreters. *See International Religious*

(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 differences that may affect the objectivity of the interpreter or the applicant's comfort level; and 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.

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 reasonable interview.

4. Generally, trivial or minor credibility concerns in and of themselves will not be sufficient to find an applicant not credible.

   Nonetheless, on occasion such credibility concerns may be sufficient to support a negative reasonable fear determination considering the totality of the circumstances and all relevant factors. Such concerns should only be the basis of a negative determination if the officer attempted to elicit sufficient testimony, and the concerns were not adequately resolved by the applicant during the reasonable fear interview.

5. The officer sould compare the applicant's testimony with any prior testimony and consider any prior credibility findings. The individual previously may have provided testimony regarding his or her claim in the context of an asylum or withholding of removal application. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination that the claim was or was not credible. It is important that the asylum officer ask the individual about any inconsistencies between prior testimony and the testimony provided at the reasonable fear interview.

In any case in which the asylum officer's credibility determination differs from the credibility determination previously reached by another adjudicator on the same allegations, the asylum officer must provide a sound explanation and support for the different finding.

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 credibility concerns, the officer finds that the applicant has provided a reasonable explanation, a positive credibility determination may be appropriate when considering the totality of the circumstances and all relevant factors.

   If, however, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the applicant fails to provide an explanation, or the officer finds that the applicant did not provide a reasonable explanation, a negative credibility determination based upon the totality of the circumstances and all relevant factors 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 reasonable 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.

IX. ESTABLISHING A REASONABLE FEAR OF PERSECUTION

To establish a reasonable fear of persecution, the applicant must show that there is a reasonable possibility he or she will suffer persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. As explained above, this is the same standard asylum officers use in evaluating whether an applicant is eligible for asylum. However, the reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish eligibility for withholding of removal in Immigration Court.

In contrast to an asylum adjudication, the APSO may not exercise discretion in making a positive or negative reasonable fear determination and may not consider the applicability of any mandatory bars that may apply if the applicant is permitted to apply for withholding of removal before the immigration judge.

A. Persecution

The harm the applicant fears must constitute persecution. The determination of whether the harm constitutes persecution for purposes of the reasonable fear determination is no different from the determination in the affirmative asylum context. This means that the harm must be serious enough to be considered persecution, as described in case law, the *UNHCR Handbook*, and USCIS policy guidance. Note that this is different from the evaluation of persecution in the credible fear context, where the applicant need only demonstrate a significant possibility that he or she could establish that the feared harm is serious enough to constitute persecution.

See Discussion of "persecution" in RAIO Training Module, *Persecution*.

B. Nexus to a Protected Characteristic

As in the asylum context, the applicant must establish that the feared harm is on account of a protected characteristic in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion). This means the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or

8 C.F.R. § 208.31(c).

more of the protected characteristics in the refugee definition.

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 reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

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.

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 reasonable 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 reasonable fear context.

C. Past Persecution

1. Presumption of future persecution

   If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of persecution in the future on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

   See 8 C.F.R. § 208.16(b)(1)(i).

   a. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

   b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. Severe past persecution and other serious harm

A finding of reasonable fear of persecution cannot be based on past persecution alone, in the absence of a reasonable possibility of future persecution. A reasonable fear of persecution may be found only if there is a reasonable possibility the applicant will be persecuted in the future, regardless of the severity of the past persecution or the likelihood that the applicant will face other serious harm upon return. This is because withholding of removal is accorded only to provide protection against future persecution and may not be granted without a likelihood of future persecution.

As noted above, a finding of past persecution raises the presumption that the applicant's fear of future persecution is reasonable.

In contrast, a grant of asylum may be based on the finding that there are compelling reasons for the applicant's unwillingness to return arising from the severity of past persecution or where the applicant establishes that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country, even if there is no longer a reasonable possibility the applicant would be persecuted in the future. 8 C.F.R. § 208.13(b)(1)(iii).

D. Internal Relocation

As in the asylum context, the evidence must establish that the applicant could not avoid future persecution by relocating within the country of feared persecution or that, under all the circumstances, it would be unreasonable to expect him or her to do so. In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

See Discussion of internal relocation in RAIO Training Module, *Well-Founded Fear*; *see also* 8 C.F.R. § 208.16(b)(3).

E. Mandatory Bars

Asylum officers may *not* take into consideration mandatory bars to withholding of removal when making reasonable fear of persecution determinations.

If the asylum officer finds that there is a reasonable possibility the applicant would suffer persecution on account of a protected characteristic, the asylum officer must refer the case to the immigration judge, regardless of whether the person has committed an aggravated felony, has persecuted others, or is subject to any other mandatory bars to withholding of removal.

8 C.F.R. § 208.31(c).

See Reasonable Fear Procedures Manual (Draft).

However, during the interview the officer must develop the record fully by exploring whether the applicant may be subject to a mandatory bar.

If the officer identifies a potential bar issue, the officer should consult a supervisory officer and follow procedures outlined in the Reasonable Fear Procedures Manual on "flagging" such information for the hearing.

The immigration judge will consider mandatory bars in deciding whether the applicant is eligible for withholding of removal under section 241(b)(3) of the Act or CAT.

8 C.F.R. §§ 208.16(c)(4), (d). Please note there are no bars to deferral of removal under CAT.

The following mandatory bars apply to withholding of removal under section 241(b)(3)(A) for cases commenced April 1, 1997 or later:

INA § 241(b)(3)(B); 8 C.F.R. §§ 208.16(d)((2), (d)(3) (for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, mandatory denials are found within section 243 (h)(2) of the Act as it appeared prior to that date).

(1) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(2) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(3) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;

(4) there are reasonable grounds to believe that the alien is a danger to the security of the United States (including anyone described in subparagraph (B) or (F) of section 212(a)(3)); or

(5) the alien is deportable under Section 237(a)(4)(D) (participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing. Any alien described in clause (i), (ii), or (iii) of section 212(a)(3)(E) is deportable.)

X. CONVENTION AGAINST TORTURE – BACKGROUND

This section contains a background discussion of the Convention Against Torture, to provide context to the reasonable fear of torture determinations. As a signatory to the Convention Against Torture

the United States has an obligation to provide protection where there are substantial grounds to believe that an individual would be in danger of being subjected to torture. Notably, there are no bars to protection under the Convention Against Torture. Torture is an act universally condemned and so repugnant to basic notions of human rights that even individuals who are undeserving of refugee protection, will not be returned to a country where they are likely to be tortured. An overview of the Convention Against Torture may be found in the RAIO Module: *International Human Rights Law*.

A. U.S. Ratification of the Convention and Implementing Legislation

The United States Senate ratified the Convention Against Torture on October 27, 1990. President Clinton then deposited the United States instrument of ratification with the United Nations Secretary General on October 21, 1994, and the Convention entered into force for the United States thirty days later, on November 20, 1994.

Recognizing that a treaty is considered "law of the land" under the United States Constitution, the Executive Branch took steps to ensure that the United States was in compliance with its treaty obligations, even though Congress had not yet enacted implementing legislation. The INS adopted an informal process to evaluate whether a person who feared torture and was subject to a final order of deportation, exclusion, or removal would be tortured in the country to which the person would be removed. The United States relied on this informal process to ensure compliance with Article 3 in immigration cases until the CAT rule was promulgated.

Similarly, the Department of State considered whether a person would be subject to torture when addressing requests for extradition.

On October 21, 1998, President Clinton signed legislation that required the Department of Justice to promulgate regulations to implement in immigration cases the United States' obligations under Article 3 of the Convention Against Torture, subject to any reservations, understandings, and declarations contained in the United States Senate resolution to ratify the Convention.

Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21, 1998).

Pursuant to the statutory directive, the Department of Justice regulations provide a mechanism for individuals fearing torture to seek protection under Article 3 of the Convention in immigration cases. One of the mechanisms for protection provided in the regulations, effective March 22, 1999, is the "reasonable fear" screening process.

See 8 C.F.R. §§ 208.16-208.18.

B. Article 3

1. *Non-Refoulement*

Article 3 of the Convention provides:

> No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This provision does not prevent the removal of a person to a country where he or she would not be in danger of being subjected to torture. Like withholding of removal under section 241(b)(3) of the INA, which is based on Article 33 of the Convention relating to the Status of Refugees, protection under Article 3 of the Convention Against Torture is country-specific.

In addition, this obligation does not prevent the United States from removing a person to a country at any time if conditions have changed such that it no longer is likely that the individual would be tortured there.

See 8 C.F.R. §§ 208.17(d)-(f), 208.24 for procedures for terminating withholding and deferral of removal.

2. U.S. Ratification Document

When ratifying the Convention Against Torture, the U.S. Senate adopted a series of reservations, understandings and declarations, which modify the U.S. obligations under Article 3, as described in the section below on the Convention definition of torture. These reservations, understandings, and declarations are part of the substantive standards that are binding on the United States and are reflected in the implementing regulations.

XI. DEFINITION OF TORTURE

Torture has been defined in a variety of documents and in legislation unrelated to the Convention Against Torture. However, only an act that falls within the definition described in Article 1 of the Convention, as modified by the U.S. ratification document, may be considered "torture" for purposes of making a reasonable fear of torture determination. These substantive standards are incorporated in the regulations at 8 C.F.R. § 208.18(a) (1999).

See RAIO Training Module, *Interviewing - Survivors of Torture and Other Severe Trauma,* background reading associated with that lesson; Alien Tort Claims Act, codified at 28 U.S.C. § 1350.

Article 1 of the Convention defines torture as:

See also 8 C.F.R. §§ 208.18(a)(1), (3).

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate adopted several important "understandings" regarding the definition of torture, which are included in the implementing regulations and are discussed below. These "understandings" are binding on adjudicators interpreting the definition of torture.

136 Cong. Rec. S17429 at S17486-92 (daily ed. October 27, 1990); 8 C.F.R. § 208.18(a).

A. Identity of Torturer

The torture must 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."

Convention Against Torture, Article 1.

1. Public official

The torturer or the person who acquiesces in the torture must be a public official or other person acting in an official capacity in order to invoke Article 3 Convention Against Torture protection. A non-governmental actor could be found to have committed torture within the meaning of the Convention *only if* that person inflicts the torture (1) at the instigation of, (2) with the consent of, or (3) with the acquiescence of a public official or other person acting in an official capacity.

Convention against Torture, Article 1. *See also* Committee on Foreign Relations Report, Convention Against Torture, Exec. Report 101-30, August 30, 1990 (hereinafter "Committee Report"), p. 14; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8483 (Feb. 19, 1999); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001).

The phrase "acting in an official capacity" modifies both "public official" and "other person," such that a public official must be "acting in an official capacity" to satisfy the state action element of the torture definition.

Matter of Y-L-, A-G-, R-S-R, 23 I&N Dec. 270 (AG 2002); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

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).

To determine whether a public official is acting in a private capacity or in an official capacity, APSOs must elicit testimony to determine whether the public official was acting within the scope of their authority and/or under color of law. A determination that the public official is acting under either of the scope of their authority or under color of law would result in a determination that the public official was acting "in an official capacity".

Although the regulation does not define "acting in an official capacity," the Attorney General equated the term to mean "under color of law" as interpreted by cases under the civil rights act.

See Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001); *Ahmed v. Mukasey*, 300 Fed.Appx. 324 (5th Cir. 2008) (unpublished).

Thus, a public official is acting in an official capacity when "he misuses power possessed by virtue of law and made possible only because he was clothed with the authority of law."

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

To establish whether a public official is acting in an official capacity (i.e. 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. The Eighth Circuit addressed "acting in an official capacity" in its decision in *Ramirez Peyro v. Holder*. The court indicated 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." *Id.*

See U.S. v. Colbert, 172 F.3d 594, 596 - 597 (8th Cir 1999); *West v. Atkins*, 487 U.S. 42, 49 (1988).

Following the guidance provided in *Ramirez Peyro v. Holder*, 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

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

personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives." Citing directly to *Ramirez Peyro v. Holder*, the Fifth Circuit determined that "proving action in an officer's official capacity 'does not require that the public official be executing official state policy or that the public official be the nation's president or some other official at the upper echelons of power. Rather ... the use of official authority by low-level officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction.'"

In this context, the court points to two published cases as examples. First, *Bennett v. Pippin,* 74 F.3d 578, 589 (5th Cir.1996), in which the court found "that an officer's action was 'under color of state law' where a sheriff raped a woman and used his position to ascertain when her husband would be home and threatened to have her thrown in jail if she refused." The Fifth Circuit compared this case to *Delcambre v. Delcambre,* 635 F.2d 407, 408 (5th Cir.1981) (per curiam), in which the court found "no action under color of law where a police chief assaulted his sister-in-law over personal arguments about family matters, but did not threaten her with his power to arrest."

See also Miah v. Mukasey, 519 F. 3rd 784 (8th Cir. 2008) (elected official was not acting in his official capacity in his rogue efforts to take control of others property).

As *Marmorato v. Holder* illustrates with its citation to *Bennett v. Pippin,* an official need not be acting in the scope of their authority to be acting under color of law.

It is unsettled whether an organization that exercises power on behalf of the people subjected to its jurisdiction, as in the case of a rebel force which controls a sizable portion of a country, would be viewed as a "government actor." It would be necessary to look at factors such as how much of the country is under the control of the rebel force and the level of that control.

See Matter of S-V-, Int. Dec. 3430 (BIA 2000) (concurring opinion); *see also Habtemichael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004) (remanding for agency determination as to the extent of the Eritrean People's Liberation Front's (EPLF) control over parts of Ethiopia during the period when the applicant was conscripted by the EPLF); *D-Muhumed v. U.S. Atty. Gen.*, 388 F.3d 814 (11th Cir. 2004) (denying protection under CAT because "Somalia currently has no central government, and the clans who control

various sections of the country do so through continued warfare and not through official power."); *but see* the Committee Against Torture decision in *Elmi v. Australia*, Comm. No. 120/1998 (1998) (finding that warring factions in Somalia fall within the phrase "public official(s) or other person(s) acting in an official capacity). Note that the United Nations Committee Against Torture a monitoring body for the implementation and observance of the Convention Against Torture. The U.S. recognizes the Committee, but does not recognize its competence to consider cases. The BIA considers the Committee's opinions to be advisory only. *See Matter of S-V-*, I&N Dec. 22 I&N Dec. 1306, 1313 n. 1 (BIA 2000).

2. Acquiescence

When the "torturer" is not a public official or other individual acting in an official capacity, a claim under the *Convention Against Torture* only arises if a public official or other person acting in an official capacity instigates, consents, or acquiesces to the torture.

A public official cannot be said to have "acquiesced" in torture unless, prior to the activity constituting torture, the official was "aware" of such activity and thereafter breached a legal responsibility to intervene to prevent the activity.

8 C.F.R. § 208.18(a)(7).

The Senate ratification history 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

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); Committee Report (Aug. 30, 1990), p. 9; *see also* S. Hrg 101-718 (July 30, 1990), *Statement of Mark Richard, Dep. Asst. Attorney General, DOJ*

obvious to him."

Criminal Division, at 14.

In addressing the meaning of acquiescence as it relates to fear of Colombian guerrillas, paramilitaries and narco-traffickers who were not attached to the government, the Board of Immigration Appeals (BIA) indicated that more than awareness or inability to control is required. The BIA held that for acquiescence to take place the government officials must be "willfully accepting" of the torturous activity of the non-governmental actor.

Matter of S-V-, Int. Dec. 3430 (BIA 2000).

Several federal circuit courts of appeals have rejected the BIA's "willful acceptance" phrase in favor of the more precise "willful blindness" language that appears in the Senate's ratification history.

For purposes of threshold reasonable fear screenings, asylum officers must use the *willful blindness* standard.

Pieschacon-Villegas v. Att'y Gen. of U.S., 671 F.3d 303 (3d Cir. 2011); *Hakim v. Holder*, 628 F. 3d 151 (5th Cir. 2010); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 (9th Cir. 2010); *Diaz v. Holder*, 2012 WL 5359295 (10th Cir. 2012) (unpublished); *Silva-Rengifo v. Atty. Gen. of U.S.*, 473 F.3d 58, 70 (3d Cir. 2007); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240 (4th Cir. 2004); *Azanor v. Aschcroft*, 364 F.3d 1013 (9th Cir. 2004); *Amir v. Gonzales*, 467 F.3d 921, 922 (6th Cir. 2006); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Ontunez-Turcios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001).

The United States Circuit Court of Appeals for the Ninth Circuit ruled that the correct inquiry concerning the acquiescence of a state actor is "whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens." The court rejected the notion that acquiescence requires a public official's "actual knowledge" and "willful acceptance." The Ninth Circuit subsequently reaffirmed that the state actor's acquiescence to the torture must be "knowing," whether through actual knowledge or imputed knowledge ("willful blindness"). Both forms of knowledge constitute "awareness."

Zheng v. INS, 332 F.3d 1186 (9th Cir. 2003).

Azanor v. Ashcroft, 364 F.3d 1013, 1020 (9th Cir. 2004).

The United States Circuit Court of Appeals for the Second Circuit agreed with the Ninth Circuit approach on the issue of acquiescence of government officials, stating "torture requires only that government officials know of or remain willfully blind to act and thereafter breach their legal responsibility to prevent it."

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (finding that even if the Egyptian police who would carry out the abuse were not acting in an official capacity, "the 'routine' nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it").

a. Relevance of a government's ability to control a non-governmental entity from engaging in acts of torture

The requirement that the torture be inflicted by or at the instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity is distinct from the "unable or unwilling to protect" standard used in the definition of "refugee".

Pieschacon v. Attorney General, 671 F.3d 303 (3d Cir. 2011) (quoting from *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007)); *see also Gomez v. Gonzales*, 447 F.3d 343 (C.A.5, 2006); Reyes-*Sanchez v. U.S. Atty. Gen.*, 369 F.3d 1239 (C.A.11, 2004)("That the police did not catch the culprits does not mean that they acquiesced in the harm.").

Although a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under CAT, that inquiry does not turn on a government's ability to control persons or groups engaged in torturous activity.

In *De La Rosa v. Holder* the Second Circuit stated "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."

De La Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010).

In a similar case, the Third Circuit remanded to the BIA,

indicating that the fact that the government of Colombia was engaged in war against the FARC, it 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 (3d Cir. 2011); *Gomez-Zuluaga v. Attorney General,* 527 F.3d 330 (3d Cir. 2008).

Evidence that private actors have general support, without more, in some sectors of the government may be insufficient to establish that the officials would acquiesce to torture by the private actors. Thus, a Honduran peasant and land reform activist who testified to fearing severe harm by a group of landowners did not demonstrate that government officials would turn a blind eye if he were tortured simply because they had ties to the landowners.

Ontunez-Tursios; 303 F.3d 341 (5th Cir. 2002).

There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture. For example, in *Ali v. Reno*, the Danish police arrested and incarcerated the male relatives of a domestic violence victim while charges against them were pending. Only after the victim requested that the male relatives not be punished were they released.

Ali v. Reno, 237 F.3d 591, 598 (6th Cir. 2001).

In the context of government consent or acquiescence, the court in *Ramirez-Peyro v. Holder* reiterated its prior holding that "[u]se of official authority by low level officials, such a police officers, can work to place actions under the color of law even when they act without state sanction."

574 F.3d 893, 901 (8th Cir. 2009).

Therefore, even if country conditions show that a national government is fighting against corruption, that fact may not mean there is no acquiescence/consent by a local public official to torture. The Fifth Circuit visited this issue in *Marmorato v. Holder,* in which the court found that the immigration judge misinterpreted "in official capacity" when it found that the *consent or acquiescence* standard could never be satisfied in a country like Italy, but only in nations with "rogue governments" with "no regard for human rights or civil rights. The Fifth Circuit rejected "any notion that a petitioner's entitlement to relief depends upon whether his country of removal could be included on some hypothetical list of 'rogue' nations."

The Convention Against Torture is designed to protect against future instances of torture. Therefore, the asylum officer should consider whether there is a reasonable possibility that:

See Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002) (finding that there is no "acquiescence" to torture unless officials know about the torture before it occurs).

1. A public official would have prior knowledge or would willfully turn a blind eye to avoid gaining knowledge of the potential activity constituting torture; and

2. The public official would breach a legal duty to intervene to prevent such activity.

Evidence of how an official or officials have acted in the past (toward the applicant or others similarly situated) may shed light on how the official or officials may act in the future. "Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA."

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

B. Torturer's Custody or Control over Individual

The definition of torture applies only to acts directed against persons in the offender's custody or physical control.

8 C.F.R. § 208.18(a)(6); Committee Report, p. 9 (Aug. 30, 1990).

The United States Circuit Court of Appeals for the Ninth Circuit held that an applicant need not demonstrate that he or she would likely face torture while in a public official's custody or physical control. It is enough that the alien would likely face torture while under private individuals' exclusive custody or control if such torture were to take place with consent or acquiescence of a public official or other individual acting in an official capacity.

Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004).

For example, the Seventh Circuit has posited *in dictum* that "[p]robably more often than not the victim of a murder is within the murderer's physical control for at least a short time before the actual killing..." However, the court provided "that would not be true if for example the murderer were a sniper or a car bomber".

Comollari v. Ashcroft, 378 F.3d 694, 697 (7th Cir. 2004).

Pre-custodial police operations or military combat operations are outside the scope of Convention protection.

Establishing whether the act of torture may occur while in the offender's custody or physical control is very fact specific and in practicality it is very difficult to establish. While the applicant bears the burden of establishing "custody or physical control", the burden must be a reasonable one and this element may be established solely by circumstantial evidence.

While the law is unsettled as to the meaning of "in the offender's custody or physical control", when considering this element, APSOs must give applicants the benefit of doubt.

C. Specific Intent

For an act to constitute torture, it must be specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain is not torture under the Convention definition.

8 C.F.R. §§ 208.18(a)(1), (5); *Auguste v. Ridge*, 395 F.3d 123, 146 (3d Cir. 2005); 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990). See Committee Report, pp 14, 16.

Where the evidence shows that an applicant may be specifically targeted for punishment that may rise to the level of torture, the harm the applicant faces is specifically intended.

Kang v. Att'y Gen. of the U.S., 611 F.3d 157 (3d Cir. 2010) (distinguishing the facts from those in *Auguste v. Ridge*).

However an act of legitimate self-defense or defense of others would not constitute torture.

Also, harm resulting from poor prison conditions generally will not constitute torture when such conditions were not intended to inflict severe physical or mental pain or suffering.

Matter of J-E-, 23 I&N Dec. 291, 300-01 (BIA 2002); *but see Matter of G-A-*, 23 I&N Dec. 366, 372 (BIA 2002) (finding that where deliberate acts of torture are pervasive and widespread and where authorities use torture as a matter of policy, the specific intent requirement can be satisfied); *see also Settenda v. Ashcroft*, 377 F.3d 89 (1st Cir. 2004); *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004).

For example, in *Matter of J-E-* the BIA considered a request for protection under the *Convention Against Torture* by a Haitian national who claimed that upon his removal to Haiti, as a criminal deportee, he would be detained indefinitely in substandard prison conditions by Haitian authorities. The BIA found that such treatment does not amount to torture where there is no evidence that the authorities are "intentionally and deliberately maintaining such prison conditions in order to inflict torture." Like other elements of the reasonable fear of torture analysis, the evidence establishing specific intent can be circumstantial.

It is important to analyze the specific facts of each case in order to accurately determine the *specific intent* element. For

example, in a case that was very similar to the facts in *Matter of J-E-*, the Eleventh Circuit directed the BIA to consider whether a Haitian criminal deportee, who was mentally ill and infected with the AIDS virus satisfied the *specific intent* element where there was evidence that mentally ill detainees with HIV are singled out for forms of punishment that included ear-boxing (being slapped simultaneously on both ears), beatings with metal rods, and confinement to crawl spaces where detainees cannot stand up was eligible for withholding of removal under the CAT. In distinguishing the facts from *Matter of J-E-*, the court stated that in *J-E-*, the petitioner did not establish that he would be individually and intentionally singled out for harsh treatment and only produced evidence of generalized mistreatment and isolated instances of torture.

Jean-Pierre v. U.S. Attorney General, 500 F.3d 1315 (11th Cir. 2007).

Note that, in contrast, when determining asylum eligibility, there is no requirement of specific intent to inflict harm to establish that an act constitutes persecution: "requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture."

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

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

1. Reasons torture is inflicted

   The Convention definition provides a **non**-exhaustive list of possible reasons torture may be inflicted. The definition states that torture is an act that inflicts severe pain or suffering on a person *for such purposes as:*

8 C.F.R. § 208.18(a)(1).

   a. obtaining from him or a third person information or a confession,

   b. punishing him for an act he or a third person has committed or is suspected of having committed,

   c. intimidating or coercing him or a third person, or

   d. for any reason based on discrimination of any kind

Note: All discrimination is not torture.

2. No nexus to protected characteristic required.

   Unlike the non-return *(non-refoulment)* obligation in the *Convention relating to the Status of Refugees*, 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

"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.

8 C.F.R. § 208.18(a)(1).

8 C.F.R. § 208.18(a)(2).

See Matter of J-E-, 23 I&N Dec. 291 (BIA 2002) (citing to *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1978) (discussing the severe nature of torture)).

The Report of the Committee on Foreign Relations, accompanying the transmission of the Convention to the Senate for ratification, explained:

Committee Report, p. 13.

> The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. . . ." The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.

Therefore, certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

See, RAIO Training Module, *Interviewing Survivors of Torture and other Severe Trauma*, section *Forms of Torture*.

Types of harm that may be considered torture include, but are not limited to, the following:

1. rape and other severe sexual violence;

Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003).

2. application of electric shocks to sensitive parts of the body;
3. sustained, systematic beating;
4. burning;

5. forcing the body into positions that cause extreme pain, such as contorted positions, hanging, or stretching the body beyond normal capacity;

Matter of G-A-, 23 I&N Dec. 366, 372 (BIA 2002).

6. forced non-therapeutic administration of drugs; and

7. severe mental pain and suffering.

Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. In some cases, whether the harm above constitutes torture will depend upon its severity and cumulative effect.

The BIA in *Matter of G-A-* held that treatment that included "suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and ... severe and repeated beatings with cables or other instruments on the back and on the soles of the feet ... beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness" when intentionally and deliberately inflicted constitutes torture.

Matter of G-A-, 23 I&N Dec. 366, 370 (BIA 2002).

E. Mental Pain or Suffering

For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:

8 C.F.R. § 208.18(a)(4); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

a. The intentional infliction or threatened infliction of severe physical pain or suffering;

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.

F. Lawful Sanctions

Article 1 of the Convention provides that pain or suffering "arising only from, inherent in or incidental to lawful sanctions" does not constitute torture.

8 C.F.R. § 208.18(a)(3).

8. Definition of *lawful sanctions*

"Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the *Convention Against Torture* to prohibit torture."

8 C.F.R. § 208.18(a)(3).

The supplementary information published with the implementing regulations explains that this provision "does not require that, in order to come within the exception, an action must be one that would be authorized by United States law. It must, however, be legitimate, in the sense that a State cannot defeat the purpose of the Convention to prohibit torture."

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

Note that "lawful sanctions" do not include the intentional infliction of severe mental or physical pain during interrogation or incarceration after an arrest that is otherwise based upon legitimate law enforcement considerations.

See 8 CFR § 208.18; *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

9. Sanctions cannot be used to circumvent the Convention

A State Party cannot through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. In other words, the fact that a country's law allows a particular act does not preclude a finding that the act constitutes torture.

8 C.F.R. § 208.18(a)(3); 136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

Example: A State Party's law permits use of electric shocks to elicit information during interrogation. The fact that such treatment is formally permitted by law does not exclude it from the definition of torture.

10. Failure to comply with legal procedures

Failure to comply with applicable legal procedural rules in imposing sanctions does not *per se* amount to torture.

8 C.F.R. § 208.18(a)(8).

11. Death penalty

The Senate's ratification resolution expresses the "understanding" that the *Convention Against Torture* does not prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution.

136 Cong. Rec. at S17, 491-2 (daily ed. Oct. 27, 1990).

The supplementary information to the implementing regulations explains,

> "The understanding does not mean . . . that any imposition of the death penalty by a foreign state that fails to satisfy United States constitutional requirements constitutes torture. Any analysis of whether the death penalty is torture in a specific case would be subject to all requirements of the Convention's definition, the Senate's reservations, understandings, and declarations, and the regulatory definitions. Thus, even if imposition of the death penalty would be inconsistent with United States constitutional standards, it would not be torture if it were imposed in a legitimate manner to punish violations of law. Similarly, it would not be torture if it failed to meet any other element of the definition of torture."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8482-83 (Feb. 19, 1999).

XII. ESTABLISHING A REASONABLE FEAR OF TORTURE

To establish a reasonable fear of torture, the applicant must show that there is a reasonable possibility the applicant would be subject to torture, as defined in the *Convention Against Torture*, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

8 C.F.R. §§ 208.31(c), 208.18(a).

A. Torture

In evaluating whether an applicant has established a reasonable fear of torture, the asylum officer must address each of the elements in the torture definition and determine whether there is a *reasonable possibility* that each element is satisfied.

1. Severity of feared harm

Is there a reasonable possibility the applicant will suffer severe pain and suffering?

If the feared harm is mental suffering, does it meet each of the requirements listed in the Senate "understandings," as reflected in the regulations?

2. State action

Is there a reasonable possibility the pain or suffering would be inflicted by or at the instigation of a public official or other person acting in an official capacity?

If not, is there a reasonable possibility the pain or suffering would be inflicted with the consent or acquiescence of a public official or other person acting in an official capacity?

3. Custody or physical control

Is there a reasonable possibility the feared harm would be inflicted while the applicant is in the custody or physical control of the offender?

4. Specific intent

Is there a reasonable possibility the feared harm would be specifically intended by the offender to inflict severe physical or mental pain or suffering?

5. Lawful sanctions

Is there a reasonable possibility the feared harm would not arise only from, would not be inherent in, and would not be incidental to, lawful sanctions?

If the feared harm arises from, is inherent in, or is incidental to, lawful sanctions, is there a reasonable possibility the sanctions would defeat the object and purpose of the Convention?

B. No Nexus Requirement

There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition. While there is a "specific intent" requirement that the harm be intended to

inflict severe pain or suffering, the reasons motivating the offender to inflict such pain or suffering need not be on account of a protected characteristic of the victim.

Rather, the Convention definition provides a non-exhaustive list of possible reasons the torture may be inflicted, as described in section IX.C. above. The use of the modifier "for such purposes" indicates that this is a non-exhaustive list, and that severe pain and suffering inflicted for other reasons may also constitute torture.

See Committee Report, p. 14.

Note that the reasons for which a government has inflicted torture on individuals in the past may be important in determining whether the government is likely to torture the applicant.

See Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002) (finding that the BIA did not abuse its discretion in denying a motion to reopen to consider a Convention claim when country conditions indicate that the government in question usually uses torture to extract confessions or in politically-sensitive cases and there is no reason to believe that the applicant falls into either category).

C. Past Torture

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.

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

However, for purposes of the reasonable fear screening, which requires a lower standard of proof than is required for withholding of removal, that an applicant who demonstrates that he or she has been tortured in the past should generally be found to have met his or her burden of establishing a reasonable possibility of torture in the future, absent evidence to the contrary.

This approach governs only the reasonable fear screening and is not applicable to the actual eligibility determination for withholding under the *Convention Against Torture*. *See Abdel-Masieh v. INS*, 73 F.3d 579, 584 (5th Cir. 1996)(past actions do not create "an outer limit" on the government's future actions against an individual).

Conversely, past harm that does not rise to the level of torture does not mean that torture will not occur in the future, especially in countries were torture is widespread.

D. Internal Relocation

Regulations require the immigration judge 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 can establish that it is more likely than not that he or she would be tortured. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in assessing whether there is a reasonable possibility that he or she would be tortured.

8 C.F.R. § 1208.16(c)(3)(ii).

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. In deciding whether the applicant has satisfied his or her burden, the adjudicator must consider all relevant evidence, including but not limited to the possibility of relocation within the country of removal.

8 C.F.R. §§ 208.16(c)(2), (3)(ii).

Maldonado v. Holder, 786 F.3d 1155, (9th Cir. 2015) (overruling *Hassan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004) ("Section 1208.16(c)(2) does not place a burden on an applicant to demonstrate that relocation within the proposed country of removal is impossible because the IJ must consider all relevant evidence; no one factor is determinative.... Nor do the regulations shift the burden to the government because they state that the applicant carries the overall burden of proof.")

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 reasonable fear context.

See, e.g., Comollari v. Ashcroft, 378 F.3d 694, 697-98 (7th Cir. 2004).

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 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)(iv).

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

E. Mandatory Bars

Although certain mandatory bars apply to a grant of withholding of removal under the Convention Against Torture, no mandatory bars may be considered in making a reasonable fear of torture determination.

8 C.F.R. §§ 208.16(d)(2); 208.31(c).

Because there are ***no*** bars to protection under Article 3, an immigration judge must grant deferral of removal to an applicant who is barred from a grant of withholding of removal, but who is likely to be tortured in the country to which the applicant has been ordered removed. Therefore, the reasonable fear screening process must identify and refer to the immigration judge aliens who have a reasonable fear of torture, even those who would be barred from withholding of removal, so that an immigration judge can determine whether the alien should be granted *deferral of removal.*

8 C.F.R. § 208.17(a).

APSOs must elicit information regarding any potential bars to withholding of removal during the interview.

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 reasonable fear of persecution or torture. In such cases, the officer should consult a supervisory officer and follow procedures on "flagging" such information for the hearing as outlined in the Reasonable Fear Procedures Manual.

XIII. EVIDENCE

A. Credible Testimony

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or the Convention Against Torture, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. §§ 208.16(b); 208.16(c)(2).

As in the asylum context, there may be cases where lack of corroboration, without reasonable explanation, casts doubt on the credibility of the claim or otherwise affects the applicant's ability to meet the requisite burden of proof. Asylum officers should follow the guidance in the RAIO Modules, *Credibility,* and *Evidence,* and HQASY memos on this issue in evaluating whether lack of corroboration affects the applicant's ability to establish a reasonable fear of persecution or torture.

B. Country Conditions

Country conditions information is integral to most reasonable fear determinations, whether the asylum officer is evaluating reasonable fear of persecution or reasonable fear of torture.

See RAIO Training Module, *Country of Origin Information (COI) Researching and Using COI in RAIO Adjudications.*

The Convention Against Torture specifically requires State Parties to take country conditions information into account, where applicable, in evaluating whether a person would be subject to torture in a particular country.

> "[T]he competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Convention Against Torture, Article 3, para. 2.

The implementing regulations reflect this treaty provision by providing that all evidence relevant to the possibility of future torture must be considered, including, but not limited to, evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal.

8 C.F.R. §§ 208.16(c)(3).

As discussed in the supplementary information to the regulations, "the words 'where applicable' indicate that, in each case, the adjudicator will determine whether and to what extent evidence of human rights violations in a given country is in fact a relevant factor in the case at hand. Evidence of the gross and flagrant denial of freedom of the press, for example, may not tend to show that an alien would be tortured if referred to that country."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999).

Analysis of country conditions requires an examination into the likelihood that the applicant will be persecuted or tortured upon return. Some evidence indicating that the feared harm or penalty would be enforced against the applicant should be cited in support of a positive reasonable fear determination.

See Matter of M-B-A-, 23 I&N Dec. 474, 478-79 (BIA 2002) (finding that a Nigerian woman convicted of a drug offense in the United States was ineligible for protection under the Convention where she provided no evidence that a Nigerian law criminalizing certain drug offenses committed outside Nigeria would be enforced against

her).

In *Matter of G-A-*, the BIA found that an Iranian Christian of Armenian descent who lived in the U.S. for more than 25 years and who had been convicted of a drug-related crime is likely to be subjected to torture if returned to Iran. The BIA considered the combination of the harsh and discriminatory treatment of ethnic and religious minorities in Iran, the severe punishment of those associated with narcotics trafficking, and the perception that those who have spent an extensive amount of time in the U.S. are opponents of the Iranian government or even U.S. spies to determine that, in light of country conditions information, the individual was entitled to relief under the Convention Against Torture.

Matter of G-A-, 23 I&N Dec. 366, 368 (BIA 2002).

In *Matter of J-F-F-*, the Attorney General held that the applicant failed to meet his evidentiary burden for deferral of removal to the Dominican Republic under the Conventions Against Torture. Here, the IJ improperly "... strung together [the following] series of suppositions: that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result respondent would fail to control himself and become 'rowdy'; that this behavior would lead the police to incarcerate him; and that the police would torture him while he was incarcerated." The Attorney General determined that this hypothetical chain of events was insufficient to meet the applicant's burden of proof. In addition to considering the likelihood of each step in the hypothetical chain of events, the adjudicator must also consider whether the entire chain of events will come together to result in the probability of torture of the applicant.

Matter of J-F-F-, 23 I&N Dec. 912, 917 n.4 (AG 2006) ("An alien will never be able to show that he faces a more likely than not chance of torture if one link in the chain cannot be shown to be more likely than not to occur." Rather, it "is the likelihood of all necessary events coming together that must more likely than not lead to torture, and a chain of events cannot be more likely than its least likely link.") (*citing Matter of Y-L-*, 23 I&N Dec. 270, 282 (AG 2002)).

"Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA".

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

The Ninth Circuit has also addressed the use of country conditions in withholding cases, holding in *Kamalthas v. INS* that the "BIA failed to consider probative evidence in the record of country conditions which confirm that Tamil males have been subjected to widespread torture in Sri Lanka."

Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001).

XIV. INTERVIEWS

A. General Considerations

See Reasonable Fear Procedures Manual (Draft).

Interviews for reasonable fear determinations should generally be conducted in the same manner as asylum interviews. They should be conducted in a non-adversarial manner, separate from the public and consistent with the guidance in the RAIO Combined Training lessons regarding interviewing.

8 C.F.R. § 208.31(c).

The circumstances surrounding a reasonable fear interview may be significantly different from an affirmative asylum interview. A reasonable fear interview may be conducted in a jail or other detention facility and the applicant may be handcuffed or shackled. Such conditions may be particularly traumatic for individuals who have escaped persecution or survived torture and may impact their ability to testify. Additionally, the applicant may have an extensive criminal record. Given these circumstances, officers should take particular care to maintain a non-adversarial tone and atmosphere during reasonable fear interviews.

At the beginning of the interview, the asylum officer should determine whether the applicant has an understanding of the reasonable fear process and answer any questions the applicant may have about the process.

8 C.F.R. § 208.31(c).

Officers should read to the applicant paragraph 1.19 on Form I-899, which describes the purpose of the interview.

B. Confidentiality

The information regarding the applicant's fear of persecution and/or fear of torture is confidential and cannot be disclosed without the applicant's written consent, unless one of the exceptions in the regulations regarding the confidentiality of the asylum process apply. At the beginning of the interview, the asylum officer should explain to the applicant the confidential nature of the interview.

8 C.F.R. § 208.6.

C. Interpretation

If the applicant is unable to proceed effectively in English, the asylum officer must use a commercial interpreter with which USCIS has a contract to conduct the interview.

8 C.F.R. § 208.31(c).

Asylum officers may conduct interviews in the applicant's preferred language provided that the officer has been certified by the State Department, and that local office policy permits asylum officers to conduct interviews in languages other than English.

If the applicant requests to use a relative, friend, NGO or other source as an interpreter, the asylum officer should proceed with the interview using the applicant's interpreter. However, asylum officers are required to use a contract interpreter to monitor the interview to verify that the applicant's interpreter is accurate and neutral while interpreting.

The applicant's interpreter must be at least 18 years old. The interpreter must not be:

- the applicant's attorney or representative,
- a witness testifying on behalf of the applicant, or
- a representative or employee of the applicant's country of nationality, or if the applicant is stateless, the applicant's country of last habitual residence.

See Reasonable Fear Procedures Manual (Draft).

D. Note Taking

Interview notes must be taken in a Question & Answer (Q&A) format. It is preferable that the interview notes be typed. When the interview notes are taken longhand, the APSO must ensure that they are legible. Interview notes must accurately reflect what transpired during the reasonable fear interview so that a reviewer can reconstruct the interview by reading the interview notes. In addition, the interview notes should substantiate the asylum officer's decision.

8 C.F.R. § 208.31(c).

Lafferty, John, Asylum Division, *Updated Guidance on Reasonable Fear Note-Taking*, Memorandum to All Asylum Office Staff (Washington, DC), May 9, 2014.
See also Reasonable Fear Procedures Manual (Draft).

The Reasonable Fear Q&A interview notes are not required to be a *verbatim* transcript.

Although interview notes are not required to be a *verbatim* record of everything said at the interview, they must provide an accurate and complete record of the specific questions asked and the applicant's specific answers to demonstrate that the APSO gave the applicant every opportunity to establish a reasonable fear of persecution, or a reasonable fear of torture. In doing so, the Q&A notes must reflect that the APSO asked the applicant to explain any inconsistencies as well as to provide more detail concerning material issues. This type of record will provide the SAPSO with a clear record of the issues that may require follow-up questions or analysis, as well as assist the asylum officer in the identification of issues related to credibility and analysis of the claim after the interview.

Before ending the interview, the APSO must provide a summary of the material facts related to the protection claim and read it to the applicant who, in turn, will have the opportunity to add, or correct facts. The interview record is not considered complete until the applicant agrees that the summary of the protection claim is complete and correct.

E. Representation

See Reasonable Fear Procedures Manual (Draft).

The applicant may be represented by counsel or by an accredited representative at the interview. The representative must submit a signed form G-28. The role of the representative in the reasonable fear interview is the same as the role of the representative in the asylum interview.

8 C.F.R. § 208.31(c); *see* discussion on role of the representative in the RAIO Training Module, *Interviewing-Introduction to the Non Adversarial Interview*.

The representative may present a statement at the end of the interview and, where appropriate, should be allowed to make clarifying statements in the course of the interview, so long as the representative is not disruptive. The asylum officer, in his or her discretion, may place reasonable limits on the length of the statement.

F. Eliciting Information

The APSO must elicit all information relating both to fear of persecution and fear of torture, even if the asylum officer determines early in the interview that the applicant has established a reasonable fear of either.

See RAIO Training Module, *Interviewing – Eliciting Testimony*, section 3.0: "Officer's Duty to Elicit Testimony". *"Eliciting" testimony means fully exploring an issue by asking follow-up questions to expand upon and clarify the interviewee's responses before moving on to another topic.*

Specifically, the asylum officer must explore each of the following areas of inquiry, where applicable:

1. What the applicant fears would happen to him/her if returned to a country (elicit details regarding the specific type of harm the applicant fears)

2. Whom the applicant fears

The list of areas of inquiry is not exhaustive. There may be other areas of inquiry that arise in the course of the interview. Also, the asylum officer is not required to explore the areas of inquiry in the sequence listed below. As in an asylum interview, each interview has a flow of information unique to the applicant.

3. The relationship of the feared persecutor or torturer to the government or government officials

4. Was a public official or other individual acting in an official capacity? Often the public official is a police officer. The following is a brief list of questions that may be asked when addressing whether a police officer

was acting in an official capacity:

a. Was the officer on duty?

b. Was the officer in uniform?

c. Did the officer show a police badge or other type of official credential?

d. Did the officer have access to the victim because of his/her authority as a police officer?

e. If a potential torturer is not a public official or someone acting in official capacity, is there evidence that a public official or other person acting in official capacity had ,or would have prior knowledge of the torture and breached, or would breach a legal duty to prevent the torture, including acting a manner that can be considered to be willfully blind to the torture? Is the torturer part of the government in that country (including local government)?

f. If not, would a government or public official know what they were doing?

g. Would a government or public official think it was okay?

h. If you believe that the government would think this was okay or that the government is corrupt, why do you think this?

i. What experiences have you or people you know of had with the authorities that make you think they would think it was okay if someone was tortured?

j. Would the (agents of harm?) person or persons inflicting torture be told by the government or public official to do that?

k. Did you report any past harm to a public official?

l. What did the public official say to you when you reported it?

m. Did the public official ask you questions about the

incident? Did public officials go to crime scene to investigate?

n. Did you ever speak with police after you reported incident?

o. Did you inquire about any investigation? If so, please provide details.

p. Do you know if anyone was ever investigated or charged with crime?

5. The reason(s) someone would want to harm the applicant. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in reasonable fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

6. Whether the applicant has been and/or would be in the feared offender's custody or control

   a. How do you think you will be harmed?

   b. How will the feared offender find you?

7. Whether the harm the applicant fears may be pursuant to legitimate sanctions

   a. Would anyone have a legal reason to punish you in your in your home country?

   b. Do you think you will be given a trial if you are arrested?

   c. What will happen to you if you are put in prison?

8. Information about any individuals similarly situated to the applicant, including family members or others closely associated with the applicant, who have been threatened, persecuted, tortured, or otherwise harmed

9. Any groups or organizations the applicant is associated with that would place him/her at risk of persecution or torture, in light of country conditions information

10. Any actions the applicant has taken in the past (either in

the country of feared persecution or another country, including the U.S.) that would place him/her at risk of persecution or torture, in light of country conditions information

11. Any harm the applicant has experienced in the past:

    a. a description of the type of harm

    b. identification of who harmed the applicant

    c. the reason the applicant was harmed

    d. the relationship between the person(s) who harmed the applicant and the government

    e. whether the applicant was in that person(s) custody or control

    f. whether the harm was in accordance with legitimate sanctions

When probing into a particular line of questioning, it is important to keep asking questions that elicit details so that information relating to the issues above is thoroughly elicited. It is also important to ask the application questions such as, "Is there anyone else or anything else you are afraid of, other than what we've already discussed?" until the applicant has been given an opportunity to present his or her entire claim.

The asylum officer should also elicit information relating to exceptions to withholding of removal, if it appears that an exception may apply. This information may not be considered in evaluating whether the applicant has a reasonable fear, but should be included in the interview Q&A notes, where applicable.

XV. REQUESTS TO WITHDRAW THE CLAIM FOR PROTECTION

See Reasonable Fear Procedures Manual (Draft).

An applicant may withdraw his or her request for protection from removal at any time during the reasonable fear process. When an applicant expresses a desire to withdraw the request for protection, the asylum officer must conduct an interview to determine whether the decision to withdraw is entered into knowingly and willingly. The asylum officer should ask sufficient

questions to determine the following:

- The nature of the fear that the applicant originally expressed to the DHS officer,
- Why the applicant no longer wishes to seek protection and whether there are any particular facts that led the applicant to change his or her mind,
- Whether any coercion or pressure was brought to bear on the applicant in order to have him or her withdraw the request, and
- Whether the applicant clearly understands the consequences of withdrawal, including that he or she will be barred from any legal entry into the United States for a period that may run from 5 years to life.

An elicitation of the nature of the fear that the applicant originally expressed does not require a full elicitation of the facts of the applicant's case. Rather, information regarding whether the request to withdraw is knowing and voluntary is central to determining whether processing the withdrawal of the claim for protection is appropriate. The determination as to whether the request to withdraw is knowing and voluntary is unrelated to whether the applicant has a fear of future harm. Processing the withdrawal of the claim for protection is appropriate when the decision was made knowingly and voluntarily even when the applicant still fears harm.

XVI. SUMMARY

A. Applicability

Asylum officers conduct reasonable fear of persecution or torture screenings in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

B. Definition of Reasonable Fear of Persecution

A reasonable fear of persecution must be found if the applicant establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality,

membership in a particular social group, or political opinion.

C. Definition of Reasonable Fear of Torture

A reasonable fear of torture must be found if the applicant establishes there is a reasonable possibility he or she will be tortured.

D. Bars

No mandatory bars may be considered in determining whether an individual has established a reasonable fear of persecution or torture.

E. Credibility

The same factors apply in evaluating whether an applicant's testimony is credible as apply in the asylum adjudication context. The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

F. Effect of Past Persecution or Torture

1. If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of future persecution on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

    a. due to a fundamental change in circumstances, the fear is no longer well-founded, or

    b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. If the applicant establishes past torture, it may be presumed that the applicant has a reasonable fear of future torture, unless a preponderance of the evidence establishes that there is no reasonable possibility the applicant would be tortured in the future.

G. Internal Relocation

To establish a reasonable fear of persecution, the applicant must establish that it would be unreasonable for the applicant to relocate. If the government is the feared offender, it shall be presumed that internal relocation would not be reasonable, unless a preponderance of the evidence establishes that, under all the circumstances, internal relocation would be reasonable.

Asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in reasonable fear of torture determinations. 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 reasonable fear context. Asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

H. Elements of the Definition of Torture

1. The torturer must be a public official or other person acting in an official capacity, or someone acting with the consent or acquiescence of a public official or someone acting in official capacity.

2. The applicant must be in the torturer's control or custody.

3. The torturer must specifically intend to inflict severe physical or mental pain or suffering.

4. The harm must constitute severe pain or suffering.

5. If the harm is mental suffering, it must meet the requirements listed in the regulations, based on the "understanding" in the ratification instrument.

6. Harm arising only from, inherent in, or incidental to lawful sanctions generally is not torture. However, sanctions that defeat the object and purpose of the Torture Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

7. There is no requirement that the harm be inflicted "on account" of any ground.

I. Evidence

Credible testimony may be sufficient to sustain the burden of proof, without corroboration. However, there may be cases where a lack of corroboration affects the applicant's credibility and ability to establish the requisite burden of proof. Country conditions information, where applicable, must be considered.

J. Interviews

Reasonable fear screening interviews generally should be conducted in the same manner as interviews in the affirmative asylum process, except DHS is responsible for providing the interpreter. The asylum officer must elicit all relevant information.

EXECUTIVE SUMMARY OF CHANGES
TO THE CREDIBLE FEAR LESSON PLAN
FEBRUARY 2017

CREDIBLE FEAR (CF) LESSON PLAN (LP) – dated 02/13/17

- **Cubans** – Section II, Background; pp. 6-12
  - Updates the discussion and citations to include the recent Federal Register publications of the final rule and notice to make Cubans subject to expedited removal (ER).
  - Similarly removes Cubans from the list of aliens exempt from ER.
- **Parole post-CF positive** – Section II, Background; pp. 6-12
  - Removes the discussion of ICE's exercise of discretion to parole aliens out of detention following a positive CF determination.
- **Reasonable doubt** – Section V, Burden of Proof and Standard of Proof; p. 17
  - Removes the guidance that "[w]hen there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination," and replaces it with noting that reasonable doubt regarding the outcome may be considered in light of credible fear as a screening standard.
- **Credibility** – Section VI, Credibility; pp. 18-23, 47
  - Removes the "significant possibility" language from the discussion of the applicant establishing identity and credibility.
  - Adds additional references from the RAIO Credibility LP on the REAL ID Act credibility standard of the "totality of the circumstances and all relevant factors" and the applicant's need to provide detail.
  - Provides additional discussion of evaluating an applicant's prior statements to CBP.
  - Removes "relevant to the claim" language from the discussion on considering and assessing credibility.
- **Removal to a country other than of citizenship** – Section VII, Establishing a Credible Fear of Persecution; p. 34
  - Modifies the discussion to state that a claim of CF with respect to another country other than the country of citizenship or the country of removal should be memorialized in the file in order to ensure that the fear is explored in the future should DHS ever contemplate removing the person to that country. This supersedes the prior discussion stating that applicants who were firmly resettled in another country should be referred to an IJ for a full hearing if they have a positive CF claim from that country of firm resettlement.
- **Country of proposed removal** – Section VII, Establishing a Credible Fear of Persecution; p. 34
  - Modifies the discussion to state that the asylum officer should determine if the applicant has a CF "with respect to any country of proposed removal," deleting the prior language of determining if the applicant has a CF "in any country to which the applicant might be returned."

- **Convention Against Torture (CAT) internal relocation** – Section VIII, Establishing a Credible Fear of Torture; p. 41
    - Updates the burden of proof discussion for CF of torture, in order to take into account a Ninth Circuit decision holding that unlike other CAT elements for which the applicant bears the burden, the applicant and the government share the burden with regard to CAT internal relocation.

EXECUTIVE SUMMARY OF CHANGES
TO THE REASONABLE FEAR LESSON PLAN
FEBRUARY 2017

REASONABLE FEAR (RF) LESSON PLAN (LP) – dated 02/13/17

- **Country of removal** – Section III, Jurisdiction; pp. 9-10
  - In discussing when an asylum officer must explore an applicant's fear with regard to a country, includes reference to the countries "proposed" for removal, and deletes reference to "any other country to which DHS is contemplating removal," for parity with the Credible Fear (CF) LP.
  - Also removes a note stating that procedures are being developed for DHS referral of cases back to the asylum office when a person expresses fear to a new country of removal, as procedural updates are best suited for the RF Procedures Manual.
- **Credibility** – Section VIII, Credibility; pp. 12-17
  - Modifies structure and content to conform to guidance provided in the updated CF LP, other than those topics specific to credibility in the RF context.
  - Includes additional references from the RAIO Credibility LP on the REAL ID Act credibility standard of the "totality of the circumstances and all relevant factors" and the applicant's need to provide detail.
  - Removes "relevant to the claim" language from the discussion on considering and assessing credibility.
- **Nexus** – Section IX, Establishing a Reasonable Fear of Persecution; p. 17
  - Adds language from the CF LP regarding the burden of proof required to establish nexus to a protected ground.
- **Other serious harm** – Section IX, Establishing a Reasonable Fear of Persecution; p. 19
  - Clarifies that a RF of persecution may be found only if there is a reasonable possibility the applicant will be persecuted in the future, regardless of the likelihood that the applicant will face other serious harm upon return.
- **CAT internal relocation** – Section XII, Establishing a Reasonable Fear of Torture; p. 39
  - Updates the burden of proof discussion for RF of torture, in order to take into account a Ninth Circuit decision holding that unlike other CAT elements for which the applicant bears the burden, the applicant and the government share the burden with regard to CAT internal relocation.
- **Mandatory bars** – Section XII, Establishing Reasonable Fear of Torture; p. 40
  - Adds language instructing asylum officers to keep in mind procedures for flagging mandatory bars for further consideration during a hearing before an immigration judge.
- **Note taking** – Section XIV, Interviews; p. 44
  - Updates the note-taking section to conform to May 2014 memorandum by John Lafferty, *Updated Guidance on Reasonable Fear Note-Taking*, providing that asylum officers must take interview notes in a Question & Answer format during RF interviews and provide the applicant with a summary of material facts at the end of the interview, with which the applicant must agree, superseding the sworn statement requirement.