Lesson Plan Overview

Course	Refugee, Asylum and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Mandatory Bars to Asylum***
Rev. Date	May 9, 2013
Lesson Description	This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum.
Terminal Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to determine when an applicant is ineligible to apply for asylum and when a refugee is ineligible for a grant of asylum.
Enabling Performance Objectives	1. Locate the sections of the INA and regulations that apply to grounds for mandatory denials of asylum. (ACRR3) (AAS6) (ACCR4) 2. Identify the grounds of ineligibility to apply for asylum, and the exceptions to those grounds. (AILA) 3. Indicate who is subject to a mandatory denial or referral of asylum. (ACRR3) 4. Describe the factors to consider in determining whether an individual is firmly resettled. (ACRR3) 5. Identify policies and procedures for handling criminal issues. (ACRR3) (CD38)
Instructional Methods	Lecture; discussion; practical exercises
Student Materials/ References	Lesson Plans; INA; 8 C.F.R. §208; *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999)
Methods of Evaluation	Practical exercise; Written test
Background Reading	1. *Agreement Between the Government of the United States of America and the Government of Canada for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (Dec. 5, 2002), 5 pp.; Final Rule on the Implementation of the Agreement, 69 FR 69480, November 29, 2004, 12 pp. 2. Walter D. Cadman. Investigations Branch, Office of Field Operations. *Investigative Referral of Suspected Human Rights Abusers*, Memorandum to District Directors, et al. (Washington, DC: Sept. 28, 2000), 2p.

CRITICAL TASKS

1. Knowledge of mandatory bars and inadmissibilities to asylum eligibility (ACRR3)
2. Knowledge of policies and procedures for one year filing deadline (ACRR4)
3. Knowledge of criteria for refugee classification. (CD20)
4. Knowledge of policies and procedures for handling criminal issues (CD38)
5. Skill in analyzing complex issues to identify appropriate responses or decisions (CD127)

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3. Joseph E. Langlois. Asylum Division, Office of International Affairs. *Known or Suspected Human Rights Abusers*, Memorandum to Asylum Office Directors, et al. (Washington, DC: Sept. 11, 2000), 5p.

4. Joseph E. Langlois. Asylum Division, Office of International Affairs. *Procedures for Contacting HQASM on Terrorist Cases*, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 3, 2002), 2p.

5. Joseph E. Langlois. Asylum Division, Office of International Affairs. *Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR*, Memorandum to Asylum Office Directors, et al. (Washington, DC: Jan. 4, 2002), 11 p.

6. Michael A. Pearson. Office of Field Operations. *Human Rights Abuse Memorandum of Understanding*, Memorandum to Regional Directors, et al. (Washington, DC: Sept. 29, 2000), 19p.

7. Chris Sale. Office of the Deputy Commissioner. *AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief,* Memorandum to Management Team (Washington, DC: 6 August 1996), 9 p. plus attachments

8. Jeffrey Weiss. Office of International Affairs. *Processing Claims Filed By Terrorists Or Possible Terrorists*, Memorandum to Asylum Office Directors, HQASM Staff (Washington, DC: 1 October 1997), 2 p.

9. Johnny N. Williams. Office of Field Operations. *Interagency Border Inspection System Records Check*, Memorandum to Regional Directors, et al. (Washington, DC: 2 July 2002), 4 p. plus attachment.

10. James W. Ziglar. Office of the Commissioner. *New Anti-Terrorism Legislation*, Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), 8p.

11. United Nations High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees.* HCR/GIP/03/05, 4 September 2003, 9 pp.

12. Joseph E. Langlois. USCIS Asylum Division. *Updates to Asylum Officer Basic Training Course Lessons as a Result of Amendments to the INA Enacted by the REAL ID Act of May 11, 2005*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 11 May 2006), 8 pp.

13. *Matter of A-G-G-*, 25 I. & N. Dec. 486 (BIA 2011).

Presentation **References**

I. INTRODUCTION

This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is otherwise eligible for asylum. Prohibitions on applying for asylum and circumstances that require denial or referral of otherwise eligible applicants are known collectively as "bars." There are bars to applying for asylum and bars to eligibility for asylum.
This lesson only introduces the bar to applying for asylum more than one year after the date of last arrival (the one-year filing deadline), and the bar to applying based on availability of a safe third country. Both of these subjects are covered in greater detail in the asylum lessons, *One-Year Filing Deadline* and *Safe Third Country Threshold Screening*. This lesson will provide more detailed information on the bar to applying for asylum based on a Previous Denial of an Asylum Claim.

This lesson will also provide a brief review of the bars to eligibility that are covered in RAIO training modules *Analyzing The Persecutor Bar, National Security,* and *Firm Resettlement.*

This lesson will provide a more detailed discussion of bars to eligibility based on criminal activity.

You are not required to memorize all of the specific crimes listed as bars to asylum. Rather, you should become familiar with the broad category of crimes that preclude a grant of asylum, and the issues that must be considered when adjudicating the claim of an applicant who may have been involved in criminal activity.

In general, the process for interview of an asylum-seeker does not change when examining the possibility that a mandatory bar applies. However, there are certain instances when the asylum officer must switch to Question-and-Answer, Sworn Statement style interview notes. This is discussed in greater detail in the RAIO training module *Interviewing - Note-Taking.*

II. OVERVIEW OF BARS

1951 Convention relating to the Status of Refugees, Art. 1.F; *UNHCR Handbook*, paras. 140, 147-63

The *1951 Convention relating to the Status of Refugees* gives State signatories the authority to deny protection to certain refugees who are determined to be "persons who are not considered to be deserving of international protection," and persons deemed "not in need of

international protection." Specifically, the Convention does not apply to any person with respect to whom there are serious reasons for considering that he or she committed certain crimes (crime against peace, war crime, crime against humanity, or serious nonpolitical crime outside the country of refuge), or has been guilty of acts contrary to the purposes and principles of the United Nations.

In accordance with these provisions, United States law contains provisions that prohibit the granting of asylum (and/or withholding of removal) to certain individuals based on criminal activities and national security reasons. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, Congress significantly revised the law relating to eligibility to apply for and to be granted asylum. Prior to the IIRIRA, the only bar to *applying* for asylum was conviction of an aggravated felony. A change occurred with enactment of IIRIRA so that a conviction of an aggravated felony is a bar to being *granted* asylum. Other circumstances discussed below are bars to *applying* for asylum. Consequently, an asylum applicant who applies for asylum on or after April 1, 1997 must first demonstrate eligibility to apply for asylum before the merits of the claim will be adjudicated.

INA § 208(b)(2)(B)(i). This is discussed in section IV.B below.

In addition, Congress identified new mandatory bars to eligibility for asylum and codified in statute grounds for ineligibility that previously were found only in regulation.

Because the IIRIRA amendments to section 208 of the INA apply only to asylum applications filed on or after April 1, 1997, three new prohibitions on applying for asylum and the new substantive ineligibility grounds apply only to applications filed on or after April 1, 1997.

A. Overview of Bars to Applying for Asylum

Pursuant to regulation, only the BIA, an immigration judge or asylum officer may make the determination as to whether an applicant is prohibited from applying for asylum. Therefore, the Service Centers will continue to accept asylum applications in affirmative cases, regardless of whether it appears that an applicant is barred from applying. The applicant will be scheduled for an asylum interview, and an asylum officer will interview the applicant to determine whether a prohibition on filing is applicable, and if so, whether an exception exists.

8 C.F.R. § 208.4(a)(1)

Generally, an asylum seeker cannot apply for asylum on or after April 1, 1997, if any of the following three circumstances apply:

INA § 208(a)(2); 8 C.F.R. § 208.4(a)

- The asylum seeker could be returned to a "safe" third country, pursuant to a bilateral or multilateral agreement.

As will be discussed below, the first bar only

- The asylum seeker submitted an application more than one year after arrival in the United States or after April 1, 1998, whichever is most recent in time.

applies to certain applicants arriving from Canada, who are seeking credible or reasonable fear interview, and there are exceptions for all three bars.

- The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

Conviction of an aggravated felony is a prohibition on filing for asylum applications submitted between November 20, 1990 and April 1, 1997.

B. Overview of Mandatory Bars to a Grant of Asylum

There are six statutory grounds (mandatory bars) that render an applicant ineligible for asylum, even if the applicant may be a "refugee" within the meaning of section 101(a)(42)(A) of the Act.

INA §§ 208(b)(2)(A); Note that the statute provides that the Attorney General may establish by regulation additional limitations on a grant of asylum. INA § 208(b)(2)(C).

Each bar is outlined below, and will be discussed in more detail in the rest of the lesson plan.

- Persecution of others on account of one of the protected characteristics in the refugee definition
- Conviction of a particularly serious crime, including an aggravated felony
- Commission of a serious nonpolitical crime outside the United States prior to arrival in the U.S.
- Reasonable grounds exist for regarding the applicant a danger to the security of the United States
- Participation in terrorist activities or status as a representative of certain terrorist organizations
- Firm resettlement

By definition, a persecutor cannot be a "refugee." The second sentence of INA § 101(a)(42) specifically excludes persecutors from the refugee definition.

III. BARS TO APPLYING FOR ASYLUM

Only applicants who submit applications for asylum on or after April 1, 1997, are subject to the following bars to applying for asylum.

A. Safe Third Country

INA § 208(a)(2)(A).

If it is determined that the asylum seeker can be removed to a "safe third country," he or she cannot apply for asylum, unless the Attorney General finds it in the public interest for the applicant to remain in the United States.

Each of the following requirements must be met before this bar can be applied:

1. There must be a bilateral or multilateral agreement for removal with the third country;

2. The applicant's life or freedom would not be threatened on account of a protected ground in the third country; and

3. The applicant must have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection in the third country.

Please refer to Asylum Lesson Plan, *Safe Third Country Threshold Screening,* for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

B. One-Year Filing Deadline

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(ii). The Asylum Division provided a 2-week grace period when this provision was implemented and thus does not refer as untimely any I-589 applications filed before April 16, 1998.

An asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States. The one-year period is calculated from the date of the applicant's last arrival in the United States or April 1, 1997, whichever is most recent in time. Please refer to Asylum Lesson Plan, *One-Year Filing Deadline,* for a detailed discussion of the applicability and exceptions related to this bar to filing for asylum.

C. Previous Denial of Asylum

INA §§ 208(a)(2)(C) and (D); 8 C.F.R. § 208.4(a)(3).

See Joseph E. Langlois, Asylum Division, Office of International Affairs. *Procedures for Implementing the One-Year Filing Deadline and Processing Cases Previously Denied by EOIR*, Memorandum to Asylum Office Directors, et al. (Washington, DC:

An asylum seeker cannot apply for asylum if he or she has previously applied for and been denied asylum by an immigration judge (IJ), or the Board of Immigration Appeals (BIA) (collectively EOIR), unless the asylum seeker demonstrates to the satisfaction of the adjudicator changed circumstances that materially affect asylum eligibility. A previous denial of asylum *by an asylum officer* is not a bar to applying for asylum.

1. Jurisdiction

In most cases in which an applicant has been denied asylum by an IJ or the BIA, the Asylum Division does not have jurisdiction over a subsequently filed Form I-589, *Application for Asylum and for Withholding of Removal*, because a charging document has been served on the applicant and filed with EOIR. Therefore, unless the applicant left the United States after the denial, the application would fall under EOIR's exclusive jurisdiction under 8 C.F.R. § 208.2(b) and 8 C.F.R. § 208.2(b).

There are five circumstances in which the Asylum Program has jurisdiction over an I-589 filed after an IJ or BIA has denied the applicant asylum. In the first three circumstances, the applicant must have left the United States after having been denied asylum by an IJ or the BIA, returned to the United States, and then submitted the I-589 with USCIS. The last two circumstances relate only to Unaccompanied Alien Children (UACs) and are a result of the *Trafficking Victims Protection Reauthorization Act.*

Jan. 4, 2002).

Note: The "Previous Denial of Asylum" procedures do not apply to an individual who entered the US illegally after having been removed, deported, or excluded, or after having left the US under an order of removal, deportation, or exclusion, and is therefore subject to reinstatement of the prior order. For procedures involving reinstatements of prior orders, see *Affirmative Asylum Procedures Manual*, section III.S, *Reinstatement of Prior Order.*

Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (HQRAIO 120/12a) (25 March 2009).

a. The applicant was removed from or departed the United States under an order of removal, deportation, or exclusion, and subsequently made a legal entry.

Because the final order was executed, EOIR no longer has jurisdiction and, because the subsequent entry was legal, the applicant is not subject to reinstatement of the final order under INA § 241(a)(5).

b. The applicant departed the United States after the expiration of a voluntary departure period, thus becoming subject to a removal order and subsequently

made a legal entry; or

c. The applicant departed the United States before the expiration of a voluntary departure period, and subsequently made a legal or illegal entry.

USCIS has jurisdiction because no final order was entered (therefore reinstatement is not an issue), and there has been a departure and re-entry since the applicant was placed in proceedings (therefore, EOIR no longer has exclusive jurisdiction under 8 C.F.R § 208.2).

d. A UAC in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has never submitted a Form I-589, may file for asylum with USCIS.

e. For an individual in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has previously submitted a Form I-589 while a UAC, USCIS may have initial jurisdiction.

Please see the RAIO Module *Children's Claims* and the Asylum lesson *One-Year Filing Deadline* for a more detailed explanation of cases involving Unaccompanied Alien Children.

2. Determination of changed circumstances

a. Definition

The definition of "changed circumstances" applied in the one-year filing deadline analysis is the same as the definition of "changed circumstances" as applied when analyzing whether the applicant may be permitted to apply for asylum after being denied asylum by an IJ or the BIA. The changed circumstances must materially affect the applicant's eligibility for asylum and may include changes in the country of persecution or changes relating to the applicant in the United States, including changes in U.S. law.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)(4); and *see* Asylum lesson, *One-Year Filing Deadline, section Changed Circumstances*

The difference in the analysis is that to overcome the previous denial bar the changed circumstance must have occurred since the applicant was denied asylum by the IJ or BIA.

Note: The one-year filing deadline analysis requires that the changed circumstance have occurred after April 1, 1997.

Example: In 1995, an applicant claimed that he feared that he would be forcibly sterilized should he return to China. In January 1996 he was denied asylum by an IJ. He was granted voluntary departure by the IJ, left before the expiration period, and re-entered the country without inspection in August 1998. He files a second application for asylum. He establishes that there are changed

circumstances since his prior denial that materially affect his eligibility for asylum (*i.e.* the codification of persecution based on resistance to a coercive population control program as persecution on account of political opinion by IIRIRA in 1996) and has, therefore, overcome the bar to applying after a previous denial.

Example: An applicant claiming that she would be persecuted on account of her political opinion should she be returned to Panama was denied asylum by an IJ in 2010. After departing the US under voluntary departure, she returned in 2012. She claims that since the time that she was denied asylum by the judge, she has had increased health problems relating to diabetes and can receive proper care only in the United States. Her illness does not amount to a changed circumstance materially affecting her eligibility for asylum and does not overcome the previous denial bar to applying.

b. Standard of proof

See RAIO module, *Evidence.*

The standard of proof for demonstrating this exception is "to the satisfaction of" the adjudicator.

3. Review of previous decision

The entire file, including the prior application, supporting documentation, and the previous assessment or decision, must be reviewed prior to making a determination on whether the applicant is eligible to apply for and be granted asylum. Whenever possible, the case should be assigned to the officer who made the original decision.

a. Prior denial by asylum officer

As indicated above, a prior denial by an *asylum officer* is not a bar to applying for asylum. Changed circumstances need not be established for the asylum claim to be considered on its merits. Nevertheless, in such cases, substantial deference should be accorded to prior determinations as to previously established facts, including credibility findings, unless a clear error is present.

b. Prior denial by EOIR

Findings of fact made by EOIR, including credibility determinations, must be upheld and cannot be

reconsidered. The application of law to the applicant's original case also must be upheld, unless the applicant establishes changed law materially affecting his or her eligibility for asylum. The applicant has already had an opportunity to appeal the IJ's decision, and the asylum officer is not in a position to give a new hearing on issues that were or should have been raised on appeal.

4. Interview

In order to determine whether there are changed circumstances that materially affect the applicant's eligibility for asylum, the asylum officer interviews the applicant and reviews the record regarding the previous application for a thorough understanding of the basis for the applicant's claim. The asylum officer need not re-visit the details of the original asylum claim, unless it is necessary to the determination of asylum eligibility once the applicant has established changed circumstances. Therefore, the asylum interview focuses on whether any changed circumstances have occurred after the applicant was denied asylum by EOIR that may materially affect the applicant's eligibility for asylum, and any information needed to make an asylum eligibility determination if changed circumstances are established.

5. Written analysis

Where a changed circumstance exception is found, the analysis, whether in a NOID or an assessment to refer or grant, must include a statement as to why the applicant was previously denied asylum, an explanation of the changed circumstances and their materiality to the applicant's eligibility for asylum, and an analysis of the merits of the claim to asylum in light of the changed circumstances.

If a changed circumstance exception is not found, the analysis in the assessment to refer or NOID requires a description of any changed circumstances that might have been claimed by the applicant, a description of and citation to country conditions (if applicable), and an explanation of why those circumstances are not changed circumstances or why they do not materially affect the applicant's asylum eligibility. In this case, the analysis does not require a full account of all material facts or an analysis of the applicant's claim.

6. One-Year Filing Deadline

Applicants who file an application for asylum on or after April 1, 1997, are subject to the one-year filing deadline rule, including those who were previously denied asylum by an IJ or the BIA. However, please note that the one year filing deadline does not apply to UACs.

INA § 208(a)(2)(B); 8 C.F.R. § 208.4(a).

See RAIO Module: *Children's Claims, Asylum Supplement.*

The analysis of the one-year filing deadline for those who were previously denied asylum will be identical to that for all other applicants.

See generally Asylum lesson, *One-Year Filing Deadline.*

a. Filing timely

As explained above, for the Asylum Division to have jurisdiction over an asylum application filed by an individual who was previously denied asylum by an IJ or the BIA, the individual must have left the United States and made a re-entry subsequent to the denial of asylum.

Section III.C.1., *Jurisdiction*, above, lists the situations when the Asylum Division has jurisdiction over an applicant previously denied asylum.

To determine whether the applicant timely filed, the officer compares the date of the applicant's entry subsequent to the denial of asylum to the date the second asylum application was filed to determine whether the individual filed the application within one year after the date of last arrival.

See Asylum Lesson, *One-Year Filing Deadline*, section IV.

Example: Consider the same applicant from China in the example above. Recall that he was denied asylum by an IJ in January 1996, and after departing voluntarily, he re-entered the country illegally in August 1998. He filed an application for asylum in December 1999. Recall that he established that there are changed circumstances since his prior denial that materially affect his asylum eligibility (i.e., the codification of persecution based on resistance to a coercive population control program as persecution on account of political opinion by IIRIRA in 1996), overcoming the previous denial bar to applying. However, his application was not timely filed (16 months after last arrival). The officer must then determine whether the applicant has established a changed or extraordinary circumstance exception to the one-year filing deadline.

b. Exceptions to the one-year filing deadline

An applicant previously denied asylum who files an application for asylum more than one year after his or her last arrival may still be eligible for asylum if he or

See Asylum lesson, *One-Year Filing Deadline*, section *Exceptions to the One-*

she can establish eligibility for an exception to the one-year filing deadline.

Year Rule

(i) Changed circumstances

If an applicant establishes a changed circumstance that excuses a prior denial of asylum, that same circumstance may qualify as an exception to the one-year filing deadline as well, provided that the changed circumstance occurred on or after April 1, 1997 and the application was filed within a reasonable period of time given the circumstances.

See Asylum lesson, *One-Year Filing Deadline,* section *Changed Circumstances.*

Example: An ethnic Albanian from Kosovo who feared persecution on account of his nationality was denied asylum by an IJ in March 1997. The applicant timely departed under voluntary departure and re-entered the US illegally in December 1997. The applicant filed for asylum in July 1999 (an untimely filing). The applicant established an exception to the previous denial bar on the basis of a substantial increase in hostilities against ethnic Albanians in Kosovo that began in mid-1998, developed into ethnic cleansing in early 1999, and culminated in an attack on his town by Serbian police in April 1999. Because the worsening of conditions is material to the applicant's asylum eligibility, this also serves as a changed circumstance exception to the one-year filing deadline, provided that the applicant files within a reasonable period given the circumstances.

Example: Consider the same Chinese applicant above. He established a changed circumstance exception to the previous denial bar to applying (statutory change in the definition of refugee based on resistance to a coercive population control program). However, this changed circumstance does not provide an exception to the one-year filing deadline because it did not occur after April 1, 1997.

See Asylum lesson, *One-Year Filing Deadline,* section *Changed Circumstances, General Considerations.*

(ii) extraordinary circumstances

Extraordinary circumstances do not provide an exception to the bar to applying for asylum after a

See Asylum lesson, *One-Year Filing*

prior denial. However, if the changed circumstance that overcomes the previous denial bar does not apply as a changed circumstance exception to the one-year filing deadline, the asylum officer must consider whether there are extraordinary circumstances that are material to the filing deadline.

Deadline, section *Extraordinary Circumstances*

Example: Again consider the Chinese applicant above. In May 1999 he was seriously injured in a factory accident that required him to be hospitalized until September 1999. The timing and degree of injury constitute an extraordinary circumstance directly related to the delay in filing and, therefore, would serve as an extraordinary circumstance exception to the one-year filing deadline, so long as the applicant files for asylum within a reasonable period of time after he recovers from the accident.

c. Filing within a reasonable period of time

Once an applicant who applied untimely has established the requisite changed or extraordinary circumstances, a determination must be made as to whether the application was filed within a reasonable period of time given those circumstances. This requirement applies equally to applicants previously denied asylum who file more than one year after the date of last entry.

8 C.F.R. §§ 208.4(a)(4)(ii) and (5); *See* Asylum lesson, *One-Year Filing Deadline,* section *Filing within a Reasonable Period of Time, Overview.*

Example: Consider the applicant from Kosovo. He established a changed circumstance that materially affects his claim to asylum. This changed circumstance may provide an exception to both the prior denial bar and the one-year filing deadline bar, if the applicant filed his application within a reasonable period of time, given the circumstances. Though hostilities began about one year before he filed his application, it was the police attack on his town in April 1999 that crystallized his fear and brought him to file an application for asylum. Filing within three months of the occurrence of the changed circumstance generally would be considered a reasonable period of time.

7. Dependents

A denial of the principal applicant's asylum application does not prohibit an included dependent from filing a subsequent, separate asylum application.

8 C.F.R. § 208.14(f).

IV. BARS TO ELIGIBILITY FOR ASYLUM

A. Persecution of Others

"The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." In addition, the statute specifically prohibits the Attorney General from granting asylum to such a person.

INA § 101(a)(42); § 208(b)(2)(A)(i).

The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she cannot be said to have "met the definition of a refugee" if he or she is also found to be a persecutor.

It had long been held that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress. However, the Supreme Court in *Negusie v. Holder* requested that such an understanding be revisited. Specifically, the Supreme Court held that the BIA misapplied the Supreme Court's prior decision in *Fedorenko* (based on a reading of similar language in the Displaced Persons Act) as mandating that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes and remanded the case for agency interpretation of the statute in the first instance. The BIA has yet to issue a decision in the *Negusie* remand. However, DHS and DOJ are jointly developing regulations addressing possible exceptions to the persecutor bar based on duress and other factors. Until the BIA publishes a decision on the issue, or relevant regulatory guidance is issued, cases involving the persecution of others under coercion or duress should be held.

Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (1988) citing, *Fedorenko* v. *United States*, 449 U. S. 490 (1981).

Negusie v. Holder, 555 U.S. 511 (2009).

See the RAIO Module, *Analyzing The Persecutor Bar* for an in-depth discussion on the definition and application of the persecutor bar.

B. Conviction of Particularly Serious Crime

Asylum may not be granted to an applicant who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.

INA § 208(b)(2)(A)(ii).

1. Filing date

This bar applies regardless of the filing date of the asylum application; however, the filing date determines the type of crimes included in this category.

8 C.F.R. §§ 208.13(c)(1) and (2)(A).

If the application was filed before November 29, 1990, then an aggravated felony is not automatically considered a particularly serious crime.

See Section IV.B.6.a., *Aggravated Felonies*, below.

If the application was filed before April 1, 1997, then the conviction must have occurred in the United States. If the application was filed on or after April 1, 1997, then the conviction may have occurred either inside or outside of the United States.

2. Basic elements

   a. convicted by a final judgment

   b. crime is "particularly serious"

   c. the applicant constitutes a danger to the community

3. Definition of "conviction"

For immigration purposes, a conviction exists if each of the following requirements are met:

INA § 101(a)(48)(A).

   a. a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and

   b. the court has ordered some form of punishment, penalty, or restraint on a person's liberty; and

   c. the conviction must be final. A conviction is final, for immigration purposes, if direct appellate review has either been waived or exhausted

Matter of Polanco, 20 I&N Dec. 894 (BIA 1994).

If in doubt about the finality of a conviction, a Supervisory Asylum Officer should contact the USCIS Office of Chief Counsel or ICE OPLA, as appropriate.

4. Juvenile convictions

Conviction as a juvenile will not constitute a conviction for a particularly serious crime under the INA, if the applicant is

Matter of Ramirez-Rivero, 18 I&N Dec.

under 16 years of age or was tried as a juvenile (while 16 to18 years of age). However, commission of the crime may be a basis to exercise discretion to deny or refer the asylum request.

135, 137-39 (BIA 1981); *see* RAIO Module, *Discretion.*

5. What constitutes a particularly serious crime

   a. aggravated felonies

   By statute, all aggravated felonies are considered particularly serious crimes for ***purposes of evaluating asylum eligibility.***

   Given that the bar to asylum is for a conviction of a "particularly serious crime," the key inquiry for asylum officers is not whether the offense meets the definition of an aggravated felony, but whether the offense can be considered "particularly serious." As a practical matter, most particularly serious crimes encountered in asylum interviews will be aggravated felonies.

INA § 208(b)(2)(B)(i). *See* Section b, "Other Crimes – general" below. Note: The particularly serious crime discussion contained herein is applicable only to asylum decision-making and is inapplicable to withholding of removal, a topic outside the scope of this lesson.

   In order to determine if the particularly serious crime bar is applicable, the asylum officer should first consider whether the conviction is of a crime specifically identified by statute or precedent case law as an aggravated felony or otherwise as a particularly serious crime. If no such identification is available, officers must consider whether the conviction meets the defining characteristics of a "particularly serious crime." In general, when cases where the issue of a possible bar arises, guidance should be sought from supervisors, headquarters quality assurance and the USCIS Office of the Chief Counsel or ICE Office of the Principal Legal Advisor, as appropriate.

   The list of crimes statutorily designated to be aggravated felonies is contained in section 101(a)(43) of the INA. Some are specific crimes, while others are more general (e.g., murder vs. crime of violence). Some crimes are not aggravated felonies unless a sentence of particular length or a certain amount of money is involved. Therefore, it is necessary to consider the sentence in such cases.

Prior to IIRIRA, the commission and conviction dates of the crime determined which definition of aggravated felony applied. As a result of IIRIRA, the current definition of aggravated felony at INA § 101(a)(43) applies regardless of commission or conviction date.

   Note that it is not important to memorize statutory provisions defining and describing aggravated felonies. Instead, given information that the applicant was arrested, it is critical to acquire as much information as possible about whether there was a conviction, upon what charge or charges that conviction rested and what the sentence was. You should also gather information concerning the

circumstances underlying the facts of the crime, but be aware that the aggravated felony determination may, depending on the circumstances, rest solely on the record of conviction (regardless of the underlying facts).

A term of imprisonment for purposes of the INA is defined as including "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." Therefore, someone who has been sentenced to a term of imprisonment for a certain term, but whose sentence is deferred if a period of probation is successfully completed, is still considered "sentenced" to that term of imprisonment.

INA § 101(a)(48)(B).

The aggravated felony definition applies to convictions for violations of either state or federal law. It also applies to convictions in violation of a foreign law, so long as the term of imprisonment was completed within the previous 15 years.

INA § 101(a)(43).

(i) Drug related offenses

In assessing whether a state drug related conviction constitutes an aggravated felony under 18 USC § 924(c)(2) the U.S. Supreme Court held that conduct made a felony under state law but a misdemeanor under the Controlled Substances Act (CSA) is not a "felony punishable under the Controlled Substances Act" for INA purposes. A state offense comes within the quoted phrase only if it prohibits conduct punishable as a felony under the CSA.

Lopez v. Gonzales, 549 U.S. 47 (2006). Finding that a South Dakota misdemeanor conviction for aiding and abetting another person's possession of cocaine is not a felony punishable under the CSA and is therefore not a drug trafficking crime within the meaning of 18 U.S.C. § 924(c)(2).

But, the reverse is not true. A state misdemeanor conviction cannot be elevated to an aggravated felony conviction just because the same facts would support felony charges under the CSA. The Supreme Court rejected an attempt to extend *Lopez* where the government argued that "conduct punishable as a felony should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law." The court ruled that even though federal law provides for enhanced sentencing for a simple possession drug offense where there is a prior conviction, a simple possession misdemeanor conviction under state law, where there was no mention of any prior conviction included in the charges, could not be considered an aggravated felony just because the alien

Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010).

could have been charged as a felon in federal court. The court reasoned that the statute "limits the Attorney General's cancellation authority only when the noncitizen has actually been convicted of a[n] aggravated felony - not when he merely could have been convicted of a felony but was not." (internal quotation marks omitted).

(ii) "Crime of violence"

Leocal v. Ashcroft, 543 U.S. 1 (2004) holding that a Florida conviction for DUI causing serious bodily injury does not have a mens rea requirement, and therefore is not a "crime of violence" under the Act.

In determining whether an offense is a "crime of violence" under 18 USC §16, the Supreme Court held that a statute which punishes negligent or accidental conduct cannot be said to involve the "use" of physical force against the person or property of another, and therefore is not an aggravated felony.

In order to determine whether the conviction of a particular offense amounts to a "crime of violence" the officer must look to the requirements of the criminal statute and evaluate whether it includes a *mens rea* requirement. *Mens Rea* is the legal term used for the mental state required for culpability under a statute.

EXCEPTION: If an application was filed prior to November 29, 1990, the conviction of an aggravated felony does not constitute a mandatory bar to asylum. Consequently, the asylum officer must analyze the circumstances of the conviction in such cases to determine whether it constitutes a particularly serious crime.

Matter of A-A-, 20 I&N Dec. 492 (BIA 1992).

b. other crimes – general

The INA designates that all aggravated felonies are, per se, particularly serious crimes, but does not limit the consideration of what is a particularly serious crime to aggravated felonies. It is important to remember that even after a determination is made that a conviction is for a crime that is not an aggravated felony, the officer must still determine whether the conviction is for a particularly serious crime.

INA § 208(b)(2)(B)(i). *Delgado v. Mukasey*, 546 F.3d 1017 (9th Cir. 2008); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

The determination as to whether a crime (other than an aggravated felony) is "particularly serious" is most often made on a case-by-case basis. The factors to consider are the following:

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982); *Matter of B-*, 20 I&N Dec. 427, 430 (BIA 1991); *Matter of L-S-J-*, 21 I&N Dec. 973, 974-75 (BIA 1997); *Mahini v. INS*, 779 F.2d 1419, 1421 (9th Cir. 1986); *Yousefi v. INS*, 260 F.3d 318 (4th Cir. 2001)(criteria valid but not properly applied).

(i) the nature of the conviction;

(ii) the sentence imposed;

(iii) the circumstances and underlying facts of the conviction; and

(iv) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

See Section IV.B.7., *Danger to the Community*, below, and note that this element involves somewhat circular reasoning, since conviction of a PSC necessarily leads to a finding that the alien is a danger to the community.

A single conviction of a *misdemeanor* normally is not a particularly serious crime.

Matter of Juarez, 19 I&N Dec. 664 (BIA 1988).

Crimes of violence are normally particularly serious crimes. The term "crime of violence" means--
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (definition).

Note that a crime does not have to be a crime of violence to constitute a particularly serious crime. In *Matter of R-A-M-*, 25I&N Dec. 657 (BIA 2012), the BIA found that possession of child pornography constituted a particularly serious crime.

6. Danger to the community

As a matter of law, an individual who has been convicted in the United States of a particularly serious crime constitutes a danger to the community.

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991) (affirmed, *Urbina-Mauricio v. INS*, 989 F.2d 1085 (9th Cir. 1993)); *Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997).

7. Examples

Note: Many of these examples are taken from cases decided before IRIIRA broadened the list of crimes considered aggravated felonies. They remain valid examples of particularly serious crimes but for the most part are also aggravated felonies under IRIIRA.

a. assault with a dangerous weapon

Matter of D-, 20 I&N Dec. 827 (BIA 1994); *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988).

Note, however, that assault with a deadly weapon was found not to be a particularly serious crime in a case involving a single, misdemeanor offense.

b. drug trafficking

INA § 101(a)(43)(B); *see Matter of Y-L-, A-G- & R-S-R-*, 23 I&N 270 (AG 2002) drug trafficking is also presumptively a particularly serious crime for purposes of withholding of removal. The Attorney General ruled that the presumption would only be overcome in "the most extenuating circumstances" that were "both extraordinary and compelling."

Generally a drug trafficking conviction constitutes an aggravated felony and therefore a particularly serious crime as a matter of law for asylum purposes. Even if there is some question as to whether a particular drug offense constitutes an aggravated felony, it is likely to meet the criteria for a particularly serious crime described above and thus bar the applicant from asylum eligibility.

c. battery with a dangerous weapon, or aggravated battery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); *Matter of B-*, 20 I&N Dec. 427 (BIA 1991).

d. rape

INA § 101(a)(43)(A); *see Matter of B-*, 20 I&N Dec. 427 (BIA 1991).

e. sexual abuse of a minor

INA § 101(a)(43)(A); *U.S. v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993); *Matter of Small*, 23 I&N Dec. 448 (BIA 2002).

Sexual abuse or attempted sexual abuse of a minor constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Misdemeanor sexual abuse of a minor also has been found to constitute an aggravated felony (and a particularly serious crime for asylum purposes).

f. armed robbery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); *Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997).

g. theft offenses (including receipt of stolen property) or burglary offenses

Theft offenses (including receipt of stolen property) or burglary offenses for which the term of imprisonment is at least one year constitute aggravated felonies and therefore particularly serious crimes for asylum purposes. A theft offense, for which alien may be removed, includes the crime of "aiding and abetting" a theft offense. Note that burglary may also constitute a particularly serious crime if it involves a threat to an individual.

INA § 101(a)(43)(G); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986); *Matter of Frentescu*, 18 I&N Dec. 244; *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007) (holding that a conviction under a California statute prohibiting taking a vehicle without consent was a "theft offense," for which alien could be removed)

h. kidnapping (aggravated)

Groza v. INS, 30 F.3d 814 (7th Cir. 1994).

i. murder and manslaughter

Murder constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Manslaughter (including involuntary) has also been found to be a particularly serious crime.

Dor v. Dist. Dir., INS, 697 F.Supp. 694 (S.D.N.Y. 1988); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994); *Ahmetovic v. INS*, 62 F.3d 48 (2d Cir. 1995).

8. Dependents

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who was convicted of a particularly serious crime. In some cases, a principal applicant may be granted asylum, and a dependent referred or denied because he or she was convicted of a particularly serious crime.

8 C.F.R. § 208.21(a).

C. Commission of Serious Nonpolitical Crime

Asylum may not be granted if there are serious reasons to believe that the applicant committed a serious nonpolitical crime outside the United States before arriving in the United States.

INA § 208(b)(2)(A)(iii).

1. Filing Date

This mandatory bar to asylum was added by the IIRIRA and therefore applies only to applications filed on or after April 1,

Previously, this was a mandatory bar to

1997. However, when adjudicating a request for asylum filed before April 1, 1997, the commission of a serious nonpolitical crime may be considered as a serious adverse factor in the exercise of discretion.

withholding of deportation, but not asylum.

See RAIO Module, *Discretion.*

2. Definition

   a. A "serious nonpolitical crime" has been defined as a crime that:

      (i) was not committed out of genuine political motives,

      (ii) was not directed toward the modification of the political organization or structure of the state, and

      (iii) in which there is no direct, causal link between the crime committed and its alleged political purposes and object.

McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986), *citing* Guy Goodwin-Gill, *The Refugee in International Law*, 60-61 (1983).

   b. A "serious nonpolitical crime" need not be as serious as a "particularly serious crime."

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982)

   c. Even if the crime was committed out of genuine political motives, it should be considered a serious nonpolitical crime if the act is grossly out of proportion to the political objective or if it is of an atrocious or barbarous nature.

Matter of E-A-, 26 I&N Dec. 1, 3, 5 (BIA 2012) (although the applicant and his group never caused any physical injury to anyone, they placed innocent people at substantial risk); *McMullen v. INS*, 788 F.2d 591, 595 (9th Cir. 1986); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751 (8th Cir. 2004).

3. Requirements

   a. There is no requirement that the serious nonpolitical crime resulted in a conviction. The lack of conviction means that this bar can really only be discovered through the interview process, as there will probably not be any documentation. However, the adjudicator needs to find *probable cause* to believe that the crime was committed.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); *Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980).

Probable cause means that there is a reasonable basis to believe that the crime was committed.

Example: While a Coptic Christian from Egypt was on a flight en route from Egypt to United States, the Egyptian authorities notified the Department of State that the individual was wanted in Egypt allegedly for having committed a murder there just hours before his departure. The Second Circuit upheld the immigration judge's determination that there were serious reasons to believe that the applicant had committed a serious non-political crime. The immigration judge supported his finding with documentation of the charges against the applicant, including: a warrant for the applicant's arrest; a police report indicating that the applicant's fingerprints were found at the murder scene and that the applicant was seen soon after the murder with an injured hand and a bloody shirt; and a report that the blood on the recovered shirt was found to match that of the victim. Evidence presented by the applicant that there were some irregularities in the Egyptian police reports and that Coptic Christians have been wrongfully accused of crimes was insufficient to compel a finding that he was framed by the Egyptian authorities, and thus the Second Circuit found that the immigration judge supported the determination that the applicant was barred from asylum.

Khouzam v. Ashcroft, 361 F.3d 161, 164 (2d Cir. 2004).

b. The crime must have been committed outside the United States.

c. The applicant need not have personally carried out the act of harm ("pulled the trigger"). For example, providing logistical and physical support that enables others to carry out terrorist acts against ordinary citizens suffices.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986); *Matter of E-A-*, 26 I&N Dec. 1, 7 (BIA 2012) (noting that the applicant was not a "mere bystander" and that his involvement and participation "materially contributed" to the groups destructive behavior).

4. Recruitment of Child Soldiers

The Child Soldiers Accountability Act of 2008 (CSAA), effective as of October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers. Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA.

Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). *See also* Lori Scialabba and Donald Neufeld, USCIS, *Initial Information Concerning*

These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code" is inadmissible and is removable.

the Child Soldiers Accountability Act, Public Law No. 110-340, Memorandum to Field Leadership (Washington, DC: 31 December 2008). CSAA, sec. 2(b)-(c).

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability "shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime," and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii). The regulations remain in the process of being developed and promulgated. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. Note that the statute does not exempt children from the applicability of this ground, even where they were recruited as children themselves.

CSAA, sec. 2(d)(1). *See* Asylum lesson, *Guidelines for Children's Asylum Claims, VI.E.4.* Note: this is accurate at this time of posting; however, this lesson will be superseded by the RAIO training module *Guidelines for Children's Claims.*

5. Dependents

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who has committed a serious nonpolitical crime outside the United States before arriving in the United States. In some cases, a principal applicant may be granted asylum, while his or her dependent (who committed a serious nonpolitical crime) is denied or referred because he or she is subject to a mandatory bar.

8 C.F.R. § 208.21(a).

D. Security Risk

Asylum may not be granted if there are reasonable grounds to believe that the applicant is a danger to the security of the United States.

INA § 208(b)(2)(A)(iv).

See the RAIO module *National Security* for an in-depth discussion on the definition and application of the security risk bar.

E. Terrorists

1. Background on terrorist legislation, as applied to asylum adjudication

See Jeffery Weiss, *Asylum Division. Processing Claims Filed by Terrorists or Possible Terrorists,* Memorandum to Asylum Office Directors (Washington, DC: 1 October 1997), 2 p.

The Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), which came into effect on April 24, 1996, provided that any individual who falls within certain terrorist provisions in the INA is ineligible for asylum, unless it is determined that there are not reasonable grounds to believe that the individual is a danger to the security of the United States.

See Chris Sale. Office of the Deputy Commissioner. *AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief,* Memorandum to Management Team (Washington, DC: 6 August 1996), 13 p.

The IIRIRA re-designated the sub-clauses of INA § 212(a)(3)(B) and expanded the terrorist grounds for ineligibility for asylum.

The PATRIOT Act of 2001 expanded grounds of inadmissibility based on terrorism, broadened the definition of "terrorist activity," added two definitions of "terrorist organization," and added a separate ground of inadmissibility for those who have associated with a terrorist organization. The Act retained the exception to the ineligibility for those individuals who fall under sub-clause (IV) of 212(a)(3)(B)(i).

See Ziglar, James W. Office of the Commissioner. *New Anti-Terrorism Legislation,* Memorandum for Regional Directors and Regional Counsel (Washington, DC: 31 October 2001), pp. 2-3.

The Intelligence Reform and Terrorism Prevention Act of 2004 amended the provisions in INA § 219 for the designation of foreign terrorist organizations by the Department of State.

Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, PL 108-458, 118 Stat. 3638.

The REAL ID Act of 2005 further broadened the categories of individuals who are inadmissible for terrorist activities by including those who have received military-type training from or on behalf of a terrorist organization and broadening the inadmissibility ground regarding espousing terrorist activity to no longer require that the individual hold a "position of prominence." The statute also limited the affirmative defense to the inadmissibility for "engaging in terrorist activity" through soliciting things of value, soliciting individuals for membership in, or for providing material support for an undesignated terrorist organization to require the alien to "demonstrate by clear and convincing evidence that he did not know, and reasonably could not have known, that the organization was a terrorist organization."

REAL ID Act of 2005 §103(a); see RAIO module National Security

The statute also revised the Patriot Act's inadmissibility provision for material support to a terrorist organization and added INA § 212(d) to create an inapplicability provision for the material support ground, as well as for individuals or

representatives of terrorist organizations who endorse or espouse terrorist activity.

2. Grounds of ineligibility

INA § 208(b), as amended by the REAL ID Act, prohibits the granting of asylum to anyone who: — INA § 208(b)(2)(A)(v).

a. has engaged in terrorist activity; — INA § 212(a)(3)(B)(i)(I).

b. a consular officer or the Attorney General knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity; — INA § 212(a)(3)(B)(i)(II).

Note: An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered to be engaged in a terrorist activity. INA § 212(a)(3)(B)(i)(V).

c. has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity; — INA § 212(a)(3)(B)(i)(III).

d. is a representative of — INA § 212(a)(3)(B)(i)(IV).

(i) a foreign terrorist organization, as defined in section 212(a)(3)(B)(vi) or — INA § 212(a)(3)(B)(i)(IV)(aa).

(ii) a political, social, or other group that endorses or espouses terrorist activity; — INA § 212(a)(3)(B)(i)(IV)(bb).

e. is a member of a terrorist organization designated under Section 219 of the INA or otherwise designated through publication in the Federal Register under INA Section 212(a)(3)(B)(vi)(II); — INA § 212(a)(3)(B)(i)(V).

e. is a member of a terrorist organization described in INA section 212(a)(3)(B)(vi)(III) (undesignated terrorist organization), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

g. endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization; — INA § 212(a)(3)(B)(i)(VII); INA §237(a)(4)(B). Note that this ground does not require that the

statements be made under circumstances indicating an intention to cause death or serious bodily harm.

h. has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization

INA § 212(a)(3)(B)(i)(VIII); INA § 237(a)(4)(B); "military-type training is defined in 18 U.S.C. § 2339D(c)(1). Note that an exemption to the terrorist bar exists for those who received military type training under duress.

i. is the spouse or child of an alien who is inadmissible under INA § 212(a)(3)(B), if the activity causing the alien to be found inadmissible occurred within the past five years unless the spouse or child:

INA § 212(a)(3)(B)(ii).

(i) did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(ii) the consular officer or the Attorney General has reasonable grounds to believe the spouse or child has renounced the activity causing the alien to be found inadmissible under this section; or

j. who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.

INA § 212(a)(3)(F); INA § 237(a)(4)(B).

See the RAIO lesson *National Security* for an in-depth discussion on the definitions of the terms relating to terrorism and the application of the terrorist bar.

F. Firm Resettlement

An applicant who was firmly resettled in another country prior to arriving in the United States may not be granted asylum.

INA § 208(b)(2)(A)(vi)

Note: This bar does not

apply to derivatives. *See* 8 C.F.R. § 208.21(a).

1. History

The firm resettlement bar is founded on two of the cessation clauses of the United Nations Convention Relating to the Status of Refugees. The Refugee Convention states that the convention ceases to apply to an individual who "has acquired a new nationality, and enjoys the protection of the country of his new nationality", or to an individual "who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

United Nations Convention Relating to the Status of Refugees, art. 1, §§ C(3), E, *adopted* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

The firm resettlement bar has been part of United States refugee law from its inception, as a mandatory bar in The Displaced Persons Act of 1948. In a 1957 revision of the INA, the firm resettlement bar was dropped from the Act, but US courts continued to apply it as a discretionary factor. After passage of the Refugee Act of 1980, interim regulations were enacted that made firm resettlement a regulatory bar in affirmative asylum cases. When the final asylum regulations were adopted in 1990, firm resettlement was made a regulatory bar for all adjudicators. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress codified firm resettlement as a statutory bar.

A very detailed history of the firm resettlement bar can be found in *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).

2. Definition

An applicant "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." Note that, in order for the bar to apply, the entry into another nation must be after the events that caused the applicant to be a refugee.

8 C.F.R. § 208.15.

Please refer to RAIO Module, *Firm Resettlement,* for a detailed discussion of the applicability and exceptions related to this bar to eligibility for asylum.

a. Finally, if the applicant is found to have received an offer of permanent resettlement, the burden shifts to the

applicant to establish, by a preponderance of the evidence, that an exception to firm resettlement applies, pursuant to 8 C.F.R. §§ 208.15(a) and (b). If the applicant is able to meet his or her burden of proof that an exception applies, the applicant may be granted asylum.

3. Special Issues

There are a number of issues concerning the application of the firm resettlement bar that have arisen over the years. Some issues that may arise are:

a. Length of time spent in the third country

The length of time an applicant spends in a third country does not by itself establish firm resettlement. Firm resettlement occurs only after the applicant has been offered some form of enduring lawful status in that country. However, length of time is a factor to consider, particularly in determining whether the applicant cannot be considered firmly resettled because entry into the third country was a necessary consequence of flight. Refer to section 2.a above.

b. Offer of firm resettlement

The Ninth Circuit has held that to meet its burden of proving that an offer of firm resettlement exists the USCIS must present either direct evidence of an offer of permanent resettlement or, if such evidence cannot be obtained, indirect evidence of such an offer. Indirect factors may include the applicant's length of stay in the third country, intent to remain in the country and the social and economic ties developed during such stay. Relying on *Abdille v. Ashcroft,* 242 477 (3d Cir. 2001), the Court indicated that the indirect evidence used to establish firm resettlement must "rise to a sufficient level of clarity and force."

The Third Circuit, in *Abdille v. Ashcroft,* indicated in dicta that non-offer based factors, such as the length of the applicant's residence in a third country or the extent of the applicant's social and economic ties to the country, provide circumstantial evidence of a formal offer of some type of permanent resettlement and can serve as a surrogate for direct evidence of an offer.

The BIA further addressed evidence of firm resettlement in the holding of *Matter of D-X- & Y-Z-,* 25 I&N Dec. 664 (BIA

2012). In this decision, the BIA provides a straightforward approach with a strong presumption of firm resettlement when the applicant provides facially valid documentation of permission to reside and work indefinitely in a country. The decision makes clear that the mere fact that the document was obtained fraudulently does not invalidate the presumption. A number of circuit court cases support that "facially valid" documentation of residence status is enough to establish a presumption of firm resettlement, where there is no evidence that such status would be invalidated by the country of firm resettlement. In *D-X- & Y-Z-*, the female applicant had left and reentered the country where she had fraudulently obtained residence status, using the fraudulently obtained documents. While the Board does not in this decision explicitly discuss the importance of any evidence about whether the irregularities in the document render it vulnerable to invalidation, this case in fact involved evidence that the fraudulently obtained document was not invalidated, as the applicant was able to reenter the country using the documents.

4. Entry into the third country

While the focus of the analysis is on the existence of an offer of permanent residence, the plain language of the regulation makes clear that, in order for the offer to be effective, the applicant must have entered into the country at some point while the offer was available. The offer will be considered effective if, for example, the applicant entered into the country after the offer was made, and while it was still active, or, for example, the offer was made after the applicant initially entered the country, but while the applicant was still there, unless the applicant's entry into that country was a necessary consequence of his or her flight from persecution and he or she remained in that country only as long as necessary to arrange onward travel without establishing significant ties in that country.

Again, please refer to RAIO Module, *Firm Resettlement,* for a detailed discussion of such special issues as they relate to the firm resettlement bar.

V. BURDEN AND STANDARD OF PROOF

A. Mandatory Bars to Applying for Asylum

INA §§ 208(a)(2)(B) and (D); 8 C.F.R. § 208.4(a)(2)(i).

1. One-year filing deadline

   The applicant must demonstrate ***by clear and convincing evidence*** that the application has been filed within 1 year after the date the applicant arrived in the United States,

   or

   demonstrate ***to the satisfaction of the Attorney General*** (the asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum or extraordinary circumstances that resulted in the delay.

Reminder: The one-year filing period is calculated from 4/1/97 or arrival in U.S., whichever is more recent in time. *See* Asylum Lesson, *One-Year Filing Deadline,* section *Calculating the One-Year Period.*

2. Previous denials

   If an applicant has previously been denied asylum by an IJ or the BIA, the applicant must demonstrate ***to the satisfaction of the Attorney General*** (asylum officer or immigration judge) the existence of changed circumstances that materially affect eligibility for asylum.

INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a).

3. Explanation

   The "clear and convincing" standard has been defined as a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established." It is higher than the preponderance standard used in civil cases, but lower than the "beyond a reasonable doubt" standard in criminal cases.

   To demonstrate "to the satisfaction of the Attorney General" that an exception applies, means that it must be reasonable for the asylum officer to conclude that the exception applies.

See Black's Law Dictionary, 5th Ed.; *see* RAIO Module, *Evidence.*

B. Mandatory Bars to Asylum

If the evidence indicates that a ground for mandatory denial or referral exists, then the applicant has the burden of proving by a ***preponderance of the evidence*** that the ground does not apply.

8 C.F.R. § 208.13(c); *See also Cheo v. INS,* 162 F.3d 1227 (9th Cir. 1998) (where evidence indicates applicant was firmly resettled, burden is on applicant to establish the contrary); *Maharaj v. Gonzales,* 450 F. 3d 961 (9th Cir. 2006) (the burden shifts to the applicant only when USCIS has presented sufficient evidence that the statutory bar applies).

A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true (in other words, there is more than a 50% chance that the fact is true).

See RAIO Module, *Evidence.*

VI. MANDATORY NATURE OF BARS

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible. As the term itself indicates, denial in such cases is mandatory. Therefore, the asylum request must be referred or denied, as appropriate.

When a mandatory bar to asylum applies, the asylum officer does NOT weigh that adverse factor against the risk of future persecution as with the exercise of discretion.

VII. DEPENDENTS

When a principal alien is granted asylum, his or her spouse and/or children, as defined in the Act, also may be granted asylum if accompanying, or following to join, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under 8 C.F.R. § 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997.

8 C.F.R. § 208.21(a).

In other words, with the exception of firm resettlement, all the bars to granting asylum that apply to principal applicants apply equally to dependents. For example, if a dependent was convicted of an aggravated felony, the dependent is barred from a grant of asylum, even if the principal is granted. However, if the dependent was firmly resettled in a third country, the dependent is not barred from receiving a derivative grant of asylum if the principal is granted.

VIII. SUMMARY

A. Bars to Applying for Asylum

The following bars to applying for asylum are applicable only to applications filed on or after April 1, 1997. Only asylum officers, immigration judges, and the Board of Immigration Appeals can determine whether a prohibition on filing applies.

1. The asylum seeker could be returned to a "safe" third country.

   There is an agreement between the United States and Canada,

but the agreement only applies to aliens at land border ports of entry and those transiting through one country when being removed by the other country. It does not apply to affirmative asylum adjudications.

2. The asylum seeker waited more than one year after arrival in the United States to apply.

   The filing date is calculated from April 1, 1997 or the date of last arrival, whichever is most recent in time. This bar does not apply to UACs nor does it apply if the applicant establishes changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay.

3. The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

   This bar does not apply if the applicant demonstrates changed circumstances that materially affect asylum eligibility.

B. Mandatory Bars to Eligibility for Asylum

The following are mandatory bars to a grant of asylum:

1. Persecution of others on account of one of the protected characteristics in the refugee definition

2. Conviction of a particularly serious crime, including an aggravated felony

   If the application was filed on or after April 1, 1997, the conviction may have occurred either inside or outside the United States.

3. Commission of a serious nonpolitical crime outside the United States prior to arrival in the United States

   This bar does not apply to asylum applications filed prior to April 1, 1997, but may be a basis for a discretionary denial or referral.

4. Risk to the security of the United States

   Any case in which the asylum officer believes the applicant may present a risk to the security of the United States must be sent to Asylum Headquarters for review.

5. Engaging in terrorist activities or status as a representative of certain terrorist organizations

   An applicant cannot be granted asylum if he or she has engaged, is engaging, or is likely to engage in terrorist activity; has incited terrorist activity indicating an intention to cause death or serious bodily harm; is a representative of either a designated terrorist organization or a group whose endorsement of acts of terrorist activity undermines the efforts of the United States to reduce or eliminate terrorist activities; or has used his or her position of prominence in an country to endorse or espouse terrorist activity.

6. Firm resettlement

   An applicant is considered firmly resettled if the applicant, after becoming a refugee, entered into another country with, or while there received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement when in that country.

   An applicant was not firmly resettled if entry was necessary to flight, the applicant remained only to arrange onward travel, and the applicant developed no significant ties; or the conditions of residence were substantially restricted.

C. Burden of Proof

1. Prohibition on Filing

   The applicant must establish by clear and convincing evidence that he or she applied for asylum within one year after arrival in the U.S., unless an exception applies.

   If a bar to filing applies, the applicant must demonstrate to the satisfaction of the adjudicator that an exception applies.

2. Bars to asylum

   If the evidence indicates that a ground for mandatory denial of asylum applies, the applicant must prove by a *preponderance of the evidence* that a mandatory bar does not apply.

D. Mandatory Nature of Bars

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible.

E. Dependents

The spouse or child of an asylum applicant cannot be granted derivative asylum status if a mandatory bar, other than firm resettlement, applies to the spouse or child.