Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Credible Fear***
Rev. Date	March 7, 2013
Lesson Description	The purpose of this lesson is to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture using the credible fear standard.
Terminal Performance Objective	The Asylum Officer will be able to correctly make a credible fear determination consistent with the policies, procedures, and regulations that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.
Enabling Performance Objectives	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; INA Sections 235(b)(1)(A)(i) and (ii), and 235(b)(1)(B)-(F); 8 C.F.R. § 208.30; *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, (Aliens illegally arriving by sea), 67 Fed. Reg. 68924 (Nov. 13, 2002); *Notice Designating Aliens For Expedited Removal* (Apprehensions between ports of entry), 69 Fed. Reg. 48877 (Aug. 11, 2004).

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-870**: Record of Determination/Credible Fear Worksheet; **Form M-444**: Information about Credible Fear Interview

Method of Evaluation Written test

Background Reading

1. Brian R. Perryman. Office of Field Operations. *Security and Privacy Provisions for Credible Fear Interviews Under Expedited Removal*, Memorandum to Regional Directors, District Directors, Assistant District Directors for Detention and Deportation, Asylum Office Directors (Washington, DC: 1 July 1997), 2 p. plus attachment.

2. Joseph E. Langlois. INS Office of International Affairs. *Role of Consultants in the Credible Fear Interview*; Memorandum to Asylum Directors, Supervisory Asylum Officers, Asylum Officers (Washington, DC: 14 November 1997), 2 p.

3. Paul Virtue. Office of Programs: *Withdrawal of Application for Admission (IN 98-05)*; Memorandum to Management Team, Regional Directors, District Directors, Officers-in-Charge, Chief Patrol Agents, Asylum Office Directors, Port Directors, ODTF Glynco, ODTF Artesia (Washington, DC: 22 December 1997), 5 p.

4. Joseph E. Langlois. INS Office of International Affairs: *Implementation of Amendments to Asylum and Withholding of Removal Regulations, Effective March 22, 1999*, (Washington, DC: 18 March 1999) 17 p. and attachments. (included in lesson; *Reasonable Fear of Persecution and Torture Determinations*)

5. Michael A. Pearson. Executive Associate Commissioner, Office of Field Operations. *Visa Waiver Permanent Program; Revised Processing Procedures*; Action Wire (Washington, DC: 31 October 2000) 5 p.

6. INS Office of International Affairs. *Procedures Manual - Credible Fear Process; Draft* (Washington, DC: April 2002) 40p. and Appendices.

7. Joseph E. Langlois. Asylum Division, Office of International Affairs. *Streamlining the Credible Fear Process;* Memorandum to Asylum Office Directors, et al. (Washington, DC: 8 December 2000), 4 p.

8. Joseph E. Langlois. Asylum Division, Office of International Affairs. *Mentally Incompetent Aliens in the Credible Fear Process;*

Memorandum to Asylum Office Directors, et al. (Washington, DC: 20 September 2001), 2 p.

9. Office of the Assistant Commissioner, Office of Field Operations, US 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), 6pp.

CRITICAL TASKS

Critical Tasks

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

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Presentation **References**

I. INTRODUCTION

The purpose of this lesson 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), 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. Certain aliens seeking admission to the United States are subject to these provisions.

INA § 235(b)(1), 8 U.S.C. § 1225(b)(1); INA § 235(a)(2), 8 U.S.C. § 1225(a)(2) (stowaways).

Note: Aliens who are present in the U.S., and who have not been admitted, are treated as applicants for admission. INA § 235(a)(1).

Under INA section 235 and its implementing regulations, 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., are immediately removable from the United States by the Department of Homeland Security, unless they indicate an intention to apply for asylum or indicate a fear of return to their home country.

Those aliens subject to expedited removal who indicate an intention to apply for asylum or indicate 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. After interviewing the applicant, an asylum officer will determine whether such an alien has a credible fear of persecution. Pursuant to regulation implementing the Convention Against Torture 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 determine whether the alien has a credible fear of torture.

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

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

A. Aliens Subject to Expedited Removal

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

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

   8 CFR § 235.3(b)(1)(i); *see* 8 CFR § 1.1(q) for the definition of an "arriving alien."

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

   8 CFR § 208.30(e)(6). *See* the lesson, *Safe Third Country Threshold Screening.*

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

   8 CFR § 1.1(q); *see also* 67 Fed. Reg. 68924 (Nov. 13, 2002).

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

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

   This provision encompasses those aliens paroled for urgent humanitarian or significant public benefit reasons, including those paroled in between May 1, 2000 and October 29, 2000 pursuant to the Visa Waiver Pilot Program Contingency Plan.

   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 present in the U.S. for two years prior to the inadmissibility determination.

   67 Fed. Reg. 68924 (Nov. 13, 2002).

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

   69 Fed. Reg. 48877 (Aug. 11, 2004).

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

The following categories of aliens are exempt from expedited removal:

1. Stowaways

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

   INA § 235(a)(2).

2. Cubans citizens or nationals

   INA § 235(b)(1)(F) (Cubans arriving at a POE by air); 67 Fed. Reg. 68924 (Cubans arriving by sea); 69 Fed. Reg. 48877 (Cubans apprehended within 100 air miles of the border); Office of the Assistant Commissioner, Office of Field Operations, US 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), 6 pp (Cubans arriving at a land border port of entry).

3. Persons granted asylum status under INA Section 208

   8 CFR § 235.3(b)(5)(iii).

4. Persons admitted to the United States as refugees under INA Section 207

   8 CFR § 235.3(b)(5)(iii).

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

   8 CFR § 235.3(b)(5)(ii).

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

7. Persons paroled into the United States pursuant to a grant of advance parole that the alien applied for and obtained in the United States prior to the alien's departure from and

return to the United States

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

9. Persons applying for admission under INA Section 217, Visa Waiver Permanent Program (VWPP) (effective October 30, 2000) and those who applied for admission under the Visa Waiver *Pilot* Program (also known as VWPP, which expired April 30, 1999)

   This exemption includes nationals of non-VWPP countries who attempt entry by posing as nationals of VWPP countries.

   However, individuals seeking admission under the expired Visa Waiver Pilot Program under the Contingency Plan from May 1, 2000 through October 29, 2000 were paroled into the United States and *are* subject to expedited removal.

   See, *Matter of Kanagasundram*, 22 I&N Dec. 963 (BIA 1999); *See also*, Procedures Manual, Credible Fear Process (Draft, Nov., 2003), sec. IV.L., "Visa Waiver Permanent Program"; and Pearson, Michael A. Executive Associate Commissioner, Office of Field Operations. Visa Waiver Pilot Program (VWPP) Contingency Plan, Wire #2 (Washington DC: April 28, 2000).

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

   8 CFR § 208.30(e)(6).

C. Historical Background

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

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

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

3. In 1996, the INA was amended to allow for the expedited removal of certain inadmissible aliens, who would not be entitled to an immigration hearing or further review unless they were able to establish a credible fear of persecution. At the outset, expedited removal was mandatory for "arriving aliens," and the Attorney General was given the discretion to designate applicability to certain other aliens

who have not been admitted or paroled and who have not established to the satisfaction of an immigration officer continuous physical presence in the United States for the two-year period immediately following the inadmissibility determination. Initially, expedited removal was only applied to "arriving aliens."

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 the Regulations Concerning the Convention against Torture (CAT) that were published in the Federal Register on February 19, 1999, and became effective March 22, 1999.

64 Fed. Reg. 8478 (Feb. 19, 1999); 8 CFR § 208.30(e)(3).

5. Designation of other groups of aliens for expedited removal

   a. In November 2002, the Department of Justice published a notice in the Federal Register to expand 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 present in the United States for two years prior to the inadmissibility determination.

67 Fed. Reg. 68924 (Nov. 13, 2002).

INA §212(a)(6)(C) or §212(a)(7) 8 U.S.C. 1182(a)(6)(C) and 1182(a)(7)

   b. On August 11, 2004 the 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 present in the U.S. without having been admitted or paroled, who are apprehended within 100 air miles of the 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.

69 Fed. Reg. 48877 (Aug. 11, 2004).

6. The expedited removal provisions of the INA require that all aliens subject to expedited removal be detained through the credible fear determination until removal, unless found to have a credible fear of persecution, or a credible fear of torture. After a positive credible fear determination, the ICE Special Agent-in-Charge (SAC) may exercise discretion to parole the alien out of detention. Therefore, the credible fear interview process also provides a mechanism for DHS to gather information that may be used by the ICE SAC to make parole determinations.

INA § 235(b)(1)(B)(iii)(IV).

III. FUNCTION OF CREDIBLE FEAR SCREENING

In applying the credible fear standard, it is critical to understand the function for which the standard was developed. According to a member of the Conference Committee that crafted the standard, "[t]he standard...is intended to be a low screening standard for admission into the usual full asylum process." Similarly, the credible fear of torture standard was designed to "ensure that no alien is removed from the United States under circumstances that would violate Article 3 [of the Convention Against Torture] without unduly disrupting the issuance and execution of removal orders consistent with Article 3."

142 Cong. Rec. S11491-02 (statement of Sen. Hatch)

Regulations Concerning the Convention Against Torture; Interim Rule, 64 Fed. Reg. 8479 (Feb. 19, 1999) (effective Mar. 22, 1999).

The credible fear process serves a screening function and its purpose is not to foreclose on possible viable claims, but to dispose of claims where there is no significant possibility of success. To this end, the asylum pre-screening officer (APSO) has an affirmative duty to elicit all information relevant to the credible fear determination. Where the law is unsettled, as when there are conflicting decisions or no specific case that is *on-point*, a claim generally will meet the credible fear standard.

62 Fed. Reg. 10312 (Mar. 6, 1997).

It may be helpful to think of the standard as a net that will capture all potential refugees and individuals who would be subject to torture if returned to their country of feared persecution or harm. Such a protective net may also capture non-refugees and individuals who may not be subject to torture. When regulations were issued to implement the credible fear screening process, the Department of Justice described the nature of the credible fear standard as a screening mechanism 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." The purpose of the credible fear screening is to ensure access to a full hearing for all individuals who qualify under the standard.

In cases where circuit courts have issued conflicting decisions, the credible fear determination must reflect the legal interpretation most favorable to the alien.

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

A. Definition of Credible Fear of Persecution

INA § 235(b)(1)(B)(v).

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 his or her 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.

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.

8 C.F.R. § 208.30(e)(3).

V. STANDARD OF PROOF FOR CREDIBLE FEAR DETERIMINATIONS

A. Standards of Proof Generally

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.

See, RAIO Training Module, *Evidence*

A number of different standards of proof are relevant in the immigration context, and more than one standard may be applied to evaluate the evidence in different stages of a single case, or two discrete issues in a single proceeding. It may be useful to think of these standards as falling along a continuum, ranging from a very low standard requiring little probative evidence, to a higher standard requiring highly probative evidence.

B. Credible Fear Standard of Proof

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, in a full hearing before an immigration judge. 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 example, 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 he or she could show a "clear probability" of future torture.

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

Neither the statute nor the immigration regulations define the "significant possibility" standard of proof, and the standard has not yet been addressed in immigration case law. The legislative

See 142 Cong. Rec. S11491-02 (Sept. 27, 1996)

history indicates that the standard "is intended to be a low screening standard for admission into the usual full asylum process."

(statement of Sen. Hatch).

The showing required to meet a "significant possibility of success" is higher than the "not manifestly unfounded" screening standard favored by the UNHCR. A claim that has "no possibility of success," 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); 142 Cong. Rec. S11491-02 (Sept. 27, 1996) (statement of Sen. Hatch) (noting that the rejected Senate bill provided for a "manifestly unfounded" credible fear standard). "Manifestly unfounded" claims are (1) "clearly fraudulent" or (2) "not related to the criteria for the granting of refugee status."

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

142 Cong. Rec. H11071-02 (Sept. 25, 1996) (statement of Rep. Hyde) (noting that the credible fear standard was "redrafted in the conference document to address fully concerns that the 'more probable than not' language in the original House version was too restrictive").

In a non-immigration context, 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 (DC Cir. 1999) (quoting *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846, 852 (D.C. 1998) (emphasis added).

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

Id. (stating that the significant possibility" standard "need not cross the threshold of demonstrating that such success was more likely than not").

In sum, an applicant will be able to show a significant possibility that he or she could establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture

if the evidence indicates that there is a substantial and realistic possibility of success on the merits before an immigration judge. However, the applicant need not show that she has a greater than 50 percent chance that she could establish eligibility for relief in a full hearing before the immigration court.

C. General Considerations

1. 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 all persons who could qualify for asylum or protection under the Convention against Torture.

2. When there is reasonable doubt regarding an issue, that issue should be decided in favor of the applicant. When there is reasonable doubt regarding the decision, the applicant should be determined to have a credible fear of persecution. Such doubts can be addressed in a full hearing before an immigration judge.

3. In determining whether the alien has a credible fear of persecution, the asylum officer shall consider whether the alien'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 disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, or where the claim otherwise raises an unresolved issue of law, generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.

D. Credibility

1. The officer must make a determination whether there is a significant possibility that the applicant would be found credible in a full asylum and withholding hearing before an immigration judge.

2. Credibility is discussed in greater detail in Section VI of the lesson, below.

E. Identity

1. An applicant must establish his or her identity with a

See, RAIO Training Module, *Refugee Definition*

reasonable degree of certainty. Credible testimony alone can establish identity.

2. In many cases, an applicant will not have documentary proof of identity or nationality. The officer must elicit information in order to establish that there is a significant possibility that the applicant will be able to credibly establish his or her identity in a full asylum or withholding of removal hearing. Documents such as birth certificates and passports are accepted into evidence if available.

3. After the credible fear interview, the information obtained by the asylum officer may be used by the ICE SAC to determine whether to parole a detained alien. The ICE authorities in charge of detaining the alien must be satisfied that identity is established before granting parole.

Note: Although asylum officers and immigration judges may determine that an asylum applicant has established identity solely on the basis of credible testimony, ICE may require documentary evidence for the purpose of granting parole.

VI. CREDIBILITY

A. Credibility Standard

To meet the credible fear standard, an applicant must establish that there is a significant possibility that the assertions underlying his or her claim could be found credible in a full asylum or withholding of removal hearing. This means that there is "a substantial and realistic possibility" that the applicant will be found credible in a full hearing. The applicant *does not* need to establish a "clear probability" (i.e., that it is "more likely than not,") that his or her testimony will be found credible in a full hearing. The significant possibility standard is higher than the "not clearly fraudulent" or "not manifestly unfounded" standard favored by UNHCR.

Refer to section V., above, on the standard of proof in credible fear determinations

B. Evaluating Credibility in a Credible Fear Interview

1. Guidelines

   a. The screening function of the credible fear determination is important to remember when evaluating credibility.

   b. Because the credible fear determination is a screening process, the asylum officer does not make the final determination as to whether the applicant is credible. The immigration judge makes that determination in the full hearing on the merits of the claim.

c. As long as there is a significant possibility that the applicant could establish in a full hearing that the claim is credible, unresolved questions regarding an applicant's credibility should not be the basis of a negative credible fear determination.

d. The asylum officer must gather sufficient information to determine whether the alien has a credible fear of persecution or torture. This includes the identifying and evaluating issues related to the applicant's credibility. The applicant's credibility should be evaluated only after all information relevant to the claim is elicited.

e. The purpose of evaluating an applicant's credibility is solely to determine eligibility for a full asylum and withholding hearing. The asylum officer's personal opinions or moral views regarding an applicant should not affect the officer's decision.

2. Factors to Consider

The same factors that are considered when determining credibility in an asylum or withholding of removal adjudication are evaluated in the credible fear determination. However, the applicant in the credible fear process only needs to establish that there is a significant possibility that the assertions underlying his or her claim could be found credible in a full asylum or withholding of removal hearing.

See, RAIO Training Module, *Credibility*.

a. The asylum officer, considering the totality of the circumstances and all relevant factors, may base a credibility determination on:

INA § 208(b)(1)(B)(iii).

(i) the demeanor, candor, or responsiveness of the applicant,

(ii) the inherent plausibility of the applicant's account,

(iii) the consistency between the applicant's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made),

INA § 208(b)(1)(B)(iii); *See also*, RAIO Training Module, *Credibility*, for a more detailed discussion of these factors as they are considered in asylum adjudications.

(iv) the internal consistency of each such statement,

(v) the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and

(vi) any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

b. When considering the totality of the circumstances in determining whether there is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing the following factors must be considered as they may impact an applicant's ability to present his or her claim:

(i) trauma the applicant has endured;

See also, RAIO Training Module, *Interviewing-Survivors of Torture*.

(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;

Detention can especially affect applicants who were detained and mistreated in the past, triggering memories of past trauma.

(iv) detention of the applicant;

(v) problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other difference that may affect the objectivity of the interpreter or the applicant's comfort level; and/

See, 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) (1999)*; RAIO Training Module, *IRFA (International Religious Freedom Act)*.

(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;

The considerations listed above, and any other factors relevant to the applicant's ability to recall and relate events, must be considered when evaluating whether

there is a significant possibility the applicant's testimony could be found credible in a full asylum or withholding hearing.

C. Making a Credibility Determination

1. In making a credibility determination, the officer must evaluate whether there is a significant possibility that the applicant's testimony could be found credible in a full hearing before an immigration judge. The officer must consider the totality of the circumstances and all relevant factors when evaluating credibility.

2. The testimony should be evaluated in terms of its internal consistency, its consistency with prior statements, and its consistency with known country conditions. A positive credibility finding means that the evidence is such that there is a significant possibility the testimony could be found credible in a full hearing. A negative credibility finding means that there is not a significant possibility that the applicant's testimony could be found credible in a full hearing before an immigration judge.

3. An applicant who presents inconsistent information must be given an opportunity to address and explain all inconsistencies during the credible fear interview. The asylum officer must follow up on all inconsistencies by making the applicant aware of each portion of the testimony that raises credibility concerns, and the reasons the applicant's testimony is in question. The applicant must also be given an opportunity to explain any claims the officer deems implausible or lacking in detail.

   a. Minor inconsistencies and inconsistencies that are not material to the claim will not be sufficient to find an applicant not credible in the credible fear context. These inconsistencies will be explored by the immigration judge in the full asylum and withholding hearing.

   b. Material or significant inconsistencies that have not been adequately resolved during the credible fear interview may be sufficient to support a negative credible fear determination.

4. Inconsistencies between the applicant's initial statement to the Customs and Border Protection (CBP) officer and his or her testimony before the asylum officer must be probed. Such inconsistencies may form the basis of a negative

See 8 C.F.R. § 235.3(b)(4) (stating that if an applicant requests asylum or expresses a fear of return, the "examining immigration

credibility determination if, taking into account an explanation offered by the applicant, there is not a significant possibility that the applicant could establish in a full hearing that the claim is credible.

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).

Note, however, that the sworn statement completed by CBP (Form I-867B) is not intended 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.

A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien's statement to an inspector is taken when considering whether an applicant's later testimony is consistent with the earlier statement. Factors to keep in mind include: 1) whether the questions posed at 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 Balasubramanirim v. INS, 143 F.3d 157 (3d Cir. 1998); *cf. Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) (discussing in detail the limitations inherent in the initial interview process, and holding that the BIA was entitled to rely on fundamental inconsistencies between the applicant's airport interview statements and his hearing testimony where the applicant was provided with an interpreter, and given ample opportunity to explain his fear of persecution in a careful and non-coercive interview).

5. All reasonable explanations must be considered in reaching a determination on the applicant's credibility. The asylum officer need not credit an unreasonable explanation.

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

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

D. Documenting a Credibility Determination

1. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony found not credible, including the specific inconsistencies, lack of detail or other factors, along with the applicant's explanation and the reason the explanation is deemed not to be reasonable.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the credible fear determination, a follow-up interview must be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information.

4. Note-taking procedures for credible fear interviews, as described in the Credible Fear Procedures Manual, must be followed.

See, Procedures Manual, Credible Fear Process (Draft, Nov., 2003), sec. III.E.8., "Note-Taking by the APSO During a Credible Fear Interview."

VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION

A. Persecution on Account of a Protected Ground

1. Persecution on account of a protected ground means serious harm or suffering inflicted upon an individual on account of race, religion, nationality, membership in a particular social group, or political opinion. The agent of persecution may be either the government or a non-governmental entity that the government is unwilling or unable to control.

See, RAIO Training Module, *Persecution*, for a more complete discussion of persecution.

2. A determination whether the harm suffered or feared is persecution on account of a protected ground has two components:

   a. The harm or suffering must be serious, identifiable, and assessed on individual circumstances.

   b. The harm must be on account of race, religion, nationality, membership in a particular social group, or political opinion.

3. For an applicant to establish a credible fear of persecution, there must be a significant possibility that the applicant could establish in a full asylum hearing that the harm the applicant suffered or fears constitutes persecution on account of a protected ground.

   a. There must be a significant possibility that the applicant could establish in a full hearing before an immigration judge that the past or feared harm is serious enough to constitute persecution.

   b. There must be a significant possibility that the applicant could establish in a full hearing before an immigration judge that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one of the central reasons for persecuting the applicant.

4. The following are examples of past or feared harm serious enough in some instances to be deemed persecution:

   See, RAIO Training Module, *Persecution*

   a. Certain violations of an individual's core or fundamental human rights, such as:

      (i) genocide;

      (ii) slavery;

      (iii) torture and other cruel, inhuman, or degrading treatment;

      (iv) prolonged detention without notice of an opportunity to contest the grounds for detention; and

      (v) rape and other severe sexual violence, such as forced female circumcision and other forced genital mutilation.

   b. Cumulative acts of discrimination or harassment, if the adverse practices or treatment accumulates or increases in severity to the extent that it leads to consequences of a substantially prejudicial nature; such as;

      (i) serious restrictions on right to earn a livelihood;

      (ii) serious restrictions on the access to normally available educational facilities;

(iii) arbitrary interference with privacy;

(iv) relegation to substandard dwellings;

(v) enforced social or civil inactivity;

(vi) passport denial;

(vii) constant surveillance;

(viii) pressure to become an informer;

(ix) confiscation of property; and

(x) arrests and detentions based on illegitimate government action or marked by mistreatment or excessive duration.

c. Other forms of harm, including physical abuse, may amount to persecution:

(i) Substantial economic harm

(ii) Serious psychological harm

(iii) Forced abortion or sterilization

(iv) Serious harm to family members

B. Past Harm

1. In general, a finding that there is a significant possibility that harm experienced in the past could be considered persecution on account of a protected ground in a full asylum hearing is sufficient to satisfy the credible fear standard. This is because the applicant in such a case has shown a significant possibility of establishing in a full hearing that he or she is a refugee and a full asylum hearing provides the better mechanism to evaluate whether or not the applicant merits a favorable exercise of discretion to grant asylum.

See, RAIO Training Module. *Persecution*

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

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

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

3. Factors such as the applicant's risk of future harm, changed

conditions in the applicant's country or in the applicant's circumstances, and the applicant's ability to safely relocate within the country are generally not relevant to the credible fear determination, if the applicant has shown a significant possibility of establishing in a full hearing that he or she is a refugee based on past persecution on account of a protected ground. However, if the evidence that an applicant could reasonably relocate within the country is so substantial that there is no significant possibility that the applicant could establish eligibility for asylum in a full hearing, a negative credible fear determination may be appropriate.

C. Future Harm

1. When an applicant does not claim to have suffered any past harm, or where the evidence is insufficient to establish a significant possibility that any harm experienced in the past could be considered persecution on account of a protected ground, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution in a full asylum hearing.

See, RAIO Training Module, *Well-Founded Fear*.

2. 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 in a full hearing that there is reasonable possibility that he or she will be persecuted on account of a protected characteristic. Asylum officers should elicit and consider information relating to the four prongs of the modified *Mogharrabi* test for well-foundedness: possession, awareness, capability, and inclination.

See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), as modified by *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

3. The applicant does not need to show that he or she may be singled out individually for persecution. A positive determination of credible fear of persecution may be found if the evidence shows a significant possibility that the applicant could establish in a full asylum hearing that he or she may be singled out for persecution, or if there is a pattern or practice of persecution of individuals similarly situated to the applicant.

D. Nexus to One of the Five Grounds Listed in the Refugee Definition

1. The APSO's affirmative duty to elicit all information relevant to the legal determination is particularly important

See, RAIO Training Modules, *Nexus and the Protected Grounds (minus*

in the context of determining a nexus between the harm experienced or feared and any protected ground. The APSO must determine whether there is a significant possibility that the applicant can establish in a full asylum hearing that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

PSG) and *Nexus – Particular Social Group*.

8 CFR 208.9(b)

2. Both during the interview and when evaluating the case, the officer must explore all possible connections to a protected ground. For cases where no nexus to a protected ground is immediately apparent, the APSO should ask questions related to all five grounds to ensure that no nexus issues are missed.

3. The nexus to a protected ground must be identifiable and articulable, and there must be a significant possibility the applicant could establish in a full hearing that it is at least one central reason for persecuting the applicant.

4. Any credible evidence that at least one central reason the persecutor was or is motivated to harm the applicant may be on account of a protected ground is sufficient to find a nexus to a protected ground for purposes of the credible fear of persecution screening.

5. The evidence of motive can be either direct or circumstantial, and either from the applicant's testimony or other evidence provided by the applicant or from country conditions information.

6. If there is a significant possibility that the applicant will be able to establish in a full hearing that at least one central reason for the harm relates to his or her possession of a protected characteristic, the officer should find a nexus to a protected ground for the purposes of the credible fear of persecution screening.

7. Officers should be aware of novel issues that have not been completely developed by case law, such as issues surrounding whether harm is on account of membership in a particular social group or whether a political opinion is imputed to the applicant.

See, e.g., RAIO Training Module, *Gender-Related Claims*, and *Nexus – Particular Social Group*.

8. If the applicant demonstrates a significant possibility that he or she could establish past persecution or a well-founded fear of future persecution, and that at least one central reason for the harm was or will be on account of a

protected ground, then the applicant has met the credible fear of persecution standard.

E. Multiple Citizenship

Persons holding multiple citizenship or nationality must demonstrate a credible fear of persecution or torture from at least one country in which they are citizen or national to be eligible for referral to immigration court for a full asylum or withholding of removal hearing.

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 demonstrates a credible fear with respect to any country of proposed removal, regardless of citizenship, 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 as well.

F. Statelessness/Last Habitual Residence

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

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

VIII. ESTABLISHING A CREDIBLE FEAR OF TORTURE

As explained above, a credible fear of torture is defined as a *significant possibility* that the applicant could establish eligibility for withholding of removal or deferral of removal under the *Convention Against Torture* in a full hearing. An individual may be eligible for withholding of removal or deferral of removal to a country if it is more likely than not that the applicant would be

See, lesson, *Reasonable Fear of Persecution and Torture Determinations* for a more detailed discussion of the legal elements of the definition of torture; 64 Fed. Reg. 8478, 8484.

tortured in that country. 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 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

The Convention Against Torture 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 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."

Article 1, *Convention Against Torture*

See also 8 CFR § 208.18(a); lesson, *Reasonable Fear of Persecution and Torture Determinations*

B. General Considerations

Although the Convention definition of torture requires that several elements be met before an act may constitute torture, many of those elements are not relevant for the credible fear determination. This is because the purpose of the credible fear determination is to cast a wide net to identify all those who *might* require protection under the Convention, and many elements of the Convention definition of torture require complex legal and factual analyses that may be more appropriately considered in a full hearing before an immigration judge.

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:

1. the applicant's claim would be found credible;

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

2. the applicant would be intentionally subjected to serious physical or mental harm in a country to which the applicant may be removed; and

Acquiescence of a public official requires that the public official, prior to the

3. that the person(s) the applicant fears is a government official, someone acting in an official capacity or someone who would act at the instigation of or with the consent or acquiescence of a government official or someone acting in an official capacity.

'activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 CFR 208.18(a)(7). An applicant may establish acquiescence by showing the public official's actual knowledge of the torture, "willful blindness" to the torture on the part of public officials, or that public officials would "turn a blind eye" to the torture. *Zheng v. Ashcroft*, 332 F. 3d1186 (9th Cir. 2003). *Ontunez-Turcios v. Ashcroft*, 303 F., 3d 341 (5th Cir. 2002).

By attaching the aforementioned understanding, the Senate could hardly have made it clearer that it did not intend "acquiescence" in the Convention to require a showing that the government in question was actually aware of the conduct that constitutes torture. Rather, an alien seeking relief under the CAT can establish that the government in question acquiesces to torture by showing that the government is willfully blind to a group's activities. Any more restrictive reading of the CAT would be inconsistent with the fact that the Senate ratified the Convention only after attaching an understanding that acquiescence does not require "actual knowledge." *See* S. Exec. Rep. 101-30, at 36 (1990).

Silva-Rengifo v. Atty. Gen., 473 F.3d 58 3rd Cir. 2007)

For purposes of the credible fear of torture determination, the APSO does not need to take into account other elements of the torture definition, such as whether the individual would be in the offender's custody or control, or whether the feared harm would

arise from lawful sanctions. These additional questions will be explored by the immigration judge during the full hearing.

C. Intent.

In evaluating whether an individual has established a credible fear of torture, the APSO must determine whether there is a significant possibility that the applicant could establish in a full hearing that he or she would be intentionally harmed. For purposes of the credible fear determination, this does not necessarily mean that the feared offender intends to inflict serious harm on the applicant, only that the offender intends to take some action that would result in serious harm to the applicant.

Example: Applicant credibly testifies that, because he left his country without authorization, he will be forced by his government to undergo prolonged detention with common criminals in notoriously squalid conditions without access to common medications he requires for his heart condition. Although the intention of the government is simply to detain the applicant for violating departure laws, the government's intentional act could result in serious harm – subjecting the applicant to prolonged detention under conditions that could result in serious harm. Therefore, a positive credible fear of torture determination may be appropriate in this case.

Example: Applicant credibly testifies that she will be subjected to serious harm because of famine in her country, or because a medical procedure she requires is unavailable in her country. Neither scenario would meet the credible fear of torture standard, because the applicant does not fear *intentional* infliction of harm. She has not indicated an action the government intends to inflict on her that could result in serious harm.

Important Note: This standard regarding intent is different from the standard that will be applied in eligibility determinations for withholding of removal under the Convention Against Torture. To be eligible for protection under the Convention Against Torture, it would be necessary to show that the offender specifically intends to inflict severe pain or suffering upon the victim. In the screening process, however, the lower standard will be applied so that the screening may serve as a broad net to ensure that all individuals who have a significant possibility of establishing eligibility are permitted to present their claims before the immigration judge.

Important Note: There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition.

D. Serious Harm

The harm the applicant fears may be physical or mental, but it must be serious enough that there is a significant possibility that the applicant could establish in a full hearing that the feared harm amounts to torture. This does not mean that the harm as articulated in the credible fear screening must be as severe as that required to meet the Convention definition of torture ("severe pain or suffering"), but it must be more serious than certain types of harm that may be sufficient to meet the credible fear of persecution standard. For example, fear of discrimination or harassment would not be sufficient to meet the credible fear of torture standard. In evaluating this aspect of the claim, the officer must take into account that the perception of harm varies among individuals.

Example: Applicant fears he will be intentionally deprived of the right to education because he left his home country.. The feared harm would not be serious enough to meet the credible fear of torture standard.

Example: Applicant fears he will be jailed because he broke the law and will be beaten because guards routinely beat inmates. The feared harm would be serious enough to meet the credible fear of torture standard.

Important Note: As discussed above, the purpose of the credible fear screening is to cast a broad net to ensure that all individuals who have a significant possibility of establishing eligibility for protection under the Convention Against Torture are permitted to present their claims before an immigration judge. Thus, individuals who later are found not to be eligible for protection under the Convention Against Torture may, nevertheless, meet the credible fear of torture standard.

E. Identity of the Feared Person or Persons

There must be a significant possibility that the applicant can establish that the harm he or she fears would be inflicted by a person who is a government official, or a person acting in an official capacity, or who would act at the instigation of or with the consent or acquiescence of a public official on either a national or local level. This may include persons who have affiliations, either formal or informal, with the government or

government officials on either the national or local level.

F. Past Harm

Although protection under the Convention Against Torture is based solely on an applicant's fear of future 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.

G. Internal Relocation

For purposes of the credible fear of torture determination, the applicant does not need to show that there is a significant possibility that the applicant will be able to establish in a full hearing that the threat of serious harm exists throughout the country to which the applicant may be returned. Given that the applicant must establish that the harm he or she fears would be inflicted by a government official or a person acting with the consent or acquiescence of a public official in order to satisfy the credible fear of torture standard, an examination into an internal relocation alternative is not necessary at the credible fear screening stage.

IX. EVIDENCE

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.

Evidence may be direct or circumstantial.

Site v. Holde, 656 F.3d 590 (7th Cir. 2011)

It is not appropriate to require that a person seeking relief under the Convention Against Torture articulate, with personal knowledge, how he knows he will be tortured. 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 *Evidence* Training Module and the RAIO *Credibility* Training Module, and HQASY memos on this issue.

8 C.F.R. §§ 208.16(b); 208.16(c)(2)

Bosede v. Mukasey, 512 F.3d 946 (7th Cir. 2008)

in evaluating whether lack of corroboration affects the applicant's ability to establish a credible fear of persecution or torture.

(finding that the IJ's requirement that the applicant show that Decree 33 would be enforced against him was unreasonable

X. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

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). *See also*, Asylum lesson plan, *Mandatory Bars Overview and Criminal Bars to Asylum*, for a discussion of bars to asylum.

B. APSO 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 asylum or withholding of removal.

Procedures Manual, Credible Fear Process (Draft, Nov., 2003), sec. IV.G., "Mandatory Bars." *See also* 8 C.F.R. § 208.30(d).

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.

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 aggravated felony), and therefore constitutes a danger to the community of the US;
3. is a danger to the security of the US;
4. is subject to the inadmissibility or deportability grounds relating to terrorist activity as identified in INA section 208(b)(2)(v);
5. has committed a serious non political 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.

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 APSO should consult with the supervisory asylum pre-screening officer (SAPSO) in charge and 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, Nov., 2003), sec. IV.G., "Mandatory Bars."

XI. ROLE OF COUNTRY CONDITIONS INFORMATION

Pursuant to the definition of the credible fear standard, the APSO must take account of "such other facts as are known to the officer." Such "other facts" include relevant country conditions information. Similarly, country conditions information should be considered when evaluating a credible fear of torture. The Convention Against Torture and implementing regulations require consideration of "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."

INA § 235(b)(1)(B)(v); 8 CFR § 208.30(e)(2); *see also*, lesson, *Country Conditions Research and the Resource Information Center (RIC)*.

See also, 8 C.F.R. §§ 208.1(b) (training of asylum officers); 208.11 (Department of State comments); 208.12(a) (reliance on information compiled by other sources); 208.16(c)(3) (assessing eligibility for withholding of removal under CAT).

See, Procedures Manual, Credible Fear Process (Draft, Nov., 2003), sec. III.G., "Researching a Case."

A. Proper Use of Country Conditions Information in the Credible Fear of Persecution and Torture Processes

1. Country conditions information may assist the APSO in formulating questions that fully develop the applicant's claim.

   a. An officer who has a good understanding of country conditions can identify the most relevant parts of the testimony more clearly and ask specific questions to develop the relevant issues further.

   b. A good understanding of country conditions information is especially important when eliciting information from a confused or inarticulate applicant.

2. Country conditions information may add relevant information that can assist the APSO's evaluation of the claim and the applicant's eligibility.

   a. Country conditions information may indicate groups of persons who could be subjected to harm or groups of persons who appear to have no risk of harm.

   b. Country conditions information may also assist in the identification of applicants who may be persecutors or security risks.

3. Country conditions information may assist the APSO in developing a sufficient record to evaluate the applicant's credibility appropriately.

   a. Knowledge of country conditions information helps the APSO to ask appropriate, probing questions to evaluate credibility.

   b. Knowledge of country conditions can help an officer uncover false claims more effectively and fairly.

   c. Knowledge and proper use of country conditions information prevents credibility findings erroneously based on the officer's personal experiences, biases, or expectations of how people behave.

B. CHANGED CONDITIONS

4. 1. Credible fear of persecution

If the applicant has shown a significant possibility that he or she experienced past harm that after a full hearing could be determined to be persecution on account of a protected characteristic, generally the applicant will satisfy the credible fear standard. In most cases, changes in the conditions in the applicant's country or the applicant's circumstances need not be considered in making the credible fear of persecution determination. However, evidence of changed country conditions so substantial that the applicant has no significant possibility of establishing eligibility for asylum may be considered, taking into the account any evidence that the applicant may establish eligibility for asylum based on past persecution alone.

2. Credible fear of torture

Because the credible fear of torture determination looks at prospective harm, changes in conditions in the applicant's country or circumstances could affect the credible fear of torture determination. If an applicant has suffered serious harm inflicted by a government actor, the applicant usually will satisfy the credible fear of torture standard. Changes in the conditions in the applicant's country or circumstances can lead to a negative credible fear of torture decision where the changes, as they affect the applicant, are so substantial that the applicant has no significant possibility of establishing that it is more likely than not that he or she will be tortured in the future.

XII. TREATMENT OF DEPENDENTS

8 C.F.R. § 208.30(b)

A spouse or child of an alien 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.

Any alien also has the right to have his/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 withholding of removal 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.

See, Procedures Manual, Credible Fear Process (Draft, Nov., 2003), for more information.

XIII. SUMMARY

A. Function of Credible Fear Screening

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

B. Credibility

Considerations:

1. Standard

   The applicant must establish that there is a significant possibility, considering the totality of the circumstances and all relevant factors, that the applicant's claim could be found credible in a full hearing.

2. Factors to consider

   The same factors that are considered when determining credibility in an asylum or withholding of removal interview are evaluated in the credible fear interview, but the applicant only needs to establish that there is a significant possibility that the assertions underlying his or her claim could be found credible in a full asylum or withholding of removal hearing.

3. Scope of evidence to be considered

   The totality of the circumstances and all relevant factors must be considered in making a credibility determination in the credible fear process.

4. The applicant must be given an opportunity to explain any inconsistency, implausibility or lack of detail before a

credibility determination is made.

5. The APSO's personal opinions or moral views may not be considered when making a credibility determination.

C. Definition of Credible Fear of Persecution

"Credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the alien's statements and such other facts as are known to the officer, that the alien could establish eligibility for asylum on account of a protected ground in a full asylum hearing.

D. Definition of Credible Fear of Torture

"Credible fear of torture" means that there is a significant possibility that the applicant could establish eligibility for withholding of removal or deferral of removal under the Convention Against Torture in a full hearing before an immigration judge.

E. Establishing a Credible Fear of Persecution

1. The "significant possibility" standard has been described in the non-immigration context as requiring the person bearing the burden of proof to "demonstrate a *substantial and realistic possibility* of succeeding." This standard of proof is lower than the "clear probability" standard which requires a determination that success is "more likely than not."

2. A "significant possibility of establishing eligibility for asylum" is higher than the "not manifestly unfounded" standard.

3. For claims based on past persecution, the standard is met by finding that there is a significant possibility that the applicant could establish in a full hearing that the past harm endured could be found to be persecution on account of a protected ground. The officer need not determine if the harm described constitutes persecution; the officer need only determine if there is a significant possibility that the applicant could establish in a full asylum hearing that the harm would be considered persecution. If there is a significant possibility that the past harm endured could be found to be persecution on account of a protected ground, credible fear is established, regardless of changed country conditions, ability to relocate, or any other factors.

For claims based on a fear of future persecution, the credible fear standard is met by a finding that there is a significant possibility the applicant could establish in a full hearing a well-founded fear of persecution on account of a protected ground.

4. There must be a significant possibility that the applicant's testimony could be found credible in a full hearing before an immigration judge.

5. To establish identity for the purpose of the credible fear determination the applicant must show that there is a significant possibility that he or she could establish who he or she claims to be in a full hearing before an immigration judge.

6. There must be a significant possibility that the applicant could establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant in a full asylum hearing. If doubts exist, the officer should resolve the issue in favor of the applicant.

7. All reasonable inferences should be drawn in favor of the applicant.

8. Disputed, close or novel questions of law should be analyzed as to whether they merit consideration in a full asylum hearing before an immigration judge.

F. Establishing a Credible Fear of Torture

To establish a credible fear of torture, the applicant must demonstrate that there is a significant possibility that he or she could establish in a full hearing before an immigration judge:

1. that the applicant's testimony could be found credible;

2. that he or she would be intentionally subjected to some action that would result in serious physical or mental harm in a country to which the applicant may be removed; and

3. that the harm feared would be inflicted by or at the instigation of, or with the consent or acquiescence of, a government official or other person acting in an official capacity.

G. Bars to Asylum and Withholding of Removal

1. The applicability of a bar to asylum or withholding of removal cannot form the basis for finding no credible fear of persecution or torture.

2. However, the possibility that a bar to asylum or withholding of removal may apply must be explored and flagged for the record.

H. Role of Country Conditions Information

Knowledge of country conditions information informs the credible fear interview and assists the interviewing officer in developing the applicant's claim.

I. Treatment of Dependents

A dependent (spouse or child) who arrives concurrently with a "principal" applicant for admission may be included in the credible fear evaluation of the "principal" if the spouse or child requests to do so. All aliens also have a right to have their credible fear determinations done separately.

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	March 11, 2013
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 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; Rove 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 January 2003)

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. 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.: 18 March 1999), 16 p. plus attachments.

4. 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), 1 p. plus attachment (including updated version of Withdrawal of Request of Reasonable Fear Determination form; 6/13/02 version).

5. 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.

6. 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.

7. 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: 15 April 2002), 3p.

8. Langlois, Joseph E. Asylum Division. *Reasonable Fear Procedures Manual*, Memorandum for Asylum Office Directors, et al. (Washington, DC: 03 January 2003), 3p. plus attachments.

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

10. 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)

TABLE OF CONTENTS

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

Interim regulations require asylum officers to make reasonable fear determinations in two types of cases referred by other DHS officers after a final order of removal has been issued or reinstated. 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; 64 Fed. Reg. 8478 (February 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*" or "the Convention") 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.

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 would be tortured or the person's life or freedom would be threatened on account of a protected characteristic in the refugee definition and, at the same time, to adhere to Congressional directives to subject certain categories of aliens to streamlined removal proceedings.

These treaty obligations are based on Article 33 of the *1951 Convention relating to the Status of Refugees*; and Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

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 January 2003), Section II.C; *(Types of Reasonable Fear Cases)*

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 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).

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), 3p. plus attachments.

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.

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."

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 who is unsure about the validity of a reinstated prior removal order should consult the Reasonable Fear Procedures Manual, a supervisor or Headquarters Quality Assurance unit.

Fernandez-Vargas v. Gonzales, 126 S.Ct. 2422 (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 F3d 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 intends 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.

NOTE: Procedures are currently being developed for referring a person back to the asylum office when DHS decides to disregard a country of removal designation and the person expresses a fear of return to the new country of removal.

The asylum officer need only explore the person's fear with respect to the countries designated and any other country to which DHS is contemplating removal. 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 that 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).

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 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 withholding of removal under CAT 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. 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 for relief.

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

For discussion on what constitutes "deference", see section *VII. Credibility, D. Prior Credibility Determinations*.

VII. CREDIBILITY

A. Credibility Finding

To determine whether an applicant has a reasonable fear of persecution or a reasonable fear of torture, the asylum officer must evaluate whether the applicant's claim is credible. In contrast to the credible fear determination, where the asylum officer determines only whether there is a significant possibility the applicant may establish a credible claim, the asylum officer must make a finding as to whether the claim is or is not credible.

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*. The asylum officer should evaluate the consistency, detail, and plausibility of the testimony, in light of country conditions and other documentary evidence. The asylum officer must also take into account factors that may impede clear communication or lead to misunderstandings, such as effects of trauma, cultural factors, and use of an interpreter.

See RAIO Modules: *Cross Cultural Communication*, *Interviewing – Working with an Interpreter* and *Interviewing - Survivors of Torture and Other Severe Trauma*.

B. Relevance

If parts of the testimony are found not credible, the asylum officer must determine whether those parts of the testimony are relevant to the applicant's claim of persecution or to the applicant's claim of torture. Only if the aspects of the testimony found not credible are relevant to the applicant's claim may the APSO base an adverse reasonable fear determination on the applicant's lack of credibility. For example, if there are inconsistencies between the applicant's testimony and government records regarding the number of times applicant entered the United States but this inconsistency does not affect the applicant's claim, this would not be relevant and an adverse determination should not be based on this discrepancy.

For discussion on what constitutes a "relevant" inconsistency or discrepancy, see RAIO Module: *Credibility*.

However, there are instances where this inconsistency could be relevant. For example, if the government records indicate that the applicant was in the United States during the time s/he claims to have been harmed while residing in a foreign country, this would be relevant and it could be used as a factor supporting a negative determination, provided that the applicant is unable to explain the inconsistency reasonably.

C. Opportunity to Address Inconsistencies and Discrepancies

The asylum officer must afford the applicant the opportunity to explain any apparent relevant inconsistencies and discrepancies. This opportunity to respond must be documented in the sworn statement. This is particularly important in the reasonable fear process, because the interview may be the applicant's only opportunity to explain perceived discrepancies.

The individual previously may have provided testimony regarding his or her claim in the context of an asylum or withholding of removal application. It is important that the asylum officer review all prior testimony before the interview in order to ask the individual about any inconsistencies between prior testimony and the testimony provided at the reasonable fear interview. If the individual is not given such an opportunity at the reasonable fear interview, and inconsistencies are discovered at a later date, it may be necessary to conduct a second interview to give the individual an opportunity to explain.

D. Prior Credibility Determinations

An adjudicator previously may have made a determination on the credibility of the individual's assertions regarding facts that form the basis of the claim, particularly 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 that the claim was or was not credible.

See Mansour v. INS, 230 F.3d 902 (7th Cir. 2000) (Where the basis for an applicant's asylum and torture claims differ, individualized treatment is warranted to ensure a thorough exploration of the torture claim)

The APSO should accord deference to previous credibility determinations made on the same facts alleged in support of the reasonable fear claim. However, the asylum officer is not strictly bound by prior credibility determinations – whether the determination was that the assertions were credible or not credible. The evidence presented to the asylum officer may be different than that presented to the previous adjudicator, either because the individual has obtained additional information since the previous adjudication, or because of the difference in the nature of the claim for protection from removal. (For example, previously the applicant may not

See Efe v. Ashcroft, 293 F.3d 899 (5th Cir. 2002) (Factual conclusions of Board of Immigration Appeals (BIA) are reviewed for substantial evidence, and questions of law are reviewed de novo, giving great deference to an immigration judge's decisions concerning an alien's credibility.)

have been able to present a claim based on fear of torture.)

Deference is typically thought of in the context in which a reviewing body is reviewing a decision made below, to determine whether or not decision as a whole should be upheld Deference operates differently where the APSO is making a new decision on a new record. Even when the claim asserted is the same as the claim previously adjudicated, a new reasonable fear interview creates a new record. The APSO decision is a new action under a different authority. The APSO is not acting as a reviewing body for the previous decision and must instead make a new determination, which includes a new credibility determination. Therefore, deference in this context cannot entail assumption of a negative credibility determination as a fact found and application of it to the new decision in lieu of a separate analysis. Instead, it requires the APSO to acknowledge the significance of the prior credibility considerations on the "same facts" and then take them into account in the analysis. What constitutes "the same facts" is an important part of this discussion. Prior vague testimony might not be considered to be the same facts as more specific testimony received during the reasonable fear interview.

Note: This differs from how we treat prior credibility determinations in the affirmative asylum context where an applicant was previously denied by an Immigration Judge. An asylum seeker cannot apply for asylum before an AO if he or she has previously applied for and has been denied asylum (and there is not appeal pending) 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 (in facts or in law) that materially affect asylum eligibility.

Some prior negative credibility determinations may be clear and the facts they address are easily identified as being the same facts that are being assessed for credibility in the reasonable fear interview. In such as case, deference can be accorded by raising to the applicant the problems noted by the previous adjudicator, during the reasonable fear interview, giving the applicant the opportunity to explain, and deferring to the previous adjudicator's judgment in assessing the reasonableness of any explanation where that judgment is supportable. Since it is important that the applicant be given the opportunity to explain the negative credibility factors raised by the prior adjudicator, this would require a review of the previous record and determination prior to the reasonable fear interview and some exploration of the credibility concerns during the reasonable fear interview. The record of the applicant's previous testimony can also be helpful in the determination of whether the explanation of credibility issues is reasonable. For example, if the applicant indicates during his reasonable fear interview that he was not given the opportunity to talk about other instances of harm, but the transcript of his prior hearing indicates he was asked several times if anything else happened to him, this could support a determination that the applicant's explanation is not reasonable. Keep in mind, however, that some of the instances that applicant is testifying about may have occurred *after* the previous interview or hearing.

In any case in which the APSO'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.

VIII. ESTABLISHING 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 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

8 C.F.R. § 208.31(c).

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 more of the protected characteristics in the refugee definition.

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. § 208.13(b)(1) and discussion of presumption in RAIO lessons: *Persecution* and *Well-Founded Fear*

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

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. 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.

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, even if there is no longer a reasonable possibility the applicant would be persecuted in the future.

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

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

See discussion of internal relocation in RAIO Module: *Well-Founded Fear*; *See also* 8 CFR 208.13(b)(3)

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.

E. Mandatory Bars

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

8 C.F.R. § 208.31(c)

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.

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

For the purposes of drafting the determination, the asylum officer should flag any potential bars by including a brief description of the facts that may implicate a mandatory bar. The asylum officer should then note that the mandatory bars were not considered when making the determination.

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.

8 C.F.R. § 208.16(c)(4)

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 CFR § 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.)

IX. 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.

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 the United States' obligations under Article 3 of the *Convention Against Torture*, subject to any reservations,

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

understandings, declarations, and provisos contained in the United States Senate resolution to ratify the Convention.

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. One of the mechanisms for protection provided in the regulations, effective March 22, 1999, is the "reasonable fear" screening process.

See 8 CFR 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 CFR 208.17(d),(e),(f) and 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.

X. 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 Module: *Interviewing - Survivors of Torture and Other Severe Trauma*, background reading associated with that lesson, and the Alien Tort Claims Act, 28 U.S.C. § 1350 (1997)

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 official capacity.

Convention against Torture, Article 1. See also, Committee on Foreign Relations Report, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Exec. Report 101-30, August 30, 1990 (hereinafter "Committee Report"), p. 14; Regulations Concerning the Convention Against Torture, 64 FR 8478, 8483 (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 (BIA 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.

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

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

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 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

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

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 their 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 fn 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.

8 C.F.R. § 208.18(a)(7)

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.

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 obvious to him."

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 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.

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

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

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 acing 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.

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

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."

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

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.

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

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.

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".

Coniollari v. Ashcroft, 378 F.3d 694, 697 (7th Cir. 2004) 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 CFR § 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*)

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 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)

1. 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. October 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.

E. 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)

1. 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." — 64 Fed. Reg. 8478, 8482 (February 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. — 8 CFR §208.18; *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

2. 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. October 27, 1990).

Example: A State Party's law permits use of electric

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, or be inherent in or 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, page 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.

64 Fed. Reg. 8478, 8480 (February 19, 1999); 8 C.F.R. § 208.16(c)(3)

This approach governs only the reasonable fear screening and is not applicable to the actual eligibility determination for withholding under the *Convention Against Torture*.

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

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).

contrary.

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 feared torture, in assessing whether the applicant is eligible for withholding of removal under the *Convention Against Torture.*

8 C.F.R. § 208.16(c)(3)(ii)

However, for purposes of the reasonable fear of torture determination, the asylum officer should not consider whether the applicant could relocate to another part of his or her country. In light of the lower standard applied in the reasonable fear screening process, asylum officers should find a reasonable fear of torture if the applicant establishes a reasonable possibility of torture in any part of the country to which the applicant has been ordered removed.

Again, this approach governs only the reasonable fear of torture screening and is not applicable to the actual eligibility determination for withholding under the *Convention Against Torture.*

This approach should be differentiated from the reasonable fear of persecution determination, in which internal relocation is considered.

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(e)

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 and document such information in the sworn statement.

For the purposes of drafting the determination, the officer should flag the potential bar by including a brief description of the facts that may implicate a mandatory bar. If a bar is flagged then

XII. 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 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."

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, 478-479 (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

Matter of J-F-F-, 23 I&N Dec. 912, 917 n.4 (A.G. 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 (A.G. 2002)).

the probability of torture of the applicant.

"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. Kamalthas v. I.N.S., 251 F.3d 1279 (C.A.9,2001) held 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."

XIII. INTERVIEWS

A. General Considerations

See Draft Reasonable Fear Procedures Manual (Jan. 2003), Section III.E., Conducting a Reasonable Fear Interview.

8 C.F.R. § 208.31(c)

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.

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.

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.

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.

B. Confidentiality

8 C.F.R. § 208.6.

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.

C. Interpretation

8 C.F.R. § 208.31(c)

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.

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.

See Draft Reasonable Fear Procedures Manual (Jan. 2003); III.E.4. Note Taking and Sworn Statement.

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.

D. Note Taking

8 C.F.R. § 208.31(c)

Notes must be taken in the Question and Answer format and recorded on a sworn statement. The asylum officer must read the sworn statement to the applicant (unless the applicant is able to read it, in which case the applicant may read the sworn statement to make any corrections), and allow the applicant to make any corrections before signing it.

Note that the signatures on the sworn statement must be witnessed by a third party. *See Draft Reasonable Fear Procedures Manual* (Jan. 2003), 4. Note Taking and Sworn Statement.

E. Representation

See *Draft Reasonable Fear Procedures Manual* (Jan. 2003), III.E.6. Representation.

The applicant may be represented by counsel or by an accredited representative at the interview. The representative submits 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 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 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

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 a exception may apply. This information may not be considered in evaluating whether the applicant has a reasonable fear, but should be included in the sworn statement, where applicable.

XIV. REQUESTS TO WITHDRAW THE CLAIM FOR PROTECTION

See *Draft Reasonable Fear Procedures Manual* (Jan. 2003), IV.F., Withdrawals.

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.

XV. 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 claim is credible as apply in the asylum adjudication context. Only if the aspects of a claim found not credible are relevant to the claim may the asylum officer base an adverse determination on lack of credibility. The applicant must be given the opportunity to address any inconsistencies and discrepancies.

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.

For purposes of reasonable fear of torture determinations, the asylum officer does not need to consider whether the threat of torture exists country-wide.

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 and the interview notes must be recorded in Question and Answer format in a sworn statement. The asylum officer must elicit all relevant information.