

PRACTICE ADVISORY:

Common Obstacles when Representing Afghans in Immigration Proceedings

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Introduction

Starting in August of 2021, the U.S. government carried out one of the largest airlifts in history, eventually evacuating 120,000 individuals from Afghanistan.¹ The evacuation and withdrawal of American troops, allies, and a small subset of vulnerable Afghans ushered the return of the Taliban's control of Afghanistan along with the internal displacement and exodus of millions of Afghan nationals.² This recent crisis is yet another blow to Afghans, who have faced a tragic and longstanding series of political and socio-economic disasters. The humanitarian crisis in Afghanistan has produced countless Afghan refugees and asylum-seekers who meet the refugee definition because of their fears of persecution in Afghanistan, but who may in certain cases be subject to various bars to asylum.

This practice advisory is intended to orient practitioners navigating common obstacles in the representation of Afghan asylum-seekers in the United States. The advisory illuminates the complexities of these matters by discussing the historical context of the crises in Afghanistan, common types of Afghan asylum cases; commonly applied bars to asylum; potential ethical issues; considerations for Afghans arriving at the Southern border; and an appendix of tools and resources.

Relevant Historical Events in Afghanistan

Afghanistan has been in a state of war for over forty years.³ The ethnically diverse nation fought for and gained independence from the British Empire in 1921 and was ultimately declared a monarchy four years later in 1926.⁴ Despite the nation's growing pains, including a revolt against and ultimate abdication of Amir Amanullah Khan and the installation of King Zahir Shah in 1933, Afghanistan enjoyed relative stability from 1933 until the early 1970s.⁵

In 1973, Pro-Soviet General, Mohammed Daoud Khan, overthrew the monarchy and named himself President of the newly named Republic of Afghanistan.⁶ In 1978, President Khan was assassinated in a communist coup and Nur Mohammad Taraki, himself a communist, was named the new president of Afghanistan. Infighting within the Communist Party began to fracture the group and conservative Islamic

¹ *President Joseph Biden, Remarks on the End of the War in Afghanistan (Aug 31, 2021)* (available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/#:~:text=Remarks%20by%20President%20Biden%20on%20the%20End%20of%20the%20War%20in%20Afghanistan,-Home&text=THE%20PRESIDENT%3A%20Last%20night%20in,120%2C000%20people%20evacuated%20to%20safet y>).

² *Id.*; Afghanistan 2022 Human Rights Report, U.S. Dep't of State, available at https://www.state.gov/wp-content/uploads/2023/03/415610_AFGHANISTAN-2022-HUMAN-RIGHTS-REPORT.pdf; *See also*: Afghanistan: Refugees and displaced people in 2021, House of Commons Library (Dec. 2021), available at <https://researchbriefings.files.parliament.uk/documents/CBP-9296/CBP-9296.pdf>; Alex Horton and Dan Lamothe, Inside the Afghanistan airlift: Split-second decisions, relentless chaos drove historic military mission, Washington Post (Sept. 27, 2021), <https://www.washingtonpost.com/national-security/2021/09/27/afghanistan-airlift-inside-military-mission/>.

³ A Historical Timeline of Afghanistan, PBS Newshour, (Aug 30, 2021), <https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

and ethnic group leaders initiated an armed revolt against the government.⁷ In 1978, the Mujahadeen, Islamist guerilla fighters, formed to fight against the USSR-backed government.⁸ In December of 1979, the USSR invaded Afghanistan, beginning a 10-year Soviet-Afghan war.⁹ In the course of the war, the Mujahadeen received arms and training from nations including the United States.¹⁰

In the late 1980s, Osama Bin Ladin and other Islamist fighters united to form Al-Qaeda, naming first the Soviets as their enemies and, later, the Americans.¹¹ After the withdrawal of the Soviet Union from Afghanistan in 1989, civil war broke out as the Mujahadeen splintered.¹² In 1995, the Taliban, a newly formed militant Islamist organization, emerged in Afghanistan, enforcing a fundamentalist and draconian interpretation of Islam.¹³ In 1998, Al-Qaeda bombed two American Embassies, and the U.S. responded by bombarding Al Qaeda training grounds in Afghanistan.¹⁴ In the wake of the embassy bombings, the Taliban subsequently denied American demands for the extradition of Osama Bin Laden, and the United Nations placed sanctions on Afghanistan restricting trade to the impoverished nation.¹⁵ After Al Qaeda's September 11, 2001 attacks on the World Trade Center and the Taliban's refusal to arrest and extradite Osama Bin Laden, a U.S.-led coalition invaded Afghanistan, bombarding Taliban and Al Qaeda targets and bases.¹⁶ By December of 2001, the Taliban abandoned their last stronghold in Afghanistan, ushering in the leadership of President Hamid Karzai.¹⁷

The decline of Taliban control did not yield a period of peace and calm in Afghanistan. The U.S.-led war and military presence in the country (2001-2021) saw insurgencies by the Taliban and later ISIS.¹⁸ Despite efforts to contribute to the development of stronger institutions in the country, the slow pace of progress, ongoing insecurity, and loss of civilian life marked strategic pitfalls in the war.¹⁹ In 2011, U.S. Navy SEALs assassinated Osama Bin Laden in a raid in Pakistan.²⁰ By 2014, the U.S., along with NATO, ended their combat missions in Afghanistan but continued a limited presence in support of Afghan

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; Owen Bowcott, UK Discussed Plans to Help Mujahideen Weeks after Soviet invasion of Afghanistan, *The Guardian* (Dec. 30, 2010), <https://www.theguardian.com/uk/2010/dec/30/uk-mujahideen-afghanistan-soviet-invasion>.

¹¹ A Historical Timeline of Afghanistan, PBS Newshour, (Aug. 30, 2011), <https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan>.

¹² *Id.*

¹³ A Historical Timeline of Afghanistan, PBS Newshour, (Aug. 30, 2021), <https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Hannah Bloch, A Look At Afghanistan's 40 Years Of Crisis — From The Soviet War To Taliban Recapture, NPR (Aug. 31, 2021), <https://www.npr.org/2021/08/19/1028472005/afghanistan-conflict-timeline>.

¹⁷ A Historical Timeline of Afghanistan, PBS Newshour, (Aug. 30, 2021), <https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan>.

¹⁸ Hannah Bloch, A Look At Afghanistan's 40 Years Of Crisis — From The Soviet War To Taliban Recapture, NPR (Aug. 31, 2021) <https://www.npr.org/2021/08/19/1028472005/afghanistan-conflict-timeline>.

¹⁹ The U.S. War in Afghanistan, Council on Foreign Relations, <https://www.cfr.org/timeline/us-war-afghanistan>.

²⁰ *Id.*

government forces.²¹ In February of 2020, the U.S. and the Taliban signed a peace agreement in Doha, Qatar, agreeing on terms including for the U.S. withdrawal of troops and for the Taliban to halt attacks on Americans.²²

In April of 2021, President Biden announced the withdrawal of American troops from Afghanistan.²³ From May through July of 2021, Taliban fighters took back control of every major city in Afghanistan apart from Kabul.²⁴ On August 15, 2021, the Afghan government collapsed as the Taliban took control of the nation's capital.²⁵ Between August 14 and August 30, 2021, the U.S. evacuated 120,000 individuals from Afghanistan. Of those individuals, 79,000 were civilians (only 6,000 of which were American citizens).²⁶ An additional 40,000 civilians escaped Afghanistan on commercial, private, or allied planes with U.S. military supervision.²⁷ Many of the Afghans who were evacuated were allies (or families of the allies) of the U.S. government who feared retaliation from the Taliban.²⁸ Many more U.S. allies were left behind.²⁹ In the wake of the 2021 resurgence of Taliban control, there were 3.5 million internally displaced Afghans and an estimated 2.7 million Afghans have been forced to flee as refugees across 98 different countries.³⁰ The vast majority of Afghan refugees fled to contiguous countries with about 2 million living in Pakistan and Iran.³¹

Today, Afghans face harrowing conditions. Sanctions against Afghanistan have yielded a failed economy where government salaries go unpaid and food access is at dire levels.³² Human rights violations in Afghanistan are numerous and include torture, violence against and the subjugation of women, sexual assault, sexual abuse of children, unlawful recruitment of child soldiers, trafficking, violence against minority groups, arbitrary killings, censorship and violence against journalists, forced marriage, and “the existence of the worst forms of child labor.”³³

²¹ *Id.*, Hannah Bloch, A Look At Afghanistan's 40 Years Of Crisis — From The Soviet War To Taliban Recapture, NPR (Aug. 31, 2021) <https://www.npr.org/2021/08/19/1028472005/afghanistan-conflict-timeline>; Afghanistan War - U.S. Troop Surge and End of U.S. Combat Mission, Britannica, <https://www.britannica.com/event/Afghanistan-War/U-S-troop-surge-and-end-of-U-S-combat-mission>.

²² Hannah Bloch, A Look At Afghanistan's 40 Years Of Crisis — From The Soviet War To Taliban Recapture, NPR (Aug. 31, 2021), <https://www.npr.org/2021/08/19/1028472005/afghanistan-conflict-timeline>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Alex Horton and Dan Lamothe, Inside the Afghanistan airlift: Split-second decisions, relentless chaos drove historic military mission, Washington Post (Sept. 27, 2021), <https://www.washingtonpost.com/national-security/2021/09/27/afghanistan-airlift-inside-military-mission/>.

²⁷ *Id.*

²⁸ Dan De Luce, U.S. 'left behind' 78,000 Afghan allies in chaotic withdrawal: NGO report, NBC news (Mar. 1, 2022), <https://www.nbcnews.com/investigations/us-left-78000-afghan-allies-ngo-report-rcna18119>.

²⁹ *Id.*

³⁰ Afghanistan Refugee Crisis Explained, USA for UNHCR the UN Refugee Agency, <https://www.unrefugees.org/news/afghanistan-refugee-crisis-explained/> (last accessed Jun. 29, 2023).

³¹ *Id.*

³² Afghanistan, U.S. Institute for Peace, <https://www.usip.org/regions/asia/afghanistan#:~:text=Afghanistan%20is%20now%20facing%20one,starvation%20in%20the%20coming%20months> (last accessed: Apr. 21, 2023).

³³ 2021 Country Reports on Human Rights Practices: Afghanistan, U.S. Department of State, available at

Bars to Asylum and Withholding of Removal

Asylum applicants who meet the refugee definition of an individual with a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group may nonetheless be barred from asylum because of one or more of the mandatory bars discussed in this practice advisory. These include the terrorism-related inadmissibility grounds, the persecutor bar, the serious non-political crimes bar, and the firm resettlement bar.

Terrorism-Related Inadmissibility Grounds (TRIG)

Asylum and withholding of removal applicants are not generally subject to the inadmissibility grounds found in INA § 212(a), but they are subject to the so-called terrorism-related inadmissibility grounds (known as “TRIG”) at INA § 212(a)(3), as these grounds are included in the mandatory bars at INA § 208(b)(2)(A)(5)). The TRIG bars are a complex array of rules and interconnected definitions that the government interprets very broadly. Because of the long history of insurgent fighters in Afghanistan, and because the U.S. formally designated the Taliban a terrorist organization, it is crucial for advocates representing Afghan asylum seekers to understand TRIG.

This section of the practice advisory will discuss the TRIG bars in the context of Afghan asylum and withholding of removal applications. Note that derivative asylum applicants – both those inside the U.S. who apply along with the principal applicant, and those for whom the principal submits an I-730 after asylum approval – are also subject to the TRIG bars, as are applicants for Temporary Protected Status and SIV adjustment of status.

While it is important to be aware of all the parts of the TRIG definition, it is especially crucial to have an understanding of the provisions that have the broadest sweep and that the government has consistently applied to asylum seekers – many of whom are not individuals that most people would consider to have engaged in or supported terrorism (and many of whom have in fact been victims of terrorists). These are the “material support” and “Tier III terrorist organization” provisions, discussed in detail below.

The Statute: INA 212(a)(3)(B)(i)

INA § 212(a)(3)(B)(i) contains the inadmissibility grounds and INA § 237 (a)(4)(B) contains the deportability grounds related to terrorist activity. The bar applies to any noncitizen who:

- *Has engaged in a Terrorist Activity;*³⁴
- A consular officer (Department of State), DOJ, or DHS knows or has reasonable grounds to believe *is engaged in or is likely to engage after entry in any terrorist activity;*³⁵
- Indicated an intention to cause death or serious harm by inciting terrorist activity;³⁶
- Is a representative of a *terrorist* organization or a political, social, or other ground that *endorses or espouses* terrorist activity;³⁷

<https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/afghanistan/> ; 2022 Country Reports on Human Rights Practices: Afghanistan, U.S. Department of State, available at <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/afghanistan/>.

³⁴ INA § 212(a)(3)(B)(I).

³⁵ INA § 212(a)(3)(B)(II).

³⁶ INA § 212(a)(3)(B)(III).

³⁷ INA § 212(a)(3)(B)(IV).

- Is a (*current*) member of a terrorist organization listed as a Tier I or Tier II organization;³⁸
- Is a (*current*) member of a terrorist organization described as a Tier III organization, unless the person can demonstrate by clear and convincing evidence lack of knowledge that this was a terrorist organization;³⁹
- Endorses or espouses terrorist activity or persuades others to do so;⁴⁰
- Has received military-type training from or on behalf of a terrorist group;⁴¹ or
- Is the spouse or child of a person subjected to INA 212(a)(3)(B)(i) *if* the activity occurred within the last 5 years.⁴²

In order to determine whether or not a particular Afghan might be subject to a TRIG bar, it is essential to understand each part of this complex, interlocking and overlapping statute.

“Terrorist Activity”

The statute defines “terrorist activity” as any “activity which is unlawful under the laws of the place where it is committed” that involves acts that many people would be likely to associate with the word “terrorism,” such as hijacking, seizing, detaining and threatening to kill or injure as well as violent attacks, assassinations, use of biological, chemical agents or other dangerous weapons such as nuclear weapons.⁴³ The definition also includes “a threat, attempt, or conspiracy to do any of the foregoing.”⁴⁴ Troublingly, the statute goes far beyond these acts to include the use of any explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” Read literally, this definition could encompass a wide range of acts that most people would not consider “terrorism,” for instance, a personal altercation in which one person gets angry at another and hits him with a baseball bat, or a bar fight in which someone assaults another person with a broken bottle because of personal animosity.

In the context of Afghan asylum cases, this broader part of the terrorist definition is less likely to arise as an issue, but it is important to be aware of the breadth of this definition if your client reports having ever been in a fight or harming another person with any sort of weapon for any reason other than personal monetary gain. Domestic violence, for instance, could in theory fall under this broad definition of “terrorist activity” if the abuser uses any type of weapon or “dangerous device” with an intent to cause death or serious bodily injury.

“Engaging in Terrorist Activity”

Confusingly, the statute has a separate definition for “engaging in” terrorist activity.⁴⁵ Persons working in their individual capacity or as a member of a terrorist organization will be considered to have “engaged in terrorist activity” if they have:

³⁸ INA § 212(a)(3)(B)(V).

³⁹ INA § 212(a)(3)(B)(VI).

⁴⁰ INA § 212(a)(3)(B)(VII).

⁴¹ INA § 212(a)(3)(B)(VIII).

⁴² INA § 212(a)(3)(B)(IX).

⁴³ INA § 212(a)(3)(B)(iii).

⁴⁴ INA § 212(a)(3)(B)(iii).

⁴⁵ INA § 212(a)(3)(B)(iv).

- Committed or incited to commit a terrorist activity (as defined above) with an intention to cause death or serious bodily injury;
- Prepared or planned a terrorist activity, gathered information on potential targets for terrorist activity;
- Solicited funds for terrorist activity (see above) for a terrorist organization (definition below);
- Solicited any individual to engage in terrorist activity, solicited for membership for a terrorist organization; OR
- **Committed an act the actor knows or reasonably should know affords material support for the commission of terrorist activity, to any individual the actor knows or reasonably should know has committed or plans to commit a terrorist activity, to a terrorist organization.**

This last bullet point, the “material support” provision, has the broadest sweep and represents a large percentage of TRIG determinations, and perhaps the greatest focus of adjudicators. This section of the statute has swept in individuals who never intended to assist terrorists or terrorist activities, and who in many cases were in fact the victims of terrorists or terrorist organizations. The section below this next section discusses this provision in detail.

Terrorist Organizations

The statute identifies three types of “terrorist organizations” at INA §§ 212(a)(3)(B)(vi)(I)-(III). Because they are labeled I, II, and III in this section of the statute, advocates and the government have come to refer to them as Tiers I, II, and III. Tier I and Tier II organizations are specifically designated by the Secretary of State and the Department of Homeland Security (DHS), and the list of organizations is published in the Federal Register. An organization is designated as a Tier I organization if it is a foreign organization; engages in terrorist activity or retains the capability and intent to engage in terrorist activity or terrorism; and the organization threatens the security of the U.S. or U.S. nationals.⁴⁶ The list of Tier I groups can be found on the Department of State website.⁴⁷ Tier II organizations are designated by the Secretary of State in consultation with the Secretary of DHS or the Attorney General. The list of Tier II Terrorist Organizations is posted on the Department of State (DOS) website and is referred to as the “Terrorist Exclusion List.”⁴⁸ The Taliban is not included on the list of Tier I terrorist organizations on the DOS website, but it is a Tier I organization by statute. The Consolidated Appropriations Act of 2007 (CAA) designated the Taliban as a Tier I organization for immigration purposes only.⁴⁹ This provision of the Act applies in removal proceedings instituted on, before, or after the date of enactment of the CAA as well as to “acts and conditions constituting a ground of inadmissibility” occurring or existing on, before, or after the date of enactment of the CAA.⁵⁰

Unlike Tier I and II organizations, Tier III groups are not formally designated. Every adjudicator must make a decision in every specific case about whether or not an organization meets the Tier III statutory

⁴⁶ INA § 219(a)(1).

⁴⁷ See Department of State, Bureau of Counterterrorism, Foreign Terrorist Organizations, available at <https://www.state.gov/foreign-terrorist-organizations/>.

⁴⁸ See Department of State, Bureau of Counterterrorism, Terrorist Exclusion List, available at <https://www.state.gov/terrorist-exclusion-list/>.

⁴⁹ Consolidated Appropriations Act (CAA), 2008, Pub. L. 110-161, 121 Stat. 1844, Division J, Title VI, § 691(d) (Dec. 26, 2007).

⁵⁰ *Id.*

definition, “a group of two or more individuals, whether organized or not . . . [that] engages in terrorist activity or has a subgroup that engages in terrorist activity.” Once the adjudicator determines that a group meets the Tier III definition, the burden then shifts to the asylum seeker to prove, by a preponderance of the evidence, that the group does not meet the Tier III definition.⁵¹ When examining a group’s activities, advocates should make sure that USCIS or the IJ is only considering the time frame when the asylum applicant was involved or allegedly involved with the Tier III group and whether that time frame corresponds with the time the Tier III group was involved in engaging in terrorist activity. Although there are no formal Tier III group designations, advocates have seen that USCIS and EOIR have consistently determined that certain groups meet the Tier III definition and have created a list of those groups.⁵² As of the writing of this practice advisory there are about five known Afghan groups listed as Tier III groups, most which were last active in the 1990s.⁵³

The Tier III definition is very broad and could encompass most armed resistance groups or associations, even groups that take up arms against oppressive regimes.⁵⁴ Nevertheless, both the BIA and certain circuit courts have rejected the argument that the Tier III definition contains any implied exception, such as whether the group’s use of force is considered legal under international law.⁵⁵ The statute only carves out an exception for Tier III groups who solely act out of ‘monetary gain;’⁵⁶ meaning that criminal gangs or other organized criminal groups normally do not fall within the Tier III definition. At least one court has held that a group cannot become a Tier III group simply because some of its members engaged in terrorist activity, and that the Tier III group must have authorized the terrorist activity.⁵⁷

⁵¹ 8 C.F.R. § 1240.8(d); *Matter of S-K-*, 23 I&N Dec. at 939.

⁵² See IRAC and NIPNLG Tier III Tracker, available at <https://refugeerights.org/news-resources/undesignated-tier-iii-terrorist-organization-tracker>.

⁵³ The five organizations that appear on the IRAC Tier III Tracker are Hazed-e-Wahdat, Jamiat-i-Islami, National Islamic Front of Afghanistan, Harakat-e-Islami and the Mujahidin (generally). These five groups may not represent all the Tier III groups in Afghanistan.

⁵⁴ See Human Rights First, Denial and Delay, The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States, November 2009, available at <https://humanrightsfirst.org/wp-content/uploads/2022/12/HRF-Denial-and-Delay-Terrorism-Bars-2009.pdf>

⁵⁵ See *In Re S-K-*, 23 I&N. Dec. 936, 941 (BIA 2006) (“...there is no exception in the Act to the bar to relief in cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime. As noted by the Immigration Judge, there was sufficient evidence in the record to conclude that the CNF uses firearms and/or explosives to engage in combat with the Burmese military, and the respondent has not provided evidence that would rebut this conclusion or lead us to interpret the Act differently.”); *Khan v. Holder*, 584 F.3d 773, 781 (9th Cir. 2009) (Khan argues that the BIA’s reading of the statute is so broad that it includes within the definition of “terrorist activity” many actions that we generally do not consider to be terrorist in nature. For example, Khan argues that under the BIA’s reading, it would include armed resistance by Jews against the government of Nazi Germany. This may be true, but the text does not make an exception for actions that are lawful under international law.).

⁵⁶ INA § 212(a)(3)(B)(iii)(V)(b).

⁵⁷ *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008).

Engaging in Terrorist Activity by Providing Material Support to Terrorists

The material support provision, found at, INA §212(a)(3)(B)(iv) is the most commonly applied TRIG bar and in many ways the broadest.⁵⁸ The material support provision is part of the definition of “engaging in terrorist activity.” It includes providing “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training” to a terrorist organization, or to an individual whom the provider knows or should know plans to commit a terrorist activity.⁵⁹ This list is not exhaustive, and the government has interpreted this definition very broadly. For instance, USCIS and courts have found that “providing funds” includes ransom payments made to secure the liberty of kidnapped family members, as well as payments made to pass through checkpoints on a road. The government also considers that merchants who sell anything to terrorists have provided material support to terrorists (even though one assumes that merchants earn money from their customers, and not the other way around). The material support could have been given to a nonviolent wing of a terrorist organization, or even to individuals and not to the organization as a whole.⁶⁰

Courts have also found that the INA does not require that an individual have intent to provide material support to a terrorist organization or its members.⁶¹ Even if a person did not intend to further the goals of the terrorist organization, they could still be found inadmissible or barred from asylum.⁶²

The Amount of Support

Both federal courts and the BIA have ruled that even minor or low-level support constitutes “material support” to a terrorist organization. In *Matter of A-C-M-*, the BIA held that an act is considered to be material support if it “has a logical and reasonable foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree.”⁶³ At least two federal circuits have endorsed this reasoning. The Ninth Circuit in *Rayamajhi v. Whitaker*, held that even giving \$50 to a known Maoist in Nepal constitutes material support because there is no implied exception for a de minimis amount.⁶⁴ The Sixth Circuit in *Hosseini v. Nielsen*, held that the applicant provided material support to two terrorist organization when he copied and distributed fliers for them.⁶⁵ The Board of Immigration Appeals in *Matter of A-C-M-* as well other circuit courts also concluded that there was no

⁵⁸ 2 USA PATRIOT Act, 115 Stat. 272 (2001) at § 411(a)(1)(F)(VI) (amending INA § 212(a)(3)(B)(iv) (8 U.S.C. § 1182(a)(3)(B)(iv)). The material support provision, like the rest of the statute, is applied in criminal proceedings as well.

⁵⁹ INA § 212(a)(3)(B)(iv)(VI).

⁶⁰ *Jabateh v. Lynch*, 845 F.3d 332, 340–41 (7th Cir. 2017) (“Yet Petitioner acknowledges that under circuit precedent, an individual may offer material support “even if [the] support is confined to the nonterrorist activities of the organization.” We also note that “communications” is a form of material support delineated in the statute. Petitioner argues that his case is distinguishable from Hussain and Khan because his support was unrelated to LURD.”) (internal citations omitted.).

⁶¹ See *Matter of A-C-M-*, 27 I&N Dec. 303, 308 (BIA 2018).

⁶² *Id.*

⁶³ *Matter of A-C-M*, 27 I&N Dec. 303 (BIA 2018).

⁶⁴ *Rayamajhi v. Whitaker*, 912 F.3d 1241, 1244–45 (9th Cir. 2019).

⁶⁵ *Hosseini v. Nielsen*, 911 F.3d 366, 377 (6th Cir. 2018).

de minimis amount that would negate a material support finding.⁶⁶ Therefore, the government is likely to find even the smallest amount of support constitutes material support. This could even include making food or serving tea to members of a terrorist organization. There are exemptions that may cover many of these minimal instances of support; the section below walks through all currently available exemptions.

No Implied Duress Exception

Advocates have argued for decades that an implied duress exception to the material support provision exists, but several circuits found that there is no implied duress exemption. Finally in 2018, the BIA issued a precedent decision, *Matter of M-H-Z*, concluding that there is no implied duress exception in the material support bar.⁶⁷ The BIA reasoned that since the statute allows for the agency to apply waivers where it deems necessary, Congress must not have intended for the statute to contain a duress exception.⁶⁸

Material Support in the Context of Afghan Asylum Claims

Advocates should expect USCIS and EOIR adjudicators to be on the lookout for material support issues in asylum claims by Afghan asylum seekers. Some of the common areas that asylum officers have focused on with OAR parolee applicants include:

- Passing through Taliban checkpoints while living in Afghanistan and/or during the evacuation. Adjudicators may ask detailed questions about whether applicants had to pass through Taliban checkpoints, and if so, whether they had to pay money or give objects of value to the Taliban to pass through the checkpoint(s).
- Paying utility bills. Especially for applicants who were adults when the Taliban ruled in 1996-2001, and for Afghans who left Afghanistan after the fall of the western-backed government in 2021, it is important to be aware that adjudicators may ask about payment to the Afghan government (at those points the Taliban) for essential services such as electric bills. Advocates will want to make sure that their clients are ready to explain why they did not feel they had a choice about whether to pay these bills. The section below on exemptions to the TRIG bars provides guidance that may be useful in this context.
- Sending money home to family members who then use the money to pay for public services such as utilities or transportation.

⁶⁶ *Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 221 (3d Cir. 2015); *Bojnoordi v. Holder*, 757 F.3d 1075, 1078 (9th Cir.2014) (finding the asylum seeker was barred because he “passed out flyers, wrote articles, and trained [a terrorist group’s] members on the use of guns in the mountains outside Tehran, knowing that this training would further [the terrorist group’s] goals”); *Viegas v. Holder*, 699 F.3d 798, 803 (4th Cir.2012) (Agreeing with the BIA that there material support because the asylum seeker “paid dues and hung posters” for a terrorist group); *Barahona v. Holder*, 691 F.3d 349, 351–52, 356 (4th Cir.2012) (agreeing with the BIA that the asylum seeker, under threat, allowed terrorists to use his kitchen, gave them directions through the jungle, and occasionally allowed them to stay overnight); *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir.2008) (agreeing with the BIA’s finding that the asylum seeker provided material support because they recruited and solicited funds for a terrorist group); *In Re S–K–*, 23 I&N Dec. 936, 945–46 (BIA 2006) (agreeing with the BIA that the asylum seeker provided material support because the alien contributed a total of 1,100 Singapore dollars to a terrorist group).

⁶⁷ *Matter of M-H-Z*, 26 I&N Dec. 757, 727 (BIA 2016).

⁶⁸ *Id.*

Knowledge Exception

The INA contains a meager knowledge requirement. For Tier III groups only, the inadmissibility grounds of material support, membership and solicitation only apply if the asylum applicant can “demonstrate by clear and convincing evidence that he did know and reasonably should not have known, that the organization was a terrorist organization.”⁶⁹ Therefore, an asylum applicant will not be considered inadmissible under INA § 212(a)(3)(B) if they prove they lack the knowledge that the group engaged in terrorist activity, or is a terrorist organization, as defined in the statute. This exception only applies to members of Tier III groups, those who solicit funds for such groups, and those who provide material support to a Tier III group.⁷⁰

To establish an exception based on lack of knowledge, practitioners should consider what the individual knew of the group they provided support to or were members of, how clearly the group made their mission known to the public, the relevant country conditions information, and their client’s ability to understand and evaluate the situation, such as the client’s age or mental health status.

Presumably, based on the language of the statute, there is also an argument for a knowledge exception for Tier I, II and III groups. The INA states that a noncitizen has “engaged in terrorist activity” if they commit an act they know or reasonably should know *affords material support*” (emphasis added).⁷¹ This part of the statute presents the opportunity for various arguments. This wording of the statute suggests that the knowledge requirement attaches regardless of the type of group (Tier I, II or III) and pertains to whether the material support was for “the commission of a terrorist activity;” “to any individual who the actor knows or reasonable should know has committed or plans to commit a terrorist activity;” to a Tier I or II organization; or a Tier III organization unless the noncitizen “can demonstrate by clear and convincing evidence that the actor did not know or should not reasonably have known that the organization was a terrorist organization.”⁷² In other words, if the asylum applicant did not know or reasonably should not have known that the person the applicant gave support to belonged to a terrorist group then the applicant would not be inadmissible.

Example: In the year 2000, Amina opened the door to her house and her brother was there with three men. They had rifles in their hands, but they were not threatening her. Her brother told Amina to provide water and lunch to his friends. Years later her brother told her the three men were members of Al Qaida, a group that was designated as a Tier I terrorist organization in 1999. Amina would not be inadmissible if she could show by clear and convincing evidence that she did not know the three friends of her brother were members of Al Qaida.

⁶⁹ INA § 212(a)(3)(B)(i)(VI) (membership in a Tier III group); INA § 212(a)(3)(B)(iv)(VI)(cc)(Material Support); INA § 212(a)(3)(B)(iv)(IV)(cc) (solicitation of funds or other things of value); INA § 212(a)(3)(B)(iv)(V)(cc) (solicitation of persons).

⁷⁰ *Id.*

⁷¹ INA § 212(a)(3)(B)(iv)(VI) (“to commit an act that the actor knows, or reasonably should know, affords material support including...”).

⁷² INA § 212(a)(3)(B)(iv)(VI).

In *FH-T v. Holder*, the Seventh Circuit briefly discussed the knowledge exception in the statute.⁷³ The court concluded that an Eritrean asylum applicant did not satisfy his burden of proving lack of knowledge that the Eritrean People’s Liberation Front (EPLF) was a terrorist organization.⁷⁴ The Seventh Circuit agreed with the BIA that even though the Petitioner did not know specifically of EPLF’s acts of violence, he was present at monthly political indoctrinations where acts of violence were discussed. The Seventh Circuit agreed with the BIA that the Petitioner’s ambiguous testimony coupled with the fact that he was a member for nine years was not enough to conclude that he lacked knowledge of the EPLF’s terrorist activities.⁷⁵ A year later, the Seventh Circuit further analyzed the knowledge exception in the context of material support to a Tier III group – the Mohajir Qaumi Movement (Haqiqi), (MQM-H).⁷⁶ In *Khan v. Holder*, the court considered whether the asylum applicant provided material support to the MQM-H, a Tier III group.⁷⁷ The petitioner testified that he left the organization when he learned that the group’s activities devolved into violence.⁷⁸ The court provided helpful analysis in two respects.⁷⁹ First, it acknowledged that to meet the definition of a terrorist organization, the violence the group commits must be group-sanctioned, and not solely undertaken by rogue elements. Second, as to the knowledge exception, the court further explained that it would be hard for citizens of certain countries with “diffuse political parties” to know whether a group has engaged in terrorist activities if those who commit those activities are rogue elements.⁸⁰ While the court was unable to make an ultimate holding on the knowledge exception because the argument was not exhausted, the court’s explanation was nevertheless helpful in instances where rogue members of organizations engage in violence.⁸¹

When confronted with a potential TRIG bar, especially for a Tier III group, advocates should consider whether asylum applicants knew that the organization was considered a terrorist organization or had committed terrorist activities. Moreover, if an asylum applicant did know of any violent tendencies of the group, practitioners should ask their client if at any point they distanced themselves from the group.

Exemptions

The TRIG bars include a discretionary exemption provision for certain grounds of inadmissibility under INA § 212(a)(3)(B). The exemption authority can be exercised by the secretary of DHS or DOS after

⁷³ *FH-T v. Holder*, 723 F.3d 833, 838 (7th Cir. 2013).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Khan v. Holder*, 766 F.3d 689 (7th Cir. 2014).

⁷⁷ *Id.* at 698

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Khan v. Holder*, 766 F.3d 689, 699 (7th Cir. 2014) (“[A]n entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of authorization.”); see also *Hussain v. Mukasey*, 518 F.3d 534, 539 (7th Cir. 2008) (“And the acts of violence including almost daily killings in 1993 and 1994, while Hussain was still an MQM–H official in Pakistan were so frequent that Hussain could not have failed to learn about them—indeed, he admitted he knew about them—and to learn that they had not been denounced by the organization’s leadership, of which he was a part.”).

consultation with the DOJ.⁸² Exemptions fall into two main categories: group-based exemptions⁸³ and situational exemptions.⁸⁴ Thus far, Congress has delegated USCIS the authority to determine whether a person meets the criteria for any exemption. USCIS keeps a running list of exemptions on its website with the implementation memos and regulations.⁸⁵ Generally, USCIS takes a three-pronged approach before approving the exemption. First, certain threshold requirements must be met.⁸⁶ Each exemption is different so the threshold requirements for each of the exemptions may be different. Second, the exemption criteria must be met. Third, all factors must be considered under a totality of the circumstances.

USCIS officers are authorized to make these exemptions regarding various cases, such as refugee/asylum applications; refugee/asylee relative petitions, adjustment of status applications, and temporary protected status applications. Officers normally fill out an exemption worksheet where they record their analysis and whether a TRIG bar applies and if so whether there is an exemption. The following sections discuss many of these exemptions.

Duress Exemptions

There are currently three separate exemptions that deal with duress in the context of material support. These three duress-based exemptions apply to those who gave material support, received military-type training, or solicited individuals to join a terrorist organization, under duress.⁸⁷ There are other exemptions that will be discussed later in the practice advisory.

⁸² INA § 212(a)(3)(B)(i).

⁸³ To date, the groups that have been exempted from the TRIG bars are as follows: 10 named organizations in the Consolidated Appropriations Act of 2008 (CAA); All Burma Students' Democratic Front (ABSDF); All India Sikh Students Federation-Bittu Faction (AISSF-Bittu); Certain Burmese groups; Democratic Movement for the Liberation of the Eritrean Kunama (DMLEK); Eritrean Liberation Front (ELF); Ethiopia People's Revolutionary Party (EPRP) Farabundo Marti National Liberation Front (FMLN); Iraqi National Congress (INC), Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK); Kataeb militias; Kosovo Liberation Army (KLA); Lebanese Forces Nationalist Republican Alliance (ARENA); Oromo Liberation Front (OLF); Tigray People's Liberation Front (TPLF).

⁸⁴ The situational exemptions to date are: Material support under duress; Solicitation under duress; Military-type training under duress; Voluntary medical care; Certain applicants with existing immigration benefits; Iraqi uprisings Certain limited material support; Insignificant material support; Afghan Allies; Afghan Civil Servants.

⁸⁵ <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-exemptions>.

⁸⁶ These threshold requirements are present in all situational exemptions: establish that the applicant is otherwise eligible for the visa or benefit, undergo and pass all security and background checks, disclose in all applications, and interviews any material support provided, and establish that they are not a danger to the US. Finally, most of the threshold requirement contain certain restrictions such as not providing material support for the commission of a terrorist activity. Please read each exemption policy memoranda carefully to determine the threshold criteria. They are available on the USCIS website: <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions>.

⁸⁷ The three duress-based exemptions are for Material Support, Military Training and Solicitation. Information on these exemptions can be found on the USCIS website, available at <https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-trig-situational-exemptions#:~:text=Exemptions%20may%20be%20granted%20for,perceived%20threat%20of%20serious%20harm>

In May 2007, USCIS issued a policy memorandum allowing for a duress exemption in cases where asylum applicants can show that they provided material support under duress. The USCIS adjudicator can take into consideration the following factors:

- Whether the applicant reasonably could have avoided, or took steps to avoid providing material support;
- The severity and type of harm inflicted or threatened;
- The perceived imminence of the harm threatened;
- The perceived likelihood that the threatened harm would be inflicted (did this happen in the past to the applicant, family, community and if so, how did it happen?); or
- Any other relevant factor regarding the circumstances under which the asylum applicant felt compelled to avoid the material support.⁸⁸

After USCIS determines that the applicant provided material support under duress, the adjudicator must then consider whether the totality of the circumstances “justifies the exercise of authority as a matter of discretion.”⁸⁹ The non-exhaustive factors USCIS will consider in this analysis are the amount and type of material support provided; the frequency of material support provided; the nature of the terrorist activities; the asylum applicant’s awareness of the terrorist activities; the length of time that has passed since the applicant provided the material support; and the asylum applicant’s conduct since providing material support.⁹⁰

This exemption only applies to Tier III groups. Therefore, if advocates are unable to successfully challenge a Tier III group designation, then consider whether to make a duress defense argument in the alternative.

Other Exemptions Concerning Material Support

In 2014, DHS and DOS announced a set of TRIG exemptions. Certain Limited Material Support (CLMS) and Insignificant Material Support (IMS). As a threshold matter, both exemptions require that the applicant:⁹¹

- Has not provided the material support with any intent or desire to assist any terrorist organization or terrorist activity;
- Has not provided material support that the individual knew or reasonably should have known could directly be used to engage in terrorist or violent activity;
- Has not provided material support to terrorist activities that they knew or reasonably should have known targeted noncombatant persons, U.S. citizens, or U.S. interests; or

⁸⁸ Interoffice Memorandum, Deputy Director Scharfen, Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations, May 24, 2007. Available at <https://www.uscis.gov/sites/default/files/document/legal-docs/2007%20Scharfen%20Memo-%20Material%20Support%20Under%20Duress%20and%20to%20Selected%20Groups.pdf> (Hereafter the Scharfen Memo).

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, https://www.uscis.gov/sites/default/files/document/legal-docs/22-2613%20Attachment_3of3-DOS-SOS_SIGNED_Exercise_of_INA_Exemption_Authority_06.08.2022.pdf.

- Has not provided material support that the individual knew or reasonably should have known involved providing weapons, ammunition, explosives, or components thereof, or the transportation or concealment of such items.

The CLMS exemption covers those who have supplied certain types of material support to certain Tier III groups and the support must have been incidental to routine commercial transactions, routine social transactions, certain humanitarian assistance and/or in response to sub-duress pressure.⁹² Please see the USCIS policy memo on the implementation of CLMS exemption which includes an exemption for sub-duress pressure which is cited below.⁹³ The definition is as follows:

For purposes of this exemption, the phrase “sub-duress pressure” generally means a reasonably perceived threat of physical or economic harm, restraint, or serious harassment, leaving little or no reasonable alternative to complying with a demand. Pressure may be considered sub-duress pressure if providing the support is the only reasonable means by which the applicant may carry out important activities of his or her daily life. This pressure must come from the same undesignated terrorist organization to which the applicant provided support, either fully or partially in combination with external factors, and the applicant must have actually felt sufficient pressure that left him or her no reasonable alternative to providing the material support.⁹⁴

The other exemption released at the same time is Insignificant Material Support (IMS).⁹⁵ For this exemption to apply, the support must be 1) minimal in amount and 2) the asylum applicant must have believed that it was inconsequential in effect. Inconsequential in effect essentially refers to whether the impact of the support and the extent to which it enabled the organization to or individual to continue its mission or terrorist activity. Thus, if even a small amount of support were given and it had a consequential effect on the terrorist organization or activity, then the waiver would not apply. An example is of a person giving the leader of terrorist organization, who is about to die of dehydration, a glass of water. Both exemptions now apply to Tier I, II and III organizations. Thus, any insignificant material support or certain limited material support to the Taliban can receive the exemption if the noncitizen is otherwise eligible under the threshold requirements and otherwise material an approval of the exemption under the totality of the circumstances.

Exemptions Specific to Afghans

On June 14, 2022, DHS and DOS announced three new exemptions to the TRIG bars pertaining specifically to Afghan asylum seekers. As with all exemptions, the threshold requirements must be met,

⁹² The sub-duress pressure is meant to apply in situations where the level of duress the applicant suffered does not rise to the level of duress as articulated in the 2007 duress exemption mentioned earlier.

⁹³ Scharfen Memo, supra note 88.

⁹⁴ Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support, PM-602-0112, May 8, 2015, available at https://www.uscis.gov/sites/default/files/document/memos/2015-0508_Certain_Limited_Material_Support_PM_Effective.pdf (uscis.gov)

⁹⁵ Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support, May 8, 2015, available at https://www.uscis.gov/sites/default/files/document/memos/2015-0508_Insignificant_Material_Support_PM_Effective.pdf.

the applicant must be eligible for the exemption and a totality of the circumstances analysis must be made.

“Afghan Allies”

This exemption covers Afghans who supported U.S. military interests by fighting or supporting those who fought in the resistance movement against the Taliban, and Afghans who took part in the conflict against the Soviet occupation of Afghanistan.

The exemption does not include those *who targeted non-combatants* or U.S. interests, committed certain types of human rights violations or abuses, or acted on behalf of a designated terrorist organization.⁹⁶ This exemption most likely pertains to groups, such as the Mujahidin, who were fighting the Soviets as well as other groups that formed a resistance against the Soviets and/or the Taliban. This exemption applies to Tier I, II and III groups. Practitioners should be aware of the lengthy threshold requirements as well as the fact that these groups must not have targeted non-combatants. Please note that many of the groups previously designated on the Tier III list as per the IRAP spreadsheet, engaged in many human rights abuses.

Example: Karim is 57 years old and came to the United States in August 2021. He fled Afghanistan with his family because his brother was an advisor to the US military and his brother was a translator. In 1986, Karim supported the Mujahidin army while he was a refugee in Pakistan. He offered them a place to stay in Pakistan and offered them food and clothing. All of the Afghan refugees offered the Mujahidin assistance because they wanted the Soviets to leave Afghanistan.

“Afghan Civil Servants”

Individuals employed as civil servants in Afghanistan at any time from September 27, 1996, to December 22, 2001, or any time after August 15, 2021.⁹⁷ This exemption contains identical threshold requirements to the Afghan Allies exemption.⁹⁸ The dates in the exemption correspond to the period the Taliban was in official control over Afghanistan. This could include teachers, professors, postal workers, doctors, and

⁹⁶ Implementation of the Discretionary Exemption Authority Under Immigration and Nationality Act (INA) § 212(d)(3)(B)(i) for Afghan Allies available at <https://www.uscis.gov/sites/default/files/document/policy-manual/Afghan-Allies-PM-602-0190.pdf>.

⁹⁷ Implementation of the Discretionary Exemption Authority Under Immigration and Nationality Act (INA) § 212(d)(3)(B)(i) for Afghan Civil Servants, available at <https://www.uscis.gov/sites/default/files/document/policy-manual/Afghan-Civil-Servants-PM-602-0189.pdf>.

⁹⁸ The Threshold Requirements are that the noncitizens are otherwise eligible for the immigration benefit or protection being sought; Have undergone and passed all relevant background and security checks; Have fully disclosed, to the best of their knowledge, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of all activities or associations falling within the scope of INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B); Have not participated in, or provided material support for the commission of, a terrorist activity that they knew or reasonably should have known targeted noncombatant persons or U.S. interests; Are not otherwise inadmissible under INA section 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), for which no exemption applies; Pose no danger to the safety and security of the United States; and Warrant an exemption from the relevant inadmissibility provision(s) in the totality of the circumstances.

engineers, among others. Some civil servants held these positions prior to the Taliban announcing their so-called “interim government” and continued in their roles due to pressure, intimidation, or other hardship. In other instances, individuals used their positions to mitigate the repressive actions of the Taliban, often at great personal risk. This exemption does not include individuals who held high-level positions, worked for certain ministries, or directly assisted violent Taliban activities or activities in which the individual’s civil service was motivated by an allegiance to the Taliban.⁹⁹ Therefore, civil servants working under the Taliban regime, will be exempt from the TRIG bar unless they fail to meet the threshold requirement listed in the implementation memo.

Example: Mohamed is from Kabul and worked in the postal service for the Afghan government in Kabul. In August 2021, the Kabul fell to the Taliban, but Mohamed was lucky enough to keep his job and he continued to deliver mail. Sometimes he would post secret letters for friends and acquaintances who were sending urgent messages to friends and family in the United States. He was getting paid monthly by the Taliban government. If Mohamed is not otherwise barred for having engaged in terrorist activity and he meets all the other threshold requirements for the TRIG exemption, he should not be barred for having worked for the postal service.

Individuals Who Provided Insignificant Material Support (IMS) or Certain Limited Material Support (CLMS) to a designated terrorist organization.

DHS and DOS reissued the IMS and CLMS policy memos, mentioned above, that were issued in 2014 and applied the exemption to organizations from Tier I, II and III. Therefore, even support to the Taliban (a Tier I organization) would be subject to this particular exemption assuming the amount is minimal and inconsequential in effect. DHS provided this explanation in its press release in November 2022.¹⁰⁰

This could apply in limited circumstances where the support is incidental to a routine social or commercial transaction; incidental to certain humanitarian assistance; provided in response to a reasonably perceived threat of physical or economic harm, restraint, or serious harassment; and where the support provided is considered minimal and inconsequential.

Examples could include paying a small amount to pass through a Taliban checkpoint to flee Afghanistan; paying the Taliban for utilities such as electricity or the telephone; serving the Taliban at one’s place of business when to refuse would jeopardize one’s livelihood; or paying a fee to obtain a passport or other identity documents necessary to flee Afghanistan when the Taliban controlled the offices providing those services.

⁹⁹ DHS and DOS Announce Exemptions Allowing Eligible Afghans to Qualify for Protection and Immigration Benefits Release Date, June 14, 2022, available at <https://www.dhs.gov/news/2022/06/14/dhs-and-dos-announce-exemptions-allowing-eligible-afghans-qualify-protection-and>.

¹⁰⁰ DHS and DOS Announce Exemptions Allowing Eligible Afghans to Qualify for Protection and Immigration Benefits Release Date, June 14, 2022, available at <https://www.dhs.gov/news/2022/06/14/dhs-and-dos-announce-exemptions-allowing-eligible-afghans-qualify-protection-and>.

Due to the Taliban’s presence and control of entities, roads, and utilities, many individuals who lived in Afghanistan needed to interact with the Taliban in ways that, absent such an exemption, render them inadmissible to the United States or barred from asylum under U.S. law.

This exemption *does not* include individuals who share the goals or ideology of the Taliban, provided preferential treatment to them, or who intended to support the Taliban through their activities.

Example: Mustafa was working with USAID when the Taliban took control of Afghanistan. He needed to flee the country to save his life and rushed to the airport. Outside the gates of the airport, he paid members of the Taliban the equivalent of ten U.S. dollars. He was not able to bring his wife and children with him. Once he arrived to the U.S., he started to send money home to his wife and children. His wife used the money to pay her son’s school fees, the family’s utility bills and for transportation costs. At Mustafa’s asylum interview, the AO asked Mustafa if he ever supported the Taliban and specifically asked whether he sent money to Afghanistan. Mustafa can argue that the money was used for routine commercial transactions and that the CLMS exemption applies. Mustafa can also argue that the money he gave at the checkpoint is insignificant and that the IMS exemption applies.

The Persecutor Bar

Applicants are barred from asylum if they “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of their race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰¹ This restriction to asylum eligibility, termed the persecutor bar, prevents individuals who themselves persecuted others, from getting refugee benefits.

The analysis as to whether an applicant is subject to the persecutor bar can be broken into four elements: (1) whether the act in which the applicant participated is severe enough to rise to the level of persecution; (2) whether the act was committed against the subject of the persecution *on account of* the subject’s race, religion, nationality, membership in a particular social group, or political opinion; (3) whether the applicant’s conduct constitutes participation or assistance in the act committed against the subject; and (4) whether the applicant *knew* that his actions would assist in persecution.¹⁰²

¹⁰¹ INA § 208(b)(2)(A)(i).

¹⁰² See: Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards In the Persecutor Analysis*, 33 *Georgetown Immigration Law Journal* 213 *citing Matter of D-R-*, 27 I&N Dec. 105, 120 (BIA 2017) (the applicant must have “sufficient knowledge that the consequences of his actions may assist in acts” of persecution “to make those actions culpable”); *Meng v. Holder*, 770 F.3d 1071, 1074 (2d Cir. 2014) (requiring “sufficient knowledge” that one’s actions may assist in the persecution in order to be found culpable); *Quitaniilla v. Holder*, 758 F.3d 570, 577 (4th Cir. 2014) (the applicant must “have acted with scienter,” or with “some level of prior or contemporaneous knowledge that the persecution was being conducted.”); *Haddam v. Holder*, 547 F. App’x 306, 312 (4th Cir. 2013) (requiring examination of the “intent, knowledge, and the timing” of the applicant’s alleged assistance); *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007) (noting that “the term ‘persecution’ strongly implies both scienter and illicit motivation”); *Matter of J.M. Alvarado*, 27 I&N Dec. 27, 28 (BIA 2017) (adopting the First Circuit’s requirement that the applicant have “prior or contemporaneous knowledge” of the “persecutor acts” to apply the persecutor bar).

Many Afghan nationals seeking asylum are likely to face questioning with respect to the persecutor bar given the broad range of human rights abuses in Afghanistan.¹⁰³ This is particularly the case for individuals who have worked for law enforcement, the penal system, the military - both the former Afghan military and the U.S. military - and government security forces.¹⁰⁴ If a client was employed in these capacities, practitioners will want to carefully examine the role and activities in which the applicant engaged.

When applying the persecutor bar analysis to an asylum applicant's case, practitioners should be mindful that they are largely applying an asylum analysis coupled with the requisite *mens rea* and *actus reus* of a persecutor. If the act against the subject of persecution does not qualify as persecution under asylum law, then the applicant should not be barred. Similarly, if the act against the subject of persecution does not meet the nexus requirement of asylum law, then the asylum applicant should not be barred. If the applicant's acts were removed from and inconsequential to the persecution, the applicant should not be barred. And finally, if the asylum seeker did not have the requisite scienter, he should not be subject to the persecutor bar. These prongs are discussed further below.

Act of Persecution

The first prong in the analysis focuses on whether the asylum applicant subjected another person to an act that rises to the level of persecution. In asylum law, "persecution" is defined as serious harm or suffering.¹⁰⁵ Persecution includes acts that are broader than threats to life or freedom.¹⁰⁶ Examples of persecution have included severe economic deprivation;¹⁰⁷ non life-threatening physical abuse;¹⁰⁸ serious threats;¹⁰⁹ forced abortion or sterilization;¹¹⁰ rape, sexual assault, sexual harm, and sexual humiliation;¹¹¹ female genital mutilation;¹¹² and harm to a family member or third party.¹¹³ Persecution

¹⁰³ What are the Terrorism Bar and the Persecutor Bar? An explanation for Afghan Asylum Seekers, National Immigrant Justice Center, available at <https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2021-12/Trig%20and%20Persecutor%20Bar%20Explainer%2012.6.21%20english%20%28002%29.pdf>.

¹⁰⁴ *Id.*

¹⁰⁵ See: *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); For more information on persecution, see: RAO Combined Training Program Definition of Persecution and Eligibility Based on Past Persecution, U.S. Refugee, Asylum, and International Operations Directorate, https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAO.pdf.

¹⁰⁶ *INS v. Stevic*, 467 U.S. 407, 428 fn. 22 (1984).

¹⁰⁷ *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

¹⁰⁸ *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000).

¹⁰⁹ *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by *Salazar-Paucar v. INS*, 290 F.3d 964 (9th Cir. 2002); *Ernesto Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

¹¹⁰ See *Matter of S-L-L*, 24 I&N Dec. 1, 5-7 (BIA 2006), (en banc), overruled on other grounds by *Matter of J-S*, 24 I&N Dec. 520 (AG 2008); *Matter of Y-T-L*, 23 I&N Dec. 601, 607 (BIA 2003).

¹¹¹ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9th Cir. 2000); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996); and *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003); *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997); *Haider v. Holder*, 595 F.3d 276, 288 (6th Cir. 2010).

¹¹² See: *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

¹¹³ *Matter of A-K*, 24 I&N Dec 275 (BIA 2007).

does not include discrimination or harassment,¹¹⁴ nor does it include a “single isolated event or abuse resulting in minimal injury.”¹¹⁵ Legitimate prosecution for a recognizable crime is not considered persecution.¹¹⁶ Analysis of whether the prosecution is legitimate will hinge on factors including whether the punishment is proportionate, the prosecution pretextual, and whether the law itself is contrary to human rights standards.¹¹⁷ In the Ninth Circuit, acts of strict self-defense have been found not to constitute persecution under the INA.¹¹⁸

“On Account of”

For the second prong of the analysis, the adjudicator will question whether the harm meets the nexus and protected grounds requirements such that the subject of the persecution would meet the definition of a refugee. If the asylum applicant participated in a violent act that was indiscriminate or for reasons that do not include the applicant persecuting one or more individuals on account of (or because of) one or more of the protected grounds (race, religion, political opinion, nationality, or membership in a particular social group) then they will not be subject to the persecutor bar.¹¹⁹

Proximity

The third prong examines whether the applicant’s conduct constituted ordering, inciting, assisting, or otherwise participating in the persecution at question. This prong focuses on whether the applicant’s action or inaction furthered or led to the persecutory act.¹²⁰ What was the objective effect of the applicant’s actions (or inaction)?¹²¹ In certain circuits, there is precedent indicating that assistance and participation must be purposeful and material to the persecution as opposed to “tangential, indirect, or

¹¹⁴ *Stanojkova v. Holder*, 645 F.3d 943, 947-948 (7th Cir. 2011); *Matter of AE-M-*, 21 I&N Dec. 1157, 1159 (BIA 1998); *Matter of V-F-D-*, 23 I&N Dec. 859, 863 (BIA 2006); *Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992); *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998); *Hussain v. Holder*, 576 F.3d 54, 57 (1st Cir. 2009).

¹¹⁵ *Thapaliya v. Holder*, 750 F.3d 56, 59 (1st Cir. 2014).

¹¹⁶ See: *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004).

¹¹⁷ Asylum Manual, Elements of Asylum Law, Immigration Equality, available at

<https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law/#:~:text=Prosecution%20may%20be%20considered%20persecution,severe%20punishment%20or%20pretextual%20prosecution.&text=Asylum%20adjudicators%20will%20focus%20on,to%20international%20human%20rights%20standards>; citing: *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996). *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992); *Senathirarajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998); *Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997).

¹¹⁸ *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1250–51 (9th Cir. 2004). Finding that a Serbian member of a chekne who had broken the noses and foreheads of attacking Croats as they invaded his town because “acts of true self-defense qualify as persecution would run afoul of the “on account of” requirement of the provision. This matter becomes particularly relevant in cases where military or security forces are clashing with terror organizations (such as the Taliban).

¹¹⁹ For further information on the asylum analysis see, Callopy, Dree K., AILA Asylum Primer, American Immigration Lawyers Association (2019).

¹²⁰ *Matter of Rodriguez-Majano*, 19 I&N Dec 811, 815 (BIA 1988) (finding that the applicant was not barred from asylum because he stood watch as guerillas burned cars, delivered merchandise, and took part in guerilla propaganda trips).

¹²¹ *In the Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984) (finding that a prisoner of war of the Nazis who was forced to work as a guard at a concentration camp was deportable for assisting in Nazi persecution).

otherwise inconsequential.”¹²² The adjudicator must assess whether the applicant had “direct personal involvement” or played a “material,” “integral” role that “furthered” the persecutory act.¹²³ Similarly, applicants whose relationship in the alleged persecution includes only mere membership in an organization or group that commits persecution should not be barred under the persecutor bar.¹²⁴

A subset of the proximity test has been described as “Command Responsibility.”¹²⁵ Case law has held those in command are accountable for persecutory acts of those under their command.¹²⁶ This phenomenon has been described as the commander’s “failure to act.”¹²⁷ As was the case in *Matter of D-R-*, a person in command can not only be held accountable for failing to prevent subordinates from committing certain acts but can also be held accountable for failing to investigate or punish if learning of the persecution after the fact.¹²⁸ Additionally, the Ninth Circuit found that being in the presence of other officers when fellow officers assaulted individuals because of their religion could trigger the bar.¹²⁹

Scienter or Knowledge

The final prong in the analysis asks whether the applicant had the requisite knowledge (prior to or during the act) that they were involved in persecution. To be barred under the persecutor bar, the applicant must have had sufficient knowledge that the consequences of his actions may assist in acts of persecution.¹³⁰ The evidence does not need to show that the applicant had specific actual knowledge that his actions assisted in a particular act of persecution.¹³¹ An adjudicator will consider both direct and

¹²² Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards In the Persecutor Analysis*, 33 *Georgetown Immigration Law Journal* 213 at FN 232 *citing Kumar v. Holder*, 728 F.3d 993, 998-99 (9th Cir. 2013) (holding that the applicant’s action must constitute “personal involvement and purposeful assistance” and that to determine “personal involvement,” IJs should assess whether (1) the “involvement was active or passive” and (2) the applicant’s acts were “material to the persecutory end.”); *Chen*, 513 F.3d at 1259 (holding that the key inquiry is “whether the applicant’s personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution”); *Gao*, 500 F.3d at 99 (“Where the conduct was active and had direct consequences for the victims, we concluded that it was ‘assistance in persecution.’ Where the conduct was tangential to the acts of oppression and passive in nature, however, we declined to hold that it amounted to such assistance.”); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927-28 (9th Cir. 2006) (noting that the applicant’s acts must be in “furtherance of” the persecution, not merely “peripheral”); *Matter of Rodriguez-Majano*, 19 I&N Dec 811, 815 (BIA 1988) (concluding that an applicant is subject to the persecutor bar only if his or her “action or inaction furthers [the] persecution in some way.”).

¹²³ *Id.*, *citing Matter of D-R-*, 27 I&N Dec. 105, 120 (BIA 2017) (finding that the applicant was barred from asylum because the platoon he led in the Serbian Special Police conducted a sweep leading to the capture and assassination of hundreds of Bosnian men and boys).

¹²⁴ See *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814 (BIA 1988).

¹²⁵ *Matter of D-R-*, 27 I&N Dec. 105, 121 (BIA 2017).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Shirvanyan v. Gonzalez*, 130 F.App’x 196, 197 (9th Cir. 2005). See also: *Balachova v. Mukasey* 547 F.3d 374 (2nd Cir. 2008) where the court found that an officer was not subject to bar where he assisted fellow Russian soldiers in capture of two Armenian girls but refused to take part in rape of the girls. He was beaten and handcuffed for insubordination.

¹³⁰ *Matter of D-R-*, 27 I&N Dec. 105, 120 (BIA 2017).

¹³¹ *Id.*, *citing Quitanilla v. Holder*, 758 F.3d at 577 (4th Cir. 2014); *Suzhen Meng v. Holder*, 770 F.3d 1071 (2d Cir. 2014).

circumstantial evidence to assess whether the applicant knew or should have known that his action or inaction would lead to or assist in persecution.¹³²

No Exceptions to the Persecutor Bar

It is critical to note that at present, and since 2020, there are no exceptions to the persecutor bar. If an applicant meets all four requisites of the persecutor bar, then the applicant will be barred without exception. This includes the unfortunate scenario in which an applicant was forced to commit persecution under duress.¹³³

The seminal and ongoing case, *Matter of Negusie*, addresses whether applicants who were forced to commit or assist in acts of persecution under threat of serious harm or death (i.e. under duress) are barred from asylum and other immigration protections (including TPS, SIV, Withholding of Removal, SIJS, Family-Based Immigration Visas).¹³⁴ Daniel Ghirmay Negusie, a citizen of both Ethiopia and Eritrea sought asylum in the U.S., testifying that he had been forcefully conscripted into the Eritrean Military.¹³⁵ When he refused to fight against the Ethiopians, he was imprisoned for two years, subjected to forced labor, beaten, and forcibly exposed to the hot sun.¹³⁶ Upon his release, he was forced to serve as an armed guard in a prison where he prevented prisoners' escape, prevented prisoners from taking showers, and prevented prisoners from getting fresh air.¹³⁷ He guarded prisoners who were punitively placed in the hot sun and saw at least one man die after being in the sun for more than two hours.¹³⁸ In the two instances that he disobeyed orders and assisted prisoners, he was verbally reprimanded, but was not threatened with harm.¹³⁹ Negusie ultimately escaped the prison and hid in a container on a ship heading to the U.S.¹⁴⁰

The case has a complex procedural history. In 2005, an Immigration Judge found Negusie ineligible for asylum and withholding of removal because he was subject to the persecutor bar but did grant him deferral of removal under the Convention Against Torture.¹⁴¹ Relying on *Matter of Fedorenko*, the Board of Immigration Appeals (BIA) denied Mr. Negusie's appeal and affirmed the persecutor bar did indeed apply in his case. The Fifth circuit affirmed the BIA's decision.¹⁴² In 2009, the Supreme Court intervened in the case, finding that the BIA had misread past precedent regarding duress and coercion, taking issue

¹³² *Matter of D-R-*, 27 I&N Dec. 105, 120 (BIA 2017); *Quitaniya v. Holder*, 758 F.3d at 577 (4th Cir. 2014) (where the applicant was subject to the persecutor bar because he investigated and arrested suspected guerrillas and, despite his testimony, was likely to know the torture and extrajudicial killings to which they would be subject) ; *Suzhen Meng v. Holder*, 770 F.3d 1071 (2d Cir. 2014) (where the applicant was subject to the persecutor bar because she registered and reported pregnant women in violation of China's one-child policy, knowing that forced abortion was a likely punishment).

¹³³ *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020).

¹³⁴ *Id. see: Negusie v. Holder*, 555 U. S. 511 (2009); *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018); *Matter of Negusie*, 27 I&N Dec. 481 (A.G. 2018); and *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020); see also: Immigration Options Currently for Afghans Who Arrived in 2021, *supra*.

¹³⁵ *Matter of Negusie*, 27 I&N Dec. 347, 368 (BIA 2018).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*, citing *Negusie v. Gonzales*, 231 F. App'x 325 (5th Cir. 2007).

with its analysis in the matter.¹⁴³ The Supreme Court reversed and remanded the case.¹⁴⁴ The Supreme Court did not, however, answer the question as to whether there is a duress or coercion exception with respect to the persecutor bar, but referred the matter back to the BIA to reexamine the case because “the persecutor bar’s silence with regard to a duress exception ‘is not conclusive’ and... the statute is ambiguous.”¹⁴⁵

In 2018, the BIA found that there was a duress exception to the persecutor bar and established the requisites of a duress exception, yet found that Mr. Negusie was ineligible for this exception because neither his forced conscription nor his assignment to guard duty were under imminent threat of death or serious bodily injury and because the Mr. Negusie had a reasonable opportunity to escape or avoid guarding the prisoners who were subjected to harm and torture.¹⁴⁶ In 2020, Attorney General Barr referred *Matter of Negusie* to himself and found that the persecutor bar does not have a duress exception, vacating the 2018 BIA decision allowing for any limited exception.¹⁴⁷ In 2021, Attorney General Garland referred *Matter of Negusie* to himself for review of the 2020 decision.¹⁴⁸ The matter remains pending as of the date of this publication. If you have a client whose presumed persecutory actions were made under duress, USCIS may hold the decision on the case until there is a decision in *Matter of Negusie*.

Interviewing the Asylum Seeker

The persecutor bar will require practitioners to conduct in-depth and fact-intensive interviews with their clients regarding any activity that may be construed as persecution so that they may best advise applicants before they file for asylum and prepare their clients who have decided to file for asylum for the questions they are likely to face at the asylum interview.

When working with an Afghan potential asylum applicant, practitioners will need to be aware of which individuals are most likely to trigger the persecutor bar. Consider, for example, a scenario in which a practitioner is representing a former member of the Afghan Special Forces. The practitioner should begin interviews with broad and open-ended questions to the client, namely about the client’s role and actions as a member of the special forces. In this scenario, the client reports that he was a low-ranking guard at a special forces detention facility that housed insurgent and guerilla fighters, including members of the Taliban. The practitioner should collect information from the client as well as conduct independent country-condition research to understand the role of the special forces, the conditions of detention facilities, and the treatment of detained insurgent fighters in Afghanistan. In this scenario, the practitioner discovers incidences of human rights abuses in special forces facilities including violent acts against members of the Taliban. The practitioner should then conduct a more pointed interview, making clear to the client that they may be asking difficult questions because the client may be asked these questions by a judge, asylum officer, or government attorney in the future. The practitioner will want to conduct multiple interviews with the client to review any number of potential incidences of persecution.

¹⁴³ *Negusie v. Holder*, 555 U.S. 511 (2009); see also: Charles Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar Analysis*, 33 Georgetown Immigration Law Review, 213, 216 (2019).

¹⁴⁴ *Id.*

¹⁴⁵ *Negusie v. Holder*, 555 U.S. 511, 518 (2009).

¹⁴⁶ *Id.*, see also: *Matter of Negusie*, 27 I&N Dec. 347, 368 (BIA 2018).

¹⁴⁷ *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020).

¹⁴⁸ *Matter of Negusie*, 28 I&N Dec. 399 (A.G. 2021).

The practitioner will want to first question the client both broadly (e.g., how were detainees treated at the facility?) and subsequently pointedly as to, for example, whether the client was aware of any incidences of harm, as well as ask about specific acts of violence such as hitting, beating, kicking, maiming, etc. of any detainees. Practitioners should avoid using technical terms that are open to interpretation in their questions such as “did anyone violate the human rights of the detainees?” or “were any of the detainees persecuted?” Once the practitioner has identified any potential instances of persecution, they should research precedential decisions (from the BIA or relevant federal courts) with similar fact patterns where analogous acts were deemed to qualify as persecution. If on its face, the conduct in question does not rise to the level of serious harm, the applicant will not be subject to the persecutor bar. In this scenario, the client reports that members of the Taliban were beaten with batons during interrogations.

If there were acts of persecution conducted in the client’s presence, purview, or general environment, the second prong makes it important to understand why the subject of any persecution was being harmed or threatened with serious harm. In this instance, the practitioner should ask her client outright, why the Taliban fighters were beaten during interrogations? Questions surrounding the intent of the persecutor should be open-ended at the outset. Practitioners should be cautious not to lead clients to an answer and to make clear that the client’s candor is imperative for their representation. In this scenario, the client reports that the Taliban fighters were beaten with batons to elicit their responses in the interrogation. The practitioner then asks if other non-Taliban detainees were beaten with batons and the client responds that they were not. In cases where human rights abuses are not on account of a protected characteristic, the practitioner can argue that the applicant does not meet the nexus requirement of the persecutor bar. In this scenario, the client reports that only Taliban detainees were beaten during interrogations. When asked why, the applicant reports that this was done to protect the security of the country. As the interview continues, the practitioner asks more narrow, closed questions, as an asylum officer or government attorney may. She asks whether insurgents were beaten during interrogations because their beliefs threatened the safety of the Afghan government. The client answers “yes.” The practitioner asks whether the Taliban fighters were always beaten, the client answers “yes.” The practitioner asks why the Taliban fighters were always beaten and the applicant replies that the Taliban fighters were always seen as threats to the safety of Afghanistan. Here, the practitioner understands that it may be argued that the persecution against Taliban fighters was due to their political opinions or membership in a particular social group.

The practitioner can then proceed to question their client about the client’s relationship to any acts that could be seen as persecution. The practitioner understands that the more proximate and more material to the persecution the client’s role was, the more likely he is to be barred from asylum. The practitioner asks questions to the applicant as to what his role was in the interrogations. The client reports that he did not participate in any interrogations and that his role was only to bring the detainees to the interrogation room when summoned to do so. The practitioner then conducts research into the question of whether delivering a subject of persecution to their persecution constitutes participation or assistance in persecution and believes that the applicant’s conduct meets the requirement of assistance in persecution.

Finally, the practitioner asks the client when he knew that the detainees were being beaten during interrogation to understand whether the client possesses the requisite scienter for the persecutor bar. The client says that he was never present for the interrogations because he was ordered to remain

outside the door of the interrogation room during interrogations, but that he could hear screams inside the interrogation room and helped carry bruised detainees back to their cells after interrogations. The practitioner asks the client when he knew or suspected that the detainees were being beaten in the interrogation room. The client reports he understood from the first instance of hearing the screams and seeing the bruised detainees in the aftermath of the interrogation that they were being beaten. The practitioner believes that the applicant either knew or should have known that his bringing the detainee to the interrogation room met the fourth prong of the persecutor bar. The applicant is likely to be barred from a grant of asylum.

Persecutor Bar vs. TRIG Bar

The persecutor bar and the TRIG bar have some overlap in the conduct that they can bar someone from receiving asylum, but they are widely different in several important ways. Practitioners will need to understand the differences between them to ascertain which bar(s) their clients might be subject to. This is especially important because, as discussed above, the TRIG grounds allow for a wide range of exemptions, some specific to Afghan applicants, while the persecutor bar has no exemptions.

One of the most important distinctions between the two is whether the applicant was allegedly harming others on behalf of the former Afghan government or the U.S. government (or another allied country). If the applicant worked for the former Afghan government or the U.S. government (or another allied country), TRIG cannot apply, as these governments are not terrorist organizations. In this case, the persecutor bar would be at issue. If, however, the applicant allegedly harmed others on behalf of a non-governmental group, the TRIG bar as well as potentially the persecutor bar could be at issue.

***Practice Pointer:** Since many of the Afghan cases will involve military personnel, it is likely that practitioners will hear gruesome or disturbing events. It is important that practitioners not assume that the client is subject to the bar without applying the analysis. Practitioners should confront challenging nexus arguments where applicable. Activity that simply involves individuals with a different political opinion or ethnicity does not automatically mean that the nexus element has been met. In *Balachova v. Mukasey*, the Second Circuit questioned the nexus finding where the perpetrators were Russian soldiers and the victims were Romanian.¹⁴⁹ Furthermore, practitioners should not assume that because an act was known more broadly, that the applicant had actual knowledge of an event. For instance, it may be assumed or “common knowledge” that prisoners were tortured. However, it is critical to ascertain what your client knows and knew about an event and, where applicable, to challenge the idea of “common knowledge.”*

¹⁴⁹ *Balachova v. Mukasey* 547 F.3d 374 (2nd Cir. 2008).

Serious Nonpolitical Crime Bar

Background and Legal Framework for the Serious Nonpolitical Crime Bar

An asylum seeker is statutorily ineligible for asylum if there are reasonable grounds to believe that he or she committed a serious nonpolitical crime outside of the U.S. prior to arrival to the U.S.¹⁵⁰ Determining whether an offense is a “serious nonpolitical crime” involves consideration of whether “the political aspect of the offense outweigh[s] its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.”¹⁵¹ The BIA will generally consider whether the act is of “an atrocious nature” and, if not, will “balance the seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the applicant’s acts outweighs their political character.”¹⁵²

As with the other mandatory bars to asylum, DHS must present some evidence to show that the grounds for mandatory denial of asylum may apply. Once DHS has met its initial burden, the noncitizen has the burden of showing by a preponderance of the evidence that the bar does not apply.¹⁵³

The adjudicator need not determine whether a crime has been committed. It is “enough to find that there are serious reasons for considering that he has committed such a crime.”¹⁵⁴ The “reason to believe” standard has generally been equated to the “probable cause” standard.¹⁵⁵ This bar to asylum does not require that the applicant be convicted or even charged with a crime. The adjudicator may rely on the applicant’s own testimony or other reliable evidence in the record. For example, in a published decision in *Matter of W-E-R-B-*, the BIA found that an Interpol Red Notice based on a Salvadoran arrest warrant for illicit gang activity, including murder, was sufficient for DHS to meet its initial burden of showing a bar to asylum applied.¹⁵⁶ The BIA also found that the asylum applicant could not show by a preponderance of the evidence that the bar to asylum did not apply (even when the IJ found his testimony overall to be credible) when he could not produce court documentation showing dismissal of the charges.¹⁵⁷ Therefore, if there is some evidence that the serious nonpolitical crime bar may apply, the noncitizen must be prepared to come forward with rebuttal evidence. This may include expert witnesses who may be able to speak to the reliability of criminal documents or arrest warrants issued by the home country.

When there is no doubt that a crime has been committed, the adjudicator must look to the facts “to determine whether there are serious reasons to consider that the crime committed was a ‘serious’ one.”¹⁵⁸ In cases that are more ambiguous, the adjudicator can consider “the [non-citizen’s] description of the crime, the turpitudinous nature of the crime according to our precedents, the value of any

¹⁵⁰ INA § 208(b)(2)(A)(iii).

¹⁵¹ *INS v. Aguirre-Aguirre*, 526 US 415, 429 (1999) (quoting *Matter of McMullen*, 19 I&N Dec. 90, 97-98 (BIA 1984)).

¹⁵² *Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012).

¹⁵³ 8 C.F.R. § 1240.8(d).

¹⁵⁴ *Matter of Ballester-Garcia*, 17 I&N Dec. 592, 595 (BIA 1980) (internal quotation marks omitted).

¹⁵⁵ *Matter of E-A-*, 26 I&N Dec. at 3 (BIA 2012).

¹⁵⁶ 27 I&N Dec. 795 (BIA 2020).

¹⁵⁷ *Id.* at 799-800.

¹⁵⁸ *Ballester-Garcia*, 17 I&N Dec. at 595 (finding a serious nonpolitical crime when the petitioner had broken into a building, taken a large sum of money, and was sentenced to fifteen years’ imprisonment).

property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offenses in the United States.”¹⁵⁹

Serious Nonpolitical Crime and Afghan Cases

It is important that practitioners be aware of the serious nonpolitical crime bar. An adjudicator could find that this bar applies to an Afghan asylum applicant based on the applicant’s own testimony, or if there is evidence in the record that establishes a reasonable basis to believe that the bar applies. There may be an overlap between the persecutor bar and the serious nonpolitical crime bar. It is likely that there will be a particular focus on actions undertaken during military service or on behalf of intelligence agencies—both bars could be implicated in these contexts. It may be that the adjudicator cannot find an applicant barred based on a persecutor bar finding because there is no established link between an applicant’s actions and a protected characteristic. However, advocates must be aware that the serious nonpolitical crime bar is broader than the persecutor bar in that the applicant’s motivations for the crime do not have to be established.

Practical Tips for Addressing the Serious Nonpolitical Crime Bar

Arguing There is No “Reason to Believe”

As noted above, the “reason to believe” standard has been equated to probable cause. There is no requirement that the applicant make an admission to the crime for the “reason to believe” standard to be satisfied. That said, in the absence of such an admission, some circuit courts and the BIA have generally required that there be specific evidence in the record showing that the applicant was involved in the alleged crime. For example, the BIA and federal courts have found “reason to believe” based on an Interpol Red Notice,¹⁶⁰ a Guatemalan indictment,¹⁶¹ and an arrest warrant issued from Egypt.¹⁶² In contrast, some circuit courts have not upheld the agency’s finding of the serious nonpolitical crime bar when the evidence presented is unreliable and the applicant has no opportunity to point out deficiencies.¹⁶³ Therefore, advocates should argue that general reports about alleged abuses committed by certain groups associated with the Afghan military or Afghan intelligence should not be sufficient for DHS to meet its initial burden of showing that the mandatory bar applies. Rather, there would need to be some evidence in the record to show the applicant’s involvement in a specific crime. For the bar to apply, the applicant must have notice of the specific allegations and the opportunity to respond and point out deficiencies.

¹⁵⁹ *Id.*

¹⁶⁰ *W-E-R-B-*, 27 I&N Dec. 795 (BIA 2020).

¹⁶¹ *Silva-Pereira v. Lynch*, 827 F.3d 1176 (9th Cir. 2016) (upholding agency determination that a Guatemalan indictment provided strong reason to believe that an asylum applicant was involved in several murders when the indictment alleged specific facts connecting the asylum applicant to the crimes).

¹⁶² *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004) (finding that agency did not err in relying on Egyptian arrest warrant that detailed evidence against asylum applicant in a murder investigation in Egypt, including that asylum applicant’s fingerprints were found at the crime scene and he had an injured hand and bloody shirt on the night of the murder).

¹⁶³ *Prongsivakulchai v. Gonzales*, 461 F.3d 903 (7th Cir. 2006) (finding IJ erred in applying serious nonpolitical crime bar when DHS presented a Thai arrest warrant that was not in the applicant’s own name and did not allow the applicant the opportunity to refute the evidence).

Arguing the Alleged Crime is Political

Advocates should also consider arguing that the serious nonpolitical crime bar cannot apply when the crime is inherently political in nature. Arguably, any action taken on behalf of the U.S. government or Afghan government is inherently political in nature. However, advocates should also recognize the limitations of this argument, as a crime that is “atrocious” can still be subject to the serious nonpolitical crime bar even if it is political in nature.¹⁶⁴ Further, even crimes that are not “atrocious” can still be subject to the bar if the seriousness of the crime outweighs its political nature.¹⁶⁵ There is no balancing act at all required when the crime alleged is something as serious as murder or terrorism.¹⁶⁶ In addition, there may be some concern that focusing on the political nature of the act will provide USCIS with more evidence to argue that an act was committed on account of a protected ground and therefore may implicate the persecutor bar instead.

Arguing the Alleged Crime is Not “Serious”

When considering whether a crime is “serious,” the adjudicator may consider common law defenses to crimes. For example, a RAO Training Module on children’s asylum claims advises that officers should consider (1) whether and to what extent the applicant acted under duress; (2) the applicant's intent, with age being a relevant factor; and (3) whether and to what extent the applicant knew they were committing a crime.¹⁶⁷ This analytical approach is consistent with the purposes of the serious nonpolitical crime bar, and with basic principles of criminal law. Many advocates have successfully argued in children’s cases, for example, that the youth of an individual recruited into certain types of gang activity may be a relevant factor when assessing culpability. Similarly, for cases involving military action, advocates may consider the defense of “superior command,” which may be a defense to criminal liability unless (1) the order is illegal and (2) the accused knew it was illegal or a reasonable person would know it was illegal.¹⁶⁸ Advocates should keep in mind that duress and lack of a culpable mental state may be defenses to the serious nonpolitical crime bar, unlike the persecutor bar, in the same way that they would in a criminal proceeding.

Firm Resettlement Bar

Background and Legal Framework for the Firm Resettlement Bar

Firm resettlement is another statutory bar to asylum that Afghan applicants may confront. The statute provides that an applicant is ineligible for asylum if the applicant was “firmly resettled in another country prior to arriving in the United States.”¹⁶⁹ The regulations expand on the statutory bar, providing that an applicant “is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country, with or while in that country, received, an offer of permanent resident

¹⁶⁴ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 429-31 (1999).

¹⁶⁵ *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012) (finding that applicant’s criminal conduct was disproportionate to its political character when he threw rocks and burned buses and cars).

¹⁶⁶ *Id.*

¹⁶⁷ See USCIS, Children’s Claims Training Module (Dec. 20, 2019),

https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAO.pdf.

¹⁶⁸ Training the Defense of Superior Orders, The Army Lawyer, Major M. Keoni Medici and Major Joshua P. Scheel, Army Lawyer, Issue 6 2020, available at <https://tjaglcs.army.mil/tal/practice-notes-training-the-defense-of-superior-orders>.

¹⁶⁹ INA § 208(b)(2)(A)(vi).

status, citizenship or some other type of permanent resettlement.”¹⁷⁰ There are two exceptions in the regulations to the “firm resettlement” bar. First, an applicant is not considered firmly resettled if “entry into that country was a necessary consequence of his or her flight from persecution , that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country.”¹⁷¹ Second, an applicant is not considered firmly resettled, despite an offer of permanent residence, if the conditions of that residence “were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled.”¹⁷²

The BIA has established a four-step analysis for making firm resettlement determinations.¹⁷³ In the first step, the Department of Homeland Security (DHS) bears the burden of presenting *prima facie* evidence of an offer of firm resettlement.¹⁷⁴ This might include “direct evidence of governmental documents indicating an alien’s ability to stay in a country indefinitely,” and such evidence “may already be part of the record of proceedings as testimony or other documentary evidence.”¹⁷⁵ A facially valid permit allowing an asylum applicant to reside in a third country constitutes *prima facie* evidence of an offer of firm resettlement, even if the permit was obtained fraudulently.¹⁷⁶ An offer does not have to actually be accepted in order for the firm resettlement bar to apply to the applicant. The offer alone will be sufficient for DHS to meet its initial burden and the burden will then shift to the applicant to show that the firm resettlement bar does not apply.

DHS may also seek to rely on indirect evidence that an offer of firm resettlement has been made. *Matter of A-G-G-* sets forth the following list of potential forms of indirect evidence that the government may offer:

- Immigration laws or refugee process of the country of proposed resettlement;
- Length of the noncitizen’s stay in a third country;
- Noncitizen’s intent to settle in the country;
- Family ties and business or property connections;
- Extent of social and economic ties developed by the noncitizen in the country;
- Receipt of government benefits or assistance, such as assistance for rent, food, and transportation; and
- Whether the noncitizen had legal rights normally given to people who have some official status, such as the right to work and enter and exit the country.¹⁷⁷

In the second step of the analysis, the applicant may rebut DHS’s evidence of an offer of firm resettlement “by showing by a preponderance of the evidence that such offer has not, in fact, been made or that he or she would not qualify for it.”¹⁷⁸ In the third step, the adjudicator is required to

¹⁷⁰ 8 CFR § 208.15.

¹⁷¹ 8 CFR § 208.15(a).

¹⁷² 8 CFR § 208.15(b).

¹⁷³ *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011).

¹⁷⁴ *Id.* at 501.

¹⁷⁵ *Id.* at 501-02, 502 n.17.

¹⁷⁶ See *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664, 665-66 (BIA 2012).

¹⁷⁷ *Matter of A-G-G-*, 25 I&N Dec. At 502.

¹⁷⁸ *Matter of A-G-G-*, 25 I&N Dec. at 503; see also 8 C.F.R. § 1240.8(d).

consider the totality of the circumstances to determine whether the applicant has rebutted the evidence of firm resettlement.¹⁷⁹ In the fourth step of the firm resettlement analysis, the burden shifts to the applicant to establish by a preponderance of the evidence that he or she is eligible for one of the regulatory exceptions to the firm resettlement bar.¹⁸⁰ To do so, the applicant must demonstrate: (1) that his or her entry into the country was a necessary consequence of the flight from persecution, that the applicant remained in that country only as long as was necessary to arrange onward travel, and that the applicant did not establish significant ties to that country; or (2) that the conditions of his residence in that country were so substantially and consciously restricted by the authority of that country that he or she was not in fact resettled.¹⁸¹

Practitioners must be aware of this four-step framework, as it is applied by both asylum officers and immigration judges when considering whether the firm resettlement bar applies. The USCIS Firm Resettlement Training Module, used to train asylum officers, is a helpful resource for practitioners.¹⁸² These lesson plans can be cited in briefs to the asylum office. While these materials are not binding on immigration judges, they can be cited as persuasive authority. This training module explains the history of the firm resettlement bar, describes the burden shifting analysis of *A-G-G-*, and outlines examples of circumstances when the firm resettlement bar may apply.¹⁸³

In 2020, the BIA issued another precedential decision on firm resettlement, *Matter of K-S-E-*, reiterating the *A-G-G-* analysis.¹⁸⁴ Mr. K-S-E- was a Haitian national who resided in Brazil prior to seeking asylum in the U.S. The BIA found that DHS had met its initial burden of showing an offer of firm resettlement by submitting a copy of a registry published by the Brazilian Government, which lists Haitian nationals, including the respondent, who were offered permanent residence in Brazil.¹⁸⁵ DHS also included a translation of a joint communique from the Brazilian Ministry of Justice and the Ministry of Labor and Social Security authorizing a humanitarian program for permanent residence and explaining a description of the legal process for accepting an offer of permanent residence.¹⁸⁶ The BIA described the Brazilian permanent resident process in this case as involving a “series of ministerial acts that would not pose any significant obstacles to the respondent if he were to choose to accept the right to apply for permanent residence.”¹⁸⁷ The BIA found Mr. K-S-E- unable to rebut the evidence of an offer of firm resettlement.¹⁸⁸ The agency also found that neither of the two regulatory exceptions to firm resettlement applied to Mr. K-S-E-, despite his testimony that Haitians in Brazil were specifically targeted for violence on account of their race.¹⁸⁹

¹⁷⁹ *Matter of A-G-G-*, 25 I&N Dec. at 503.

¹⁸⁰ *Id.*

¹⁸¹ 8 C.F.R. §208.15(a)-(b).

¹⁸² See, USCIS, Firm Resettlement Training Module (Feb. 21, 2012), https://www.uscis.gov/sites/default/files/files/nativedocuments/Firm_Resettlement_LP_RAIO.pdf [hereinafter “USCIS Firm Resettlement Training Module”].

¹⁸³ *Id.*

¹⁸⁴ *Matter of K-S-E-*, 27 I&N Dec. 818 (BIA 2020).

¹⁸⁵ *Id.* at 818-19.

¹⁸⁶ *Id.* at 819.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 820-21.

¹⁸⁹ *Id.* at 821-22.

Mr. K-S-E- filed a petition for review with the Ninth Circuit. In 2021, the decision was vacated and remanded to the BIA.¹⁹⁰ As a result, practitioners should argue that *Matter of K-S-E-* is not binding precedent. However, DHS may continue to argue that the case is good law outside of the Ninth Circuit. As a result, it is important for practitioners to be aware of *K-S-E-*, particularly given that Brazil has offered some humanitarian visas with a pathway to permanent residency for Afghans seeking safe-haven.¹⁹¹ For those cases, practitioners must be prepared to follow the four-step *A-G-G-* analysis and submit evidence as to why the firm resettlement bar does not apply. This may be challenging in jurisdictions outside of the Ninth Circuit, but practitioners must always remember that the firm resettlement analysis is fact specific and turns on what evidence is contained in the record.

Dual nationality is a separate issue that can impact eligibility for asylum. While dual nationality issues may overlap with the firm resettlement bar, the analyses are separate and distinct. For example, a person who holds citizenship in a third country may be subject to the firm resettlement bar if prior to arrival in the U.S. the individual entered the third country and was offered or received citizenship in that third country. However, the firm resettlement bar does not apply in every case where a person holds dual nationality, for example, if the individual never entered the third country but still holds citizenship from that country. That said, dual nationality often makes it more difficult for an applicant to prevail on an asylum claim, as an asylum applicant who holds two nationalities will need to establish eligibility for asylum from both countries. In the 2013 precedential decision *Matter of B-R-*, the BIA considered asylum eligibility for a dual national of Spain and Venezuela. Although there was no evidence that the applicant had ever traveled to Spain and thus the “firm resettlement bar” did not apply, the agency found that the asylum applicant had to establish eligibility for asylum in both Venezuela and Spain in order to prevail in his case.¹⁹²

The Firm Resettlement Bar and Afghan Asylum Applicants

Offer of Firm Resettlement

While many Afghan asylum applicants have spent time in third countries prior to arrival in the United States, this does not mean that a large number will be subject to the “firm resettlement” bar. In fact, the inquiry will end for many at step 1 of the *Matter of A-G-G-* analysis, in that the applicant never received an offer of permanent resident or citizenship status in the third country. Consider the following examples:

Example: Afghan asylum applicant, Abdul was evacuated from Afghanistan and spent three weeks on a U.S. military base in Qatar before being evacuated to the United States in late 2021. There is no firm resettlement bar at issue in this case because the applicant remained on U.S. territory while in Qatar and was never offered permanent residence status there.

¹⁹⁰ Board of Immigration Appeals Vacates *Matter of K-S-E-*, <https://innovationlawlab.org/blog/board-of-immigration-appeals-vacates-matter-of-k-s-e/>.

¹⁹¹ Information for the Afghan population - UNHCR Brazil, <https://help.unhcr.org/brazil/en/information-for-the-afghan-population/>.

¹⁹² See *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013).

Example: Afghan asylum applicant Bibi spent several months in a refugee camp in the United Arab Emirates (UAE) before being paroled into the U.S. Like Abdul, he was never offered permanent status in the UAE. There is no firm resettlement bar at issue in this case because he was never offered permanent resident status in the UAE.

Example: Afghan asylum applicant Chari was paroled into the U.S. in 2022 along the southwest border after traveling to Mexico. Chari spent several months in Mexico but never applied for asylum or any other type of permanent status. There is no firm resettlement bar at issue here because Chari was not offered permanent status in Mexico.

For all three of these applicants, the inquiry into the firm resettlement bar can end at step 1 of the A-G-G- analysis—with no evidence of a direct or indirect offer of firm resettlement, the bar is not implicated. The applicant does not need to argue the regulatory exceptions to the bar (“no significant ties” or “restrictive conditions”) because DHS cannot meet its initial burden of showing an offer of permanent residency or citizenship in the third country.

It is important to remember that the bar is not implicated simply based on the length of time that the individual spent in the third country. As the RAI0 Training Module acknowledges, “[t]he length of time an applicant spends in a third country does not by itself establish firm resettlement. Firm resettlement occurs only after the applicant has been offered some form of enduring lawful status in that country as demonstrated by direct evidence or, if direct evidence is not available, by circumstantial evidence of an offer of some type of permanent resettlement.”

Example: Afghan asylum applicant Diana lived in Pakistan for six years, from 2016- 2022. Diana was undocumented in Pakistan and was never offered or obtained any type of permanent resident status in Pakistan. Diana is later granted humanitarian parole and enters the U.S. The firm resettlement bar does not apply to Diana, because, despite the length of time she spent in Pakistan, she did not receive an offer of firm resettlement in that country.

The bar is also not implicated based on a grant of some type of temporary status, including a status that may be labelled “refugee status” but that does not allow the applicant to live permanently in the third country. A helpful resource for Pakistan in particular is a Country of Origin Information Report from the European Union Agency for Asylum, outlining the different types of status granted to Afghans in Pakistan.¹⁹³

Example: Afghan asylum applicant Dawar received an emergency visa while in India. Dawar is in removal proceedings and the ICE attorney argues that this emergency visa constitutes an

¹⁹³ Pakistan- Situation of Afghan Refugees, European Union Agency for Asylum, *available at* https://coi.euaa.europa.eu/administration/easo/PLib/2022_05_EUAA_COI_Report_Pakistan_Situation_of_Afghan_refugees.pdf.

“offer” of firm resettlement. Under step two of the analysis, the applicant can rebut that argument by showing that the emergency visa was temporary in nature only and was not in fact a pathway to permanent residency.

Regulatory Exceptions to Firm Resettlement Bar

If there is evidence of an offer of firm resettlement in the record, the burden will shift to the applicant to argue one of the regulatory exceptions to the firm resettlement bar, specifically, “restrictive conditions” or “no significant ties.” The regulatory exceptions recognize that an asylum applicant’s quality of life in the third country is important and that an asylum applicant should not be denied asylum in the U.S. based on an offer of resettlement in a country to which they have few connections or where they would continue to face danger. An offer of permanent residency or citizenship in a third country is therefore not the end of the inquiry but it does mean that the burden will be on the applicant to argue an exception to the firm resettlement bar.

***Example:** Afghan asylum applicant Emad spent several months in Turkey, where he was offered refugee status. However, conditions there were very difficult. He did not have freedom of movement and he was under constant surveillance by the government. He faced discrimination when looking for jobs and housing. The first step for an advocate would be to confirm that what Turkey labels as “refugee” status is equivalent to an offer of permanent status rather than a temporary status. However, even if Emad received an offer of firm settlement from Turkey, he may argue for the regulatory exception to the firm resettlement bar because of the restrictive conditions that he faced there.*

According to the USCIS, Firm Resettlement Training Module, the “restrictive conditions” exception for asylum applicants is primarily focused on conditions placed on the asylum applicant by the government of the third country. For example, the module emphasizes that job discrimination by private employers is not a factor to be considered in whether an asylum applicant has suffered restrictive conditions in the third country.¹⁹⁴ However, there is some case law that indicates that if the asylum seeker experienced harm from private actors in the country of resettlement, they may be able to meet the restrictive conditions exception if the government was unable or unwilling to protect the asylum applicant.¹⁹⁵ Therefore, practitioners should continue to point out any restrictive conditions imposed in the third country, either by the government or by a private actor.

The second regulatory exception to the firm resettlement bar is based on “no significant ties” to the third country.

¹⁹⁴ USCIS Firm Resettlement Training Module at 21.

¹⁹⁵ *Aden v. Wilkinson*, 989 F.3d 1073, 1082 (9th Cir. 2021) (finding Somali granted refugee status in South Africa was not barred from asylum where he suffered private actor persecution in South Africa based on his status as a Somali immigrant); *Arrey v. Barr*, 916 F.3d 1149, 1160 (9th Cir. 2019) (remanding to BIA where agency had denied asylum for a Cameroonian woman who had received an offer of refugee status in South Africa but where the BIA had not adequately considered the restrictive conditions there, including violence by private actors).

Example: Afghan asylum applicant Faiz was offered asylum from Germany after being evacuated from Afghanistan. Faiz was only in Germany for seven months and left as soon as he obtained a nonimmigrant visa to travel to the U.S. He has no family ties in Germany and never worked there. While Faiz received an offer of permanent status, he may be able to argue that entry into Germany was a necessary consequence of his flight from Afghanistan as he had no choice in where he was evacuated to; he remained only as long as necessary to secure his visa; and he did not establish any significant ties in this country.

The USCIS Training Module does not expand very much on this particular exception and there are only a few examples in case law of applicants who have successfully argued the “no significant ties” exception.¹⁹⁶ Practitioners can make creative arguments for asylum eligibility and should remember that the length of time spent in the third country does not necessarily mean that “significant ties” have been established if an applicant can show that they remained only as long as necessary to arrange onward travel.

Afghans and Dual Nationality

As noted above, an asylum applicant who has dual nationality is generally expected to establish eligibility for asylum in both countries. However, it is important not to assume that dual nationality exists simply based on birth in a third country. For example, many Afghans fled to Pakistan during the first period of Taliban rule, from 1996-2001. Some Afghans who are now adults and applying for asylum in the United States were born in Pakistan. However, individuals born in Pakistan to Afghan parents are not citizens of Pakistan.¹⁹⁷ Therefore, in most instances, these cases should present neither a dual nationality problem nor a firm resettlement problem. Similarly, Afghans born in Iran to Afghan parents are not citizens of Iran, and similarly should not have a dual nationality or firm resettlement issue (assuming they never received an offer of permanent resident status in Iran).¹⁹⁸

Practical Tips for Addressing the Firm Resettlement Bar

Carefully consider how to answer the questions on the I-589 which ask about travel prior to arriving in the U.S.¹⁹⁹ Many applicants will have to answer “yes” to this question and must disclose any countries

¹⁹⁶ *Gwangsu Yun v. Lynch*, 633 F. App’x 29, 30 (2d Cir. 2016) (unpublished) (rejecting agency’s determination that a North Korean asylum applicant’s two year stay in South Korea and possession of a South Korean passport meant that the applicant could not argue the “no significant ties” exception when the agency did not consider whether the applicant stayed only as long as necessary to arrange onward travel”); *compare Sultani v. Gonzales*, 455 F.3d 878 (8th Cir. 2006) (upholding agency finding that Afghan family had been firmly resettled in Australia when they received refugee status there, rented an apartment, the children obtained public schools, and received free medical care and monetary assistance from the Australian government).

¹⁹⁷ The European Union Agency for Asylum has published several helpful Country of Origin Information Reports that address the legal statuses of Afghans in various third countries. These reports are available at <https://euaa.europa.eu/coi-publications>.

¹⁹⁸ *Id.*

¹⁹⁹ The questions read: After leaving the country from which you are now claiming asylum, did you or your spouse or child(ren) who are now in the United States travel through or reside in any other country before entering the United States? Have you, your spouse, your child(ren), or any other family members, such as your parents or siblings, ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum?

they traveled through or to prior to arrival in the U.S. as well as whether they applied for or were offered any legal status in these countries. Failure to accurately disclose prior travel and offers of residency can adversely impact an asylum case. Thus, honest answers are critically important to the success of an asylum application. Applicants must understand that answering “yes” to these questions does not necessarily mean that the firm resettlement bar applies, as the questions are phrased very broadly. However, advocates will want to think carefully about the language they use in responding to these questions, particularly as some countries have immigration statuses that may be referred to as a “residency” or “refugee” status but in reality, represent only a temporary status.

Prepare applicants for testimony on this issue. Applicants should be prepared to explain to an adjudicator the type of immigration status, if any, they held in a third country. They should use precise language and should avoid using a word like “refugee” or “resident” unless they truly had a permanent status in the third country. If the applicant received a temporary status or no status at all, they should state this explicitly.

Consider whether to submit additional supporting documentation in support of the claim. For relatively straightforward cases such as the examples of Abdul, Bibi, and Chari above, it may be that no other evidence is required. The applicant can simply testify that no offer of permanent residency was made, and DHS will be unable to meet its initial burden of showing an offer of firm resettlement. However, in cases that are more complicated (such as cases where there is evidence of an offer of permanent residency or cases where the advocate is arguing for the regulatory exception to the firm resettlement bar), additional supporting evidence will be essential. This may include country conditions evidence as to the citizenship or residency laws in the home country, an expert opinion by a scholar or attorney from the home country, or country conditions reports describing the poor conditions for Afghans in the third country.²⁰⁰

New Asylum Rule

The new asylum regulation went into effect on May 11, 2023, at 11:59pm ET and is officially known as the Circumventing Lawful Pathways (“CLP”) rule.²⁰¹ The CLP rule modifies 8 CFR §§ 208, 1003, and 1208. The CLP rule creates a rebuttable presumption of asylum ineligibility based on 1) how an individual entered the U.S., and 2) whether they applied for protection in a country they traveled through on their way to the U.S. The CLP rule applies to individuals who enter the U.S. through the Southern border (or adjacent coastal border) without authorization for lawful entry (i.e., without a CBP One appointment); whose entry is between May 11, 2023, and May 11, 2025; and who traveled through a country other than their country of citizenship, nationality, or last habitual residence.²⁰² As such, this rule can be applied to Afghans who enter the U.S., through the Southern border after May 11, 2023, without a CBP One appointment and without having applied for asylum in a country they traveled through.

²⁰⁰ VECINA has a Google document with current country conditions in Afghanistan, including some that address Afghans living in third countries. [Afghan Country Conditions: Comprehensive Listing - Google Docs, https://docs.google.com/document/d/13hoYfZDXEmcVBZps7RPs7RPcwlhKmYK0lkjal4W8xiB1wqo/edit#heading=h.ckolpvzcfgeg](https://docs.google.com/document/d/13hoYfZDXEmcVBZps7RPs7RPcwlhKmYK0lkjal4W8xiB1wqo/edit#heading=h.ckolpvzcfgeg). In addition, the European Union Agency for Asylum has published several helpful Country of Origin Information Reports that address the legal statuses of Afghans in various third countries. These reports are available at <https://euaa.europa.eu/>.

²⁰¹ 88 Fed. Reg. 31,314 (May 16, 2023) (to be codified at 8 CFR §§ 208, 1003, 1208).

²⁰² 88 Fed. Reg. 31,314 (May 16, 2023), 31,319-20 (to be codified at 8 CFR §§ 208, 1208).

Unaccompanied children are excepted from the regulation as are those individuals who used the CBP One Smart Phone App to schedule an appointment and presented at a Port of Entry at their scheduled time.²⁰³ Individuals who can prove by a preponderance of the evidence that they could not access or use CBP One (e.g., language, illiteracy, significant technical failure) can be exempted.²⁰⁴ The CBP One app is currently available only in English, Spanish, and French. This analysis is applied by an asylum officer during a credible or reasonable fear interview. Another exception applies to individuals who sought and were denied asylum or other protection in a country through which they traveled. 8 CFR § 208.33(a)(2).

To overcome the rebuttable presumption, an individual seeking asylum must demonstrate by a preponderance of the evidence (probably true or “more likely than not”) that exceptionally compelling circumstances exist.²⁰⁵ This can include if the individual or a family member they were traveling with faced an acute medical emergency; faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or satisfies the definition of “victim of a severe form of trafficking in person” under 8 CFR 214.11(a). 8 CFR § 208.33(a)(3)(i).²⁰⁶

Potential Ethical Issues in the Representation of Afghan Asylum

Seekers²⁰⁷

Candor to the Tribunal

Attorneys are prohibited from offering evidence that they know to be false, and in the case that an attorney offers evidence that she later understands to be false, the attorney has a duty to take remedial measures that may include disclosure to the adjudicator.²⁰⁸ It is a particularly sensitive and emotional matter for an asylum seeker to be subjected to a bar from relief, but if an applicant wishes to go forward in a matter where they are likely to be barred, it is important to advise the client as to the potential consequences of presenting their case and the importance of providing honest evidence and testimony. If a client suggests a course of action that conflicts with the attorney’s ethical duty to be candid with the adjudicator, the attorney should inform the client of her ethical duties with respect to candor to DHS and EOIR.

Consider a scenario in which the client informs the practitioner that he was a member of the Taliban before he felt disillusioned and subsequently escaped from Afghanistan. He insists that he never harmed any civilians or engaged in any combat. He requests that his attorney not include the content in his application for asylum. The I-589 application for asylum specifically asks whether the applicant or their family members ever belonged to or have been associated with any organizations or groups in his home country. Furthermore, the attorney is aware that the applicant is likely subject to questions from the asylum officer regarding the TRIG and persecutor bars. The attorney must advise the client that if he is

²⁰³ *Id.* at 31,321 (unaccompanied child exception), 31,318 (CBP One app mechanism exemption).

²⁰⁴ *Id.* at 31318.

²⁰⁵ See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring).

²⁰⁶ 88 Fed. Reg. 31,314 (May 16, 2023), 31,318-19 (to be codified at 8 CFR §§ 208, 1208).

²⁰⁷ See *generally*: American Bar Association, Practice Advisory: Ethical Considerations for Representing Families on the Dedicated Docket, available at https://www.americanbar.org/content/dam/aba/administrative/immigration/pro_bono/ethics-of-representing-families-on-the-dedicated-docket.pdf.

²⁰⁸ Model Rules of Prof’l Conduct R. 3.3 (2020).

to apply for asylum, he is bound under penalty of perjury to tell the truth as well as the implications and potential ramifications of both telling the truth in this instance and failing to do so. Moreover, the attorney should inform the client that she cannot participate in perpetuating a falsehood before the asylum office and that if he does not intend to be candid in the application and/or during questioning, she is unable to represent him. Furthermore, if he subsequently perpetuates a falsehood before the asylum office, the attorney will be duty-bound to correct the falsehood on the record.

Conflicts of Interest between Family Members

If a practitioner is representing family members (for example, a principal asylum applicant and one or more derivatives), it is critical to maintain the ethical responsibilities owed to each client. An attorney cannot represent one client's interests to the detriment of another client's interests.²⁰⁹ Conflicts may also exist when representation of one or more family members will be materially limited because of the lawyer's responsibilities to another client.²¹⁰ For example, in the case where the principal applicant is subject to the persecutor bar, but wishes to proceed with the application without informing a derivative applicant, the attorney cannot honor one client's request without compromising the interests to the other.

At the intake stage, competent clients should be interviewed both collectively and individually to gauge potential conflicts or diverging interests of clients. Bear in mind that culture, gender, experiences, trauma, and power dynamics may also impact a client's willingness to communicate and affect the candor of any family member client.²¹¹ Furthermore, if clients or potential clients are relying on interpreters to speak with the attorney, it is advisable to avoid having family members serve as interpreters for clients. Ideally, interpretation should be a word for word oral translation from the client's language to the attorney's language. Interpreters should not be interested parties and the speaker should feel completely unencumbered or uncensored by the interpreter's presence. If a family member or interested party acts as an interpreter, there are risks that the speaker will not be able to be completely candid when discussing sensitive matters or the interpreter may include their own observations or opinions in the matter, muddying the client's communication with the attorney.²¹²

Conflicts may arise amongst familial clients when the representation of one or more of the family members will be adverse to the representation of another family member client.²¹³ In the case that representation of one client is adverse to another, the attorney must decline to represent each client.²¹⁴ Conflicts may also exist when representation of one or more family members will be materially limited

²⁰⁹ Model Rules of Prof'l Conduct R. 1.7 (2020).

²¹⁰ American Bar Association, Practice Advisory: Ethical Considerations for Representing Families on the Dedicated Docket, available at

https://www.americanbar.org/content/dam/aba/administrative/immigration/pro_bono/ethics-of-representing-families-on-the-dedicated-docket.pdf.

²¹¹ *Id.*

²¹² For further information on ethical interpretation, see: ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 500 (2021) available at

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-500.pdf.

²¹³ *Id.*, Model Rules of Prof'l Conduct R.R. 1.7 (2020).

²¹⁴ *Id.*

because of the lawyer's responsibilities to another client.²¹⁵ Attorneys can proceed in representation of clients with material limitation only in the case where the attorney reasonably believes she can provide competent and diligent representation to each affected client; the representation does not include the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceedings before a tribunal; and each affected client gives informed consent, confirmed in writing.²¹⁶

In order to obtain informed consent, the attorney must: (1) adequately educate and explain the conflict to the affected clients; (2) explain any material risks of proceeding in the face of conflict, even when there is consent; (3) provide any reasonable alternatives to the proposed course of conduct; and (4) once the affected client(s) have been adequately educated, the client(s) must sign a statement that: (a) memorializes the attorney's oral explanation; (b) confirms that the client(s) understands the risks and alternatives to waiving the conflict; and (c) notes that the client(s) consent to proceed despite the conflict.²¹⁷

Conflicts frequently arise after an attorney has committed to representing a family unit, which is why it is advisable to include a conflict-of-interest clause in a retainer agreement. A conflict of interest clause explains the responsibilities of the attorney in the case that a conflict arises.²¹⁸ Regardless, in the case that conflict arises during a joint or familial representation, withdrawal from a case is mandatory if the continuation of representation will cause the attorney to violate the rules of professional conduct or the law.²¹⁹ If the conflict is curable, meaning that it can be resolved by the clients, then the attorney may consider reminding the client(s) of the attorney's duties in case of conflict and explain the consequences of uncured conflict in the hopes that the client(s) resolve the conflict on their own.²²⁰ For example, in a case where one spouse client confides in the attorney that she wishes to keep a secret from the second spouse client, the attorney can explain that she is unable to keep one client's secrets from another. If the first client then chooses to tell the spouse the secret, in order to resolve the conflict, the attorney may continue the representation.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ American Bar Association, Practice Advisory: Ethical Considerations for Representing Families on the Dedicated Docket, available at

https://www.americanbar.org/content/dam/aba/administrative/immigration/pro_bono/ethics-of-representing-families-on-the-dedicated-docket.pdf citing generally: Model Rules of Pro. Conduct r. 1.0; r.1.0 cmt; r. 1.7 cmt.; (Am. Bar Ass'n 2020).

²¹⁸ For more information on conflict of interest clauses, see: American Bar Association, Practice Advisory: Ethical Considerations for Representing Families on the Dedicated Docket, available at

https://www.americanbar.org/content/dam/aba/administrative/immigration/pro_bono/ethics-of-representing-families-on-the-dedicated-docket.pdf.

²¹⁹ See: Model Rules of Prof'l Conduct R. 1.16 (2020).

²²⁰ See generally: American Bar Association, Practice Advisory: Ethical Considerations for Representing Families on the Dedicated Docket, available at

https://www.americanbar.org/content/dam/aba/administrative/immigration/pro_bono/ethics-of-representing-families-on-the-dedicated-docket.pdf.

Common Types of Afghan Immigration Cases with Potential Bars

Given the persistent unrest and turmoil in Afghanistan since the 1970s, there are various subsets of Afghans who are likely to face rigorous scrutiny when seeking immigration benefits in the U.S. This section will discuss some categories of individuals who are likely to face extended questioning relative to the potential bars to asylum, TPS, and adjustment of status. Note that in all cases it is critical to understand the bars to asylum and assess each individual's asylum eligibility based on her or his specific history. The categories below are meant to provide a roadmap to the groups of Afghans who have faced bars issues thus far but does not necessarily encompass every issue that might result in an individual facing a bar.

Former Interpreters for the U.S. Military

The U.S. military used local Afghan interpreters throughout its engagement in Afghanistan. The Taliban have subjected interpreters who aided the U.S. to severe retaliation. However, there are cases where interpreters have been found to be subject to the persecutor bar when they assisted with interpretation while an individual was tortured.²²¹

CIA-trained Afghan Paramilitary Members (Zero Units)

The U.S. Central Intelligence Agency (CIA) trained several Afghan paramilitary groups known as the "Zero Units."²²² The Zero Units were often involved in covert operations with support from the U.S. military. The most notorious Zero Units are those that were part of the Khost Protection Force or KPF.²²³ The Zero Units technically belonged to the Afghan National Directorate of Security (NDS), the Afghan Republic's intelligence agency. In practice they largely fell under the direction of the CIA. Their actions have been linked to various human rights violations including shooting civilians, extrajudicial executions, enforced disappearances, indiscriminate airstrikes, attacks on medical facilities and taking part in persecution and torture. These include night-time raids where Zero Unit members were ordered to hunt for Taliban members and ended up killing and/or torturing civilians as well.

In the context of asylum and TPS applications, USCIS has been closely scrutinizing applications by Zero Unit members for potential persecutor bars. While not everyone who worked with or for a Zero Unit will have engaged in persecution of others, it is crucial to understand the persecutor bar when representing a former Zero Unit member, and to understand how USCIS will scrutinize the case.

Afghans Associated with the Former Government or with the International Community in Afghanistan, Including Former Embassy Staff and Employees of International Organizations

This group includes officials of the Republic of Afghanistan as well as those who working for NGOs or the U.S. embassy. Their involvement with these organizations would likely make them targets of the Taliban. Unless an applicant worked directly with the military, criminal law enforcement, prison or security services, there are no general concerns about the persecutor bar for this group. Applicants who had to

²²¹ See *Miranda-Alvarado v. Gonzalez*, 449 F.3d 915, 927 (9th Cir. 2006).

²²² For more information see Human Rights Watch "They've Shot Many Like This" Abusive Night Raid by CIA-Backed Afghan Strike Forces. (2019) <https://www.hrw.org/report/2019/10/31/theyve-shot-many/abusive-night-raids-cia-backed-afghan-strike-forces>.

²²³ *Id.*

interact with the Taliban or any non-governmental militant groups should expect questioning aimed at uncovering whether they might be subject to a TRIG bar.

Former Members of the Afghan National Security Forces and Afghans Associated with the Former International Military Forces in Afghanistan

This group includes members of the former Afghan military as well as other security forces such as police officers. These individuals may have been involved in regular military activities including guarding check points and transporting detained individuals as well as in combat. Like the Zero Units, it is possible that their actions included persecuting others or other human rights violations. As with Zero Unit members, applicants can expect detained questioning from USCIS adjudicators to determine if they engaged in persecution.

Former Employees of International Organizations Funded by the U.S. or the West

Those working for organizations funded by the U.S. or Western governments could be targets of the Taliban. It is not likely that simply working for these organizations would make them subject to the persecutor bar, but in carrying out their duties, they may have had to deal with terrorist groups that had control over specific regions, and they could be found to have given material support to a terrorist organization. For instance, medical personnel may have provided help to an injured terrorist because they have a duty to help anyone regardless of the person's background. In addition, some organizations have provided food and other assistance that has benefited terrorist organizations.

Exploring Potential Bars to Asylum

Screening clients thoroughly is key to ethically serving this population. This section of the practice advisory will offer some tips on screening Afghan clients to determine whether any bars might apply. Representatives will then be able to best advise applicants as to the likelihood that they will be found subject to a bar to asylum and can make well-informed decisions about whether they want to apply for asylum. This guide will also along with guidance on what types of questions applicants who apply for asylum can expect at their asylum interviews so that representatives can best prepare applicants for their interviews.

Familial Relationship Screening

It is important to screen derivative family for potential TRIG bars. Some of the TRIG bars also apply to the spouse and/or children of those who have been found inadmissible under the statute. Spouses and children of those found inadmissible for engaging in terrorist activity are also inadmissible if the activity making the family member inadmissible occurred within the last five years.²²⁴ There is an exception to this rule if the spouse or child did not know or should not reasonably have known of the activity causing the relative to be found inadmissible or an officer has reasonable grounds to believe the spouse or child has renounced the relative's terrorist activities.²²⁵ Therefore, it is important to screen family members to determine whether they knew of any terrorist activities on the part of their relative who could be found inadmissible.

²²⁴ INA § 212(a)(3)(B)(i)(IX).

²²⁵ INA § 212(a)(3)(B)(i)(IX)(ii)(I) & (II).

Employment Screening

Some Afghan asylum seekers have worked in various organizations which precipitated their fear of staying in Afghanistan after the Taliban takeover. Some have been employed by organizations or government agencies and departments that were funded by the U.S., the European Union or the United Nations. When screening for facts related to prior employment, it is important to get the details of your client's day-to-day duties; whether there were any law enforcement functions; or if there was any exposure or cooperation with the Afghan, U.S., or other Western-backed military forces. Many asylum seekers may have been employed by or alongside U.S. military contractors or directly by the U.S. military. In addition to working with the armed forces, many asylum seekers may have worked with the government, judiciary, civil service, the media, or private security services. If asylum seekers have worked for any of these groups or organizations, it is imperative that practitioners screen for details. These details can include names of all the relevant organizations, including whether the organizations changed names or merged with a different organization, the applicant's position(s)/rank(s) and all relevant dates when the applicant worked there. It is important that the I-589 contains the exact dates of employment as those listed in any employment verification letters.

Military Screening

It is important to screen asylum applicants who have had any prior military training or service for potential mandatory bars. It is important to screen your client for any involvement the Afghan National Defense and Security Forces (ANDSF), also known as the ANSF. The ANSF was comprised of the Afghan National Army which included the Afghan Border Force, Afghan Air Force, Afghan National Civil Order Force as well as the local police and National Directory of Security (NDS).²²⁶ Many asylum applicants may have also worked with the U.S. military in various capacities. A list of questions that USCIS officers have asked at prior Afghan asylum interviews can be found in the appendix to this practice advisory. Asylum applicants with any past military associations should be prepared to answer questions such as:²²⁷

- Whether they ever carried a weapon or wore a uniform (if yes, describe the uniform);
- Whether they have any scars or wounds;
- Whether they ever fired their weapon (if so, when, at whom, where and how many times, and if this was while they were on or off duty);
- Whether they were required to arrest or detain anyone;
- Who trained them and how they were trained;
- Whether any military training or participation was forced;
- Whether they had any command responsibility and if so, to what extent;
- Whether they actively engaged in combat and if so, against whom, where and when did the combat take place; or

²²⁶ European Asylum Support Service, Afghan State Structures and Security Forces, Country of Origin Information Report, Aug. 2020, available at https://coi.euaa.europa.eu/administration/easo/PLib/2020_08_EASO_COI_Report_Afghanistan_state_structure_and_security_forces.pdf.

²²⁷ See UNHCR, Guidance Note On Maintaining The Civilian And Humanitarian Character Of Asylum, December 2018, available at <https://www.refworld.org/docid/452b9bca2.html>.

- Whether they harmed or killed any civilians or targeted or harmed any civilian structures such as hospitals, schools, or civilian buildings.

Travel screening.

Screening asylum applicants about travel prior to arriving to the U.S. is important to ascertain whether the firm resettlement bar applies. Some important screening questions include:

- Whether they traveled through any country before coming to the US;
- Whether they applied for asylum or another form of status in any country at any time anywhere in the world;
- Whether they received a decision on any application or petition they applied for;
- Whether they have family members who have status in any other country aside from their country of origin;
- Whether they had status in any country other than their home country and whether that status was permanent; or
- How were they treated in any third country they traveled to and whether they felt safe there.

Screening Related to Material Support/TRIG Bar

It is extremely important to question all clients about any contact with the Taliban or other non-state actors who may have conducted violent activities in Afghanistan. Here are some questions that may be asked at asylum interviews that practitioners can use as screening questions:

- Is anyone in your family involved with an armed group? Worked for an armed group?
- Is anyone in your family involved with the Taliban? Worked for the Taliban?
- Do you know anyone with a Taliban affiliation? Does your family know anyone with a Taliban affiliation? What is your relationship to that person? Describe all interactions you've had with this person.
- Growing up, did the Taliban own any shops in your neighborhood/town etc. Did your family go to those shops?
- Did your family ever purchase anything from a Taliban-owned store, food stand, cart?
- Did you or your family ever give anything to the Taliban? This would include things like water, food, tea, shelter, money, etc.
- Have you or your family ever helped the Taliban in any way, such as carrying luggage/supplies, transporting Taliban members or supplies, helping hold weapons, lending them a phone so they could make a phone call, or any sort of cooking/cleaning/helping with day-to-day operations, hosting anyone at your home, gathered any sort of information in furtherance of their activities?
- How does your family currently pay utilities? Who are they paying utilities to? Did your family ever take up arms against the Taliban?
- Did your father fight in the Soviet invasion in the 1980s? If so, did he use a weapon?
- Has your family encountered any checkpoints in Afghanistan? If so, what did they do to get through the checkpoint? Did they pay anyone at the checkpoint? Who oversaw the checkpoint?
- Has your family gone to a mosque where Taliban were? What were the Taliban doing? Were they taking a fee or charging in any way to enter? Did you or your family members ever have to provide goods, services, bribes, money, or anything else under the threat of harm from the Taliban or any other non-state armed group?

Screening Related to the Persecutor Bar

The persecutor bar is likely the most common mandatory bar to be applied in Afghan asylum cases. Practitioners with clients who have worked for the military, private security companies or some government agencies, and intelligence agencies should conduct an in-depth screening. The screening should include questions about the applicant's role in the organization, whether they committed any persecutory acts against anyone and whether those acts were on account of a protected characteristic.

Explaining Options to Your Clients

Once you have completed a screening of your client, it is important to make an assessment as to whether a mandatory bar applies to their asylum case. If so, it is important to determine if any defenses to the bars apply. Once practitioners determine whether a bar applies and whether it will most likely prevent their client from prevailing on an asylum claim, it is important to explain options to the client. One option could be to not apply for asylum at all and to continue with other forms of relief such as SIV or humanitarian parole where certain bars may not become an obstacle. However, the mandatory bars to asylum also apply to TPS. While not all the mandatory bars to asylum apply to adjustment of status, there is some overlap with the inadmissibility grounds and the mandatory asylum bars.²²⁸ Another option could be to advise the client that if their asylum is denied, their case may not be referred to the immigration court if they continue to maintain lawful status. However, if the asylum client is referred to immigration court, then they can apply for protections under the Convention Against Torture (CAT), which, in the case of deferral of removal, is not subject to any mandatory bars.²²⁹

Filing An Affirmative Asylum Application

Applicants for asylum are required to provide truthful answers to all the questions on the I-589. The asylum application contains several questions that could implicate mandatory bars:

Serious Non-Political Crime

I-589 Application for Asylum, Part B, Question 2: Have you or your family members ever been accused, charged, arrested, interrogated, convicted, or imprisoned in any country other than the United States (including for an immigration law violation)?

TRIG Bar

Part B, Question 3A: Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as but not limited to a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group or media?

Part B, Question 3B: Do you or your family members continue to participate in any way in these organizations or groups?

²²⁸ Applicants for Adjustment of Status must meet the admissibility requirements of the U.S., including, for example not having committed acts of terrorism or torture. For further information on the inadmissibility grounds see: INA §212.

²²⁹ It is important to note that an individual granted CAT deferral is not exempt from detention. 8 CFR § 1208.17(c).

Firm Resettlement

Part C, Question 2.B.: Have you, your spouse, your child(ren) or other family members, such as your parents or siblings, ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum?

Persecutor Bar

Part C, Question 3: Have you, your spouse or your child(ren) ever ordered, assisted, or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

The asylum application also requires applicants to explain whether they fear persecution in their home country, and if so, what persecution they fear, whom they fear would persecute them, and why the persecutor would persecute them. It is possible that an applicant's responses to these questions could trigger questions that could lead to a mandatory bar finding. For instance, an applicant who writes that he fears retribution by the Taliban because he was part of a Zero Unit should expect intense questioning about his actions as part of the Zero Unit.

At the Asylum Interview

Once the asylum application is filed with USCIS, asylum applicants are given an interview in a non-adversarial setting.²³⁰ Asylum officers are required to elicit testimony on all relevant asylum grounds and all mandatory bars.²³¹ During the interview asylum officers take notes and ask questions of the asylum seeker regarding the claim and mandatory bars. This practice advisory includes questions that have been asked in Afghan asylum interviews in the Appendix. Once mandatory bars are triggered, such as the TRIG bar or persecutor bar, then the asylum officer has the duty to convert the asylum interview, which is generally informal, to a sworn statement.²³² During the sworn statement the asylum officer asks very detailed questions of the asylum applicant and records notes verbatim on the Form G-646. These notes are then read back to the asylum applicant to verify their accuracy. The notes are printed and signed by both the officer and the applicant. Advocates should be prepared to take very detailed notes during these interviews. Some reasons for a sworn statement are:

- The applicant admits, or there are serious reasons to believe, that he is or has been associated with a Tier I or II terrorist organization or that he is or has been a member of any other terrorist organization;
- The applicant admits, or there are serious reasons to believe, that he is, or has been, involved in terrorist activities;

²³⁰ RAO Directorate – Officer Training, RAO Combined Training Program, Interviewing – Introduction to The Non-Adversarial Interview, December 20, 2019, available at https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf.

²³¹ RAO Directorate – Officer Training, RAO Combined Training Program, Interviewing - Eliciting Testimony, December 20, 2019, available at https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Eliciting_Testimony_LP_RAIO.pdf.

²³² RAO Directorate – Officer Training, RAO Combined Training Program, Note-Taking, December 20, 2019, available at https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Note_Taking_LP_RAIO.pdf.

- The applicant admits, or there are serious reasons to believe, that he assisted or otherwise participated in the persecution of others on account of one of the five protected grounds in the refugee definition;
- The applicant admits, or there are serious reasons to believe, that he assisted or otherwise participated in the commission of torture;
- There are serious reasons for considering the applicant a threat to U.S. national security;
- The interviewee admits, or there are serious reasons to believe, that he committed or was convicted of a serious crime outside the U.S. and the file does not contain a record of the conviction;
- The interviewee admits, or there are serious reasons to believe, that he committed human rights abuses; or
- When the officer believes it is appropriate to take notes in a more detailed format in his discretion.²³³

Conclusion

Advocates representing Afghan citizens in asylum claims face a number of serious challenges. Given the history of conflict in Afghanistan between the Taliban and other groups, as well as the expansive interpretations by the agencies and courts of many of the bars to relief or immigration benefits, even Afghan civilians without any military background may face potential bars. The analysis is more complex for those who have participated in armed conflicts in Afghanistan. Agency policy and interpretations are fluid and rapidly changing, which makes it difficult to keep abreast of all recent developments. However, attorneys and accredited representatives must be zealous advocates for the Afghan citizens whom they represent and must be prepared to make all possible arguments that these clients are eligible for asylum in the U.S.

²³³ RAIO Directorate – Officer Training, RAIO Combined Training Program, Note-Taking, December 20, 2019, available at <https://www.uscis.gov/sites/default/files/document/foia/Interviewing - Note Taking LP RAIO.pdf>.

Appendix

Asylum Office questions on mandatory bars

Second interview of Afghan Special Forces officer (Redacted)

January 2023 – ZAR – Arlington Office

4-hours

Background: Client attended first interview pro se.
Second interview notice was received 4 months after first interview.

Additional thoughts: At the beginning of the interview, the asylum officer confirmed the purpose of the interview was to obtain additional information about employment. AO could not confirm whether the basis of the questions was because additional information was obtained or that new standards had been set by the department. Tone, context, and extensive questions indicate the latter.

Was apparent to me AO was following a detailed database of questions. Sort of a “if yes to this, then ask this” metric. AO was friendly; it was very clear these questions were not created by this AO. A few questions have been redacted for privacy reasons. There were 194 total questions.

Hope this is helpful to others! AlisonTaborAttorney@gmail.com

1. Ever traveled/lived outside Afg?
2. Haj trip?
3. Worked in other country?
4. Live in Pakistan?
5. Regular occurrence to move between borders?
6. Why did family live between borders?
7. Any legal documentation?
8. Live in Iran?
9. Offered applied, etc immigration in any country?
10. Ever provided false info to gov official?
11. Served in military, police, etc?
12. Years of service?
13. Any other branch of law enforcement?
14. Mandatory military service?
15. Ever harmed anyone for any reason?
16. Ever conscripted by...? [named a couple of groups]
17. Ever committed a crime?
18. Ever accused or charged?
19. Convicted?
20. Read definition of terrorist activities: firearms, explosives, ..., assassination. Understand definition?
21. Ever accused of terrorist activity?

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360-359-3833

98. Go on more missions outside base?
99. Who went on missions?
100. Specific type of missions? Ambushes, defensive action?
101. As X, ever fire weapon?
102. How many times or instances of combat where fired weapon?
103. What would prompt to fire vs when would not fire weapon?
104. What do with bodies of enemy, their weapons?

105. How chosen to be [next job position]?
106. How did job duties change from X to X?
107. What was involvement like with foreign troops? What interaction with American, British, NATO?
108. Before 2014, how often US came on missions?
109. When out in field, how often were US troops with you?
110. Ever conduct night raids?
111. Did you participate in night raid in DATE in X province?
112. Participate in operation named X?
113. Ever participate in mission that killed X?
114. What was your role?
115. You fought T, but any other groups too?

Special Forces questions

116. When first grad, where assigned?
117. Units name?
118. Ever go on combat missions?
119. Dates?

120. Duties in X position?
121. What type of crimes did you see inside military? [committed by Afghan military members]
122. What were repercussions for people in your unit who committed crimes?
123. What would happen to someone connected to enemy combatants?
124. What would happen to them with investigation team?
125. Ever hear of investigation team harming a soldier who had connected with enemy?
126. Ever work with NDS?
127. Ever interview detainee or order someone to interview detainee?
128. How many soldiers did you supervise?

129. Daily assignments in X position?
130. Ever go on missions?
131. Where did you get info or intelligence from to [perform that duty]?

132. What did you do to prevent losing civilians?
133. Did SF ever harm civilians while you were SF officer?
134. Who was direct supervisor?
135. How familiar with X? [High ranking official, not person who was answer to above question]
136. Work with X?
137. What type work?

Questions about entire military service

138. Types of classes took
139. What does human rights mean to you?
140. Ever witness human rights abuses by soldiers throughout your career?
141. Ever had basic law enforcement duties, like policing?
142. Ever seen soldiers misuse drugs or alcohol while on duty?
143. Ever see soldiers mistreat women while in uniform?
144. Ever communicated with any armed groups as part of your position?
145. Ever negotiate with any armed groups?
146. Ever attend a jirga with high level tribal leaders?
147. What type tribal leaders would you meet with?
148. Ever work in jail?
149. Ever transport prisoners?
150. Ever cited for misconduct?
151. Ever operate drones, unmanned vehicles?
152. Ever choose targets for drones to drop?
153. Ever work with counter espionage?
154. Ever work with O units?
155. Ever work with KPF?
156. Who told you to create checkpoints?
157. How regularly would you make checkpoints?
158. Big part of job?
159. Ever arrest/detain civilians at checkpoints?
160. Ever personally interrogate prisoners or enemy combatants?
161. Ever hurt a civilian even if unintentionally?
162. Ever conduct house searches of civilians?
163. Ever hear of abuse of civilians during house searches?
164. Ever see minors or young boys on base?
165. Did U.S. change of mission after 2013-2014 change your assignments?
166. Describe changes?
167. Ever work with General X?
168. Some people consider X a warlord, how would you describe?

169. Some people said he was drug smuggler or involved in corruption. Aware of any of this?
170. Reports that X operated secret detention centers, were you aware of this?
171. Were you curious if those reports were accurate?
172. There are credible reports that some high level ANA received bribes, were you aware of this happening?
173. Were you ever a recipient of unlawful payment?
174. Did you ever collect info about civilians or enemy because of their nationality, ethnicity, religion, political beliefs?
175. Did you ever collect info on foreign officials, embassy staff?
-
176. Did you ever use any aliases?
177. Ever used a birth year X?
178. Ever been to X province?
179. Why?
180. Ever claim to be born in X province?
181. Ever been to X district in X province?
182. Ever been to X province?
183. Why?
184. There for any other reason?

Afghan SIV AOS Interview Questions – 09/2022

Interview Participants: USCIS Officer, Afghan SIV Family, In-person Interpreter, Representative

***Note:** New, sealed medical forms were not required. Officer accepted copies of medicals completed on the base.

Interview questions: (Rough summary of the questions asked throughout the 1.5-hour interview)

- 1) Did you ever have any membership in any organization?
- 2) Did you work for NDS?
- 3) Which branch of the U.S. military did you work for?
- 4) Were you a member of the Afghan Military?
- 5) Ever deported?
- 6) Ever Arrested or committed a crime you were not arrested for?
- 7) Ever violated terms of nonimmigrant status?
- 8) Ever trafficked chemicals, illegal drugs or colluded to traffic?
- 9) Do you have two or more crimes?
- 10) Do you intend to illegally gamble?
- 11) Ever denied a visa?
- 12) Ever laundered money?
- 13) Are you a spy for Afghanistan?
- 14) Ever violate laws regarding the export of goods?
- 15) Do you plan to overthrow the U.S. Government?
- 16) Ever engage in dangerous activity that would threaten the U.S. Government?
- 17) Ever engage in unlawful activity?
- 18) Asked question 48.a. and 51.a. phrase by phrase
- 19) Have you or are you receiving public assistance?
- 20) Ever provided false documents to any U.S. government official or immigration?
- 21) Ever falsely claimed you were a U.S. citizen?
- 22) Ever entered the U.S. illegally or without permission?
- 23) Do you have the original copies of the HR letter confirming employment and the supervisor's recommendation letter?
- 24) Do you have COM approval notice?
- 25) What was your job title?
 - a. Where did you work?
 - b. Do you have something that shows who you worked for or where you worked?
 - c. Did you work for NDS?
 - d. Where were you a guard?
 - e. How does a guard end up becoming artillery operator?
- 26) Have you always used your current legal names?
- 27) Did you always use ***** as your last name?
- 28) What was your name at birth?
- 29) Who gave you your names?
- 30) What are your DOBs?
- 31) How long have you lived at your current address?
- 32) You live in apartment *****?
- 33) How many times have each of you been married?

- 34) How many children do you have?
- 35) Have you ever worked for the Afghan government?
- 36) How long did you work with the U.S. Government DOS?
- a. Who trained you to use weapons?
 - b. Ever use training outside U.S. command?
 - c. Ever use personal weapon in combat?
 - d. Who gave coordinates for artillery strikes?
 - e. Were your commanders civilian or military (in uniform)?
 - f. Did you go on missions?
 - g. Who went on missions?
 - h. Did you detain people?
 - i. What was process of detaining people?
 - j. Did you work for anyone else other than the U.S. government?
 - k. When did you start the SIV application?
 - l. Who was your supervisor?
 - m. Do you know (*supervisor's name*)?
 - n. Who gave you/obtained for you the recommendation letter?
 - o. What was his name?
 - p. Who was the supervisor of (*client's supervisor*)?
 - q. Do you know your supervisor personally?
 - r. How did you get job with DOS / Who told you about it?
 - s. Was there an application or physical test?
 - t. Did you live on the base? How long were you on base?
 - u. How far was house from base?
 - v. How did you go home?
 - w. How did you get paid?
 - x. Were your HR & supervisory letters originals?
 - y. Where did you get them?
 - z. Did any other family work for the DOS?
 - aa. Did any family members work for any other U.S. companies?
- 37) Regarding your evacuation:
- a. Where did you land first after leaving Afghanistan?
 - b. What camp did you go to?
 - c. Why move to ***** state to live?
- 38) When you worked for the U.S., were you ever fingerprinted or eye scanned?
- 39) Ever fingerprinted another time by the U.S. in Afghanistan?
- 40) Ever fingerprinted for any reason in Afghanistan?
- 41) Ever arrested for any reason anywhere in the world?
- 42) While living in Afghanistan, ever travel to any border countries?
- 43) Do you have any family in any other countries?
- 44) Do you have any family in any other countries than the U.S. and Afghanistan?
- 45) Is family safe in Afghanistan?
- 46) Have any of your family members ever joined the Taliban?
- 47) Family ever had problems with the Taliban?
- 48) Family ever kidnapped?
- 49) Have you ever been kidnapped?
- 50) Have you ever interacted with the Taliban on any of your missions?
- 51) Who were the people you detained?

- 52) Were you ever asked to be in the Taliban?
- 53) Did you ever give money to any armed group?
- 54) Did the Taliban ever train you in weapons?
- 55) Did you (wife) ever receive military training?
- 56) Did you ever serve in the Afghan military?
- 57) How many brothers and sisters do you have?
- 58) Please write me a list of all your family members names – Parents, siblings, and grandparents
- 59) Final questions to clarify confusion about husband's service:
 - a. Help me understand why your badge states Security Officer, but you say you operated artillery?
 - b. Does everyone start as a security officer?
 - c. What type of artillery did you use?
 - d. Explain to me the process of using and loading artillery?

Example RFEs and NOIDs

U.S. Department of Homeland Security
75 Hawthorne Street
7th Floor
San Francisco, CA 94105-0000



U.S. Citizenship
and Immigration
Services

Date: NOV 03 2022



RE: [REDACTED]

Notice of Intent to Deny

Dear [REDACTED]

The purpose of this letter is to notify you of the intent to deny your request for asylum. U.S. Citizenship and Immigration Services ("USCIS") has carefully considered your written application and accompanying documents, available country conditions materials, and your oral testimony to reach this determination for the reasons given below.

I. BIOGRAPHIC/ENTRY INFORMATION

In presenting your request for asylum, you indicated that you are a [REDACTED] native of Afghanistan and citizen of Afghanistan, and you stated that you were admitted as a parolee under the Operation Allies Refuge (OAR) program until [REDACTED].

II. BASIS OF CLAIM

You fear that you will be killed by the Taliban in Afghanistan on account of your actual or imputed pro-American and anti-Taliban political opinion.

IV. SUMMARY OF TESTIMONY

You testified as follows: You stated that you worked as a military police officer, employed by the Afghan ministry of Interior in Afghanistan from [REDACTED] until you left Afghanistan in August of 2021. Stated that your first job with the military was working as a secretary for [REDACTED] a commander. You did this from [REDACTED]. After working as a secretary, you were transferred to [REDACTED] where you worked as a technical mechanic assessing weapons, tanks and other vehicle for repair and sending them out for repair. During that time, you also worked as a fire fighter and that you also guarded checkpoints for places that were prohibited for people to come.

RE: LAST NAME, FIRST NAME A

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You stated that during your time in the military you also worked as a member of the health sector, mostly going into the field or in combat locations and finding injured people and transporting the injured people to the military hospitals in the capital. You stated that you helped people by putting in IVs and doing other emergency medical procedures to get them stable for transport and that you worked on military members, colleagues and civilians harmed during incidences of combat and fighting but that you never worked on members of the opposition. You stated that you visited prisoners at the station and assessed how many were injured and who needed vaccinations.

You stated that in your capacity as a military police officer you captured over 50 members or suspected members of the Taliban and gave them over to the authorities. You stated that you sometimes assisted in the transport of these detainees to prisons and that you knew that they would be questioned/interrogated and that this often involved torture. You stated that you knew this from early on in your military career and that if the detained person gave information, they would not be tortured but if they did not give information then they would be tortured. You were not involved in the questioning or interrogation of detainees and did not engage in torture yourself. Sometimes when you were attempting to capture a member of the Taliban and they were resisting, you or others in your unit would try to injure them in their arms or their legs.

You stated that people in Afghanistan knew that you were a member of the military police. You stated that you wore both a military uniform at work and another uniform also issued by the government and that sometimes when you were at home he would be picked up for work in a military vehicle and that everyone in his tribe and everyone knew that he was in the military.

You stated that two of your cousins, [REDACTED], a police officer and [REDACTED], a military officer were killed by the Taliban in [REDACTED] and [REDACTED] respectively. You stated that your uncle, a [REDACTED] was also killed when a bomb was placed in his car in [REDACTED].

You stated that you received several reports through the intelligence section of your station that you were also in danger. The reports stated that the Taliban had killed your uncle and cousins and wanted to kill you as well. Your uncle and cousins had received similar reports before their deaths. The people reporting to the intelligence unit told the unit that the Taliban were stating that you were American's mate and asking, "why do you work for the government?" and "why are you cooperating with Americans?" The people that reported to the intelligence unit would tell the Unit that the Taliban warned people not to work for the government or for the Americans.

You stated that around the time your uncle was killed, you received a phone call from an unknown number. The caller stated, "the Taliban know you they will either kidnap you or they will explode you be cautious." When you heard this, you hung up the phone and changed your phone number. At work you also received several calls from the same unknown number, but you did not answer the phone.

You stated that when you were leaving Afghanistan and were attempting to enter the airport Taliban members hit you on the back with your gun and left a bruise. The Taliban members were hitting everyone trying to enter the airport and cursing them in Pashto, saying not to go to the foreigners. You do not believe that they knew you were member of the military. You believe that if they knew you were a military member that they would have killed you.

V. CREDIBILITY

RE: LAST NAME, FIRST NAME A
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You have presented testimony that was detailed, consistent, and plausible. Considering the totality of the circumstances and all relevant factors, your testimony is found credible.

VI. FOCUSED ANALYSIS COMPONENT

In order to receive asylum, an asylum-seeker must establish past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1158, 1101(a)(42); 8 C.F.R. § 208.13(b).

The events you described do not amount to past persecution.

You stated that you received reports that the Taliban wanted to harm you and the other members of your unit throughout your military career. You also stated that you received a phone call from an unknown number and that the caller told you that the Taliban know you and that they will either kidnap you or they will explode you so be cautious.³⁷ You hung up the phone and changed your phone number after you received several calls from the same number. You also stated you were hit in the back with a gun by members of the Taliban when you were attempting to get inside the Kabul airport. Given that you were called one time by an unknown caller and that your entire unit was warned in the reports that the Taliban was targeting the unit and given that the threats were not specific or immediate and there is no indication that anyone attempted to carry out the threats and given that the Taliban was not specifically targeting you at the airport and you did not receive a severe or lasting injury, the past harm that you testified to does not rise to the level of persecution.

You also claim to have a fear of future persecution. You fear that you will be killed by the Taliban if you return to Afghanistan. The harm you fear, death, is serious enough to rise to the level of persecution.

To establish a well-founded fear of future persecution, an asylum applicant must show that his or her fear is both subjectively genuine and objectively reasonable. An asylum applicant may establish an objectively reasonable fear by demonstrating that there is a reasonable possibility of suffering persecution.

Accordingly, it is the applicant's burden to establish that:

- (1) she or he possess (or is believed to possess) beliefs or characteristics the persecutor seeks to overcome in others;
- (2) the persecutor is already aware, or could become aware, that she or he possesses these beliefs or characteristics;
- (3) the persecutor has the capability of persecuting the applicant; and
- (4) the persecutor has the inclination to persecute the applicant.

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

You have established all four prongs of the *Mogharrabi* test for well-foundedness.

You possess the protected characteristic of a political opinion that is Pro-American and Anti-Taliban. You stated that you were a military police officer employed by the Afghan Department of the Interior from [REDACTED] until you came to the United States in August 2021. You stated that you engaged in missions capturing Taliban members and worked with Afghan and US forces against the Taliban.

RE: LAST NAME, FIRST NAME A

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The Taliban is aware or there is a reasonable possibility that they could become aware of your protected characteristic. You stated that an unknown caller called you and told you that the Taliban know you they will either kidnap you or they will explode you be cautious. You stated that you received reports that the Taliban wanted your unit to quit your jobs and stop working with the Americans and when you were leaving Afghanistan Taliban members at the airport told you and others leaving Afghanistan not to leave with the foreigners.

The Taliban is capable of harming you. You stated that Taliban members killed your uncle and cousins and that you were informed in reports that that they had killed your cousins and uncle and wanted to kill you as well.

The Taliban is inclined to harm you. Taliban members at the airport hit you with their guns, they killed other military members including your uncle and cousin and other police officers including your cousin in the past and they threatened to kidnap or explode you and told you to stop working with Americans.

You have established that, under all the circumstances it is not reasonable for you to relocate within your country to avoid future persecution.

Country reports indicate that the Taliban has quickly taken control over the majority of the country. The Taliban initiated its final offensive on 1 May 2021, the same day as the withdrawal of international forces was initiated. During the summer months the Taliban swept over Afghanistan and took control over several districts, notably in the northern provinces and districts encircling the provincial capitals. In the first week of August the Taliban advanced, and in less than nine days they took control over most of Afghanistan's provincial capitals, including Kabul.¹⁸ During the last days key cities fell as Afghan National Defense and Security Forces (ANDSF) surrendered. By 13 August 2021 the Taliban had taken control over 17 of 34 provincial capitals, including Kandahar and Herat.¹⁹ On 14 August 2021, Mazar-e Sharif fell, and as Jalalabad fell the following day, Kabul was left as the only major city still under government control. On 15 August, President Ashraf Ghani fled the country, police and other government forces gave up their posts, and Taliban fighters entered the capital and took control of its checkpoints. Taliban leaders entered the presidential palace, addressed media on the following day, and declared the war to be over.

See EASO – European Asylum Support Office: Afghanistan - Security situation update, September 2021 https://www.ecoi.net/en/file/local/2060163/2021_09_EASO_COI_Report_Afghanistan_Security_situation_update.pdf (accessed on 19 May 2022).

Therefore, you have established that you have a well-founded fear of persecution on account of your real or imputed Pro-American and Anti-Taliban political opinion.

VII. ANALYSIS OF BARS/DISCRETIONARY FACTORS

You are subject to a mandatory bar to a grant of asylum because you assisted in the persecution of others on account of a protected ground.

You stated that you captured Taliban members and that sometimes during that capture you would hurt their arms or legs in order to capture them. You also stated that you sent captured detainees to units and prisons where you knew that they had a high likelihood of being tortured. You stated that sometimes you brought detainees to prisons or put them on planes or in cars to be sent to the intelligence unit or terrorism unit. You stated that everyone knows that the Taliban members are tortured during interrogation and that if they do not give information they will be tortured. Though you were working as a military officer at the time of the persecutory acts, your actions were not legitimate acts of war or law enforcement because knowingly

RE: LAST NAME, FIRST NAME A
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subjecting someone to torture is not a legitimate act of war or law enforcement. Though you, yourself did not interrogate or torture the Taliban members, you captured them and sent them to prisons and other units knowing there was a high likelihood that they would be subject to torture. You stated that they were tortured because of being Taliban members and under questioning in an attempt to get information, therefore their political opinion as a member of the Taliban was a central reason for their torture. There is no indication that you acted under duress in capturing the Taliban members or in sending Taliban members to prisons or other units despite knowing that in doing so there was a high likelihood that these people were going to be subject to torture under questioning.

You failed to establish by a preponderance of the evidence that the mandatory bar does not apply. Therefore, you are barred from a grant of asylum.

VIII. DECISION

For the reasons explained above, USCIS has found that you are not eligible for asylum status in the United States.

You can provide a rebuttal to this notice in support of your request. You have sixteen (16) days [6 days total for mail included] from the date of this notice to submit such rebuttal or new evidence. Failure to respond to this notice within this allotted time may result in the denial of your request for asylum.

Please direct any response to the address on this letterhead. Mark both the envelope and the contents as follows:

Attention: File Number A- [REDACTED]

Rebuttal -- [REDACTED]

Sincerely,

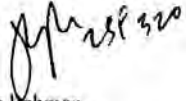
Danielle Lehman
Director
SAN FRANCISCO ASYLUM OFFICE



RE: [REDACTED]

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Sincerely,



for Danielle Lehman
Acting Director
SAN FRANCISCO ASYLUM OFFICE

CC:

SOAR IMMIGRATION LEGAL SERVICES
C/O J MERCEDES RIGGS
7931 NE HALSEY ST STE 302
PORTLAND, OR 97213

RECEIVED SEP 06 2022

U.S. Department of Homeland Security
75 Hawthorne Street
7th Floor
San Francisco, CA 94105-0000



U.S. Citizenship
and Immigration
Services

Date: AUG 30 2022

[REDACTED]
[REDACTED]
PORTLAND, OR [REDACTED]

RE: [REDACTED]

Notice of Intent to Deny

Dear Mr. [REDACTED]

The purpose of this letter is to notify you of the intent to deny your request for asylum. U.S. Citizenship and Immigration Services ("USCIS") has carefully considered your written application and accompanying documents, available country conditions materials, and your oral testimony to reach this determination for the reasons given below.

In presenting your request for asylum, you indicated that you are a [REDACTED]-year-old male native and citizen of Afghanistan, who was admitted to the United States at Washington, DC on [REDACTED], 2021 as part of Operation Allies Welcome with valid status until [REDACTED], 2023. You are currently in lawful status.

You fear that you will be arrested and killed by the Taliban in Afghanistan on account of your political opinion (anti-Taliban [support of the US government]).

You testified as follows:

You were in the military in Afghanistan. Your unit, the National Department of Security (NDS), assisted Americans on the ground in Afghanistan. You were in the NDS from [REDACTED] until your departure in August 2021. During your service with NDS, the Taliban sent letters to the office threatening your unit that your unit would be killed. The letters would ask why NDS employees were working with the Americans. Many of your colleagues were killed. You did not receive the letters directly. The office would receive threats every 5-10 days and you were afraid of being killed.

The Taliban knew you and NDS employees worked with the Americans, because of spies who report back to the Taliban. Taliban members communicate with the commander offices and targeted certain people in the force. Taliban killed NDS employees in certain areas to retaliate against them. People in your tribe and community knew you worked for NDS, because the Taliban had connections within your community. Some of your relatives knew about your employment.

RE: [REDACTED]

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You are afraid to return to Afghanistan out of fear that the Taliban will arrest and kill you. They would identify you as the enemy, because they knew you worked with the Americans and government. People who worked with the Taliban have been taken so they can try and obtain info from them and were later killed.

After you left Afghanistan, the Taliban came to your house to look for you. They asked for you by name. Your father told the Taliban you left with the forces and were with them. The Taliban also showed your father a letter saying that you needed to report to them and cooperate with them.

You cannot relocate, because the Taliban is located throughout the country.

You were a soldier in the Afghan Commando Force (ACF) from [REDACTED] until [REDACTED] before you were a soldier with NDS. You did whatever your unit told you to do. Your unit would receive intelligence reports of where the Taliban was located and you were instructed to detain Taliban members and bring them back to your unit. You would guard the office and be dispatched on missions.

While on duty with the NDS, you would detain Taliban members once or twice a month. After you were notified of the Taliban members' location, your unit would try to catch the Taliban members alive. You used your gun to shoot at Taliban members, and not other people. You killed about 30-40 Taliban members on different missions. Taliban members that were caught alive were turned into the commanders. You had no permission to torture the Taliban members. You testified to beating the Taliban members, but specifically you grabbed Taliban members' beards, disarmed them, and pushed them. When you turned the Taliban members in, you believed they were interviewed.

You never encouraged any other person or anyone in your unit to harm anyone else, including Taliban members. If you had to shoot someone, you were following orders. You described your role with ACF and NDS as law enforcement activities. During every mission, you followed orders given by intelligence. If you did not follow orders, you would have been fired.

In your role at ACF, you would also catch Taliban members. You would watch enemy vehicles and followed commands. During your time with the ACF, you killed Taliban members and did not know how many Taliban members you killed. Info about the Taliban was given by the commander. After Taliban members were taken into custody, you did not know what happened to them. If you did not follow orders, you would be fired from your job.

You never detained, interrogated, or tortured Taliban members or any other person off-duty.

Your testimony was detailed, consistent, and plausible. Considering the totality of the circumstances and all relevant factors, your testimony is found credible.

In order to receive asylum, an asylum-seeker must establish past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The acts you described do not amount to past persecution on account of your political opinion. Your unit received multiple threats. However, the threats were not made directly to you nor was there an immediate threat of danger to you. Therefore, you did not suffer serious past harm that rises to the level of persecution.

RE: [REDACTED]

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available at: <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/afghanistan/> [accessed on July 13, 2022].

You have established that, under all the circumstances it is not reasonable for you to relocate within your country to avoid future persecution. You testified that the Taliban is located throughout Afghanistan. Country conditions reports also indicate, "In the wake of the withdrawal of international troops from Afghanistan, there has been a rapid deterioration in the security and human rights situation in large parts of the country. The Taliban has taken control of a rapidly increasing number of districts, with their advance accelerating in August 2021, to capture 26 out of 34 of Afghanistan's provincial capitals in the space of ten days, ultimately taking control of the presidential palace in Kabul. The upsurge of violence has a serious impact on civilians, including women and children. UNHCR is concerned about the risk of human rights violations against civilians, including against women and girls and against Afghans who are perceived by the Taliban to have a current or past association with the Afghan government or with the international military forces in Afghanistan or with international organizations in the country." UN High Commissioner for Refugees (UNHCR). UNHCR Position on Returns to Afghanistan, August 2021, available at: <https://www.refworld.org/docid/611a4c5c4.html> [accessed July 13, 2022].

As such, you could not avoid persecution by relocating within your country.

Therefore, you have established that you are a refugee.

However, your testimony and documentary evidence provides that you participated in the persecution of others. An applicant is subject to a mandatory bar to a grant of asylum because he ordered, incited, assisted, or otherwise participated in the persecution of another person on account of a protected ground (political opinion). You failed to establish by a preponderance of the evidence that the mandatory bar does not apply.

When you were employed by the NDS, you used your gun to shoot at Taliban members. You killed about 30-40 Taliban members on different missions. In your role at ACF, you would also catch Taliban members. During your time with the ACF, you killed Taliban members and do not know how many Taliban members you killed.

Killing others is harm that rises to the level of persecution.

You testified that the purpose of detaining or killing Taliban members was to bring them to the commanders. Country conditions reports indicate the conflict between the Afghan government and the Taliban were politically motivated. Thus, efforts to eliminate the Taliban were on account of a political opinion. "The Taliban are a predominantly Pashtun, Islamic fundamentalist group... Taliban pose immediate threats to Afghans' civil and political rights enshrined in the constitution created by the U.S.-backed government.. They have cracked down on protesters, reportedly detained and beaten journalists, and reestablished their Ministry for the Promotion of Virtue and Prevention of Vice, which under previous Taliban rule enforced prohibitions on behavior deemed un-Islamic." "The Taliban in Afghanistan, Center on Foreign Relations, Sept 15, 2021, available at: <https://www.cfr.org/backgrounder/taliban-afghanistan> (accessed on July 13, 2022).

Although you testified that your acts were an act of law enforcement, country conditions reports indicate that the NDS engaged in persecutory acts beyond the scope of law enforcement. "A January 7 operation by National Directorate of Security (NDS) forces killed a prominent politician, Amer Abdul Sattar, and five others at a house in Kabul. Government officials claimed to be investigating the killings of civilians in night raids by CIA-backed special forces, but no findings from these

RE: [REDACTED]

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investigations were made public." World Report 2021, Afghanistan, available at: <https://www.hrw.org/world-report/2021/country-chapters/afghanistan> (accessed on July 13, 2022).

Furthermore, "And many Afghans believe that the NDS, with the CIA's help and approval, has already turned into a second incarnation of KhAD, the brutal intelligence service of the Afghan communists in the 1980s. KhAD killed and tortured tens of thousands of people following the bloody communist coup in 1978...The government has declined to comment on most of the allegations. But NDS director Mohammad Masoom Stanekzai was forced to resign last September after an NDS raid in Jalalabad, the capital of the eastern province of Nangarhar, targeted a prominent local family and killed four brothers, all civilians. While the intelligence service claimed to have attacked alleged members of the Islamic State, locals rejected this version. It was later revealed that all victims were innocent men between 24 and 30 years old who were beaten and shot dead by the infamous 02 unit, which is responsible for similar operations in the eastern region...According to some people, the NDS is not just the official successor of KhAD—it is also imitating its brutal tactics to turn Afghanistan into a new police state with the help of U.S. intelligence, which is supporting the regime." "Is Afghan Intelligence Building a Regime of Terror With the CIA's Help?" Foreign Policy.com, February 6, 2020, available at: <https://foreignpolicy.com/2020/02/06/nds-afghanistan-intelligence-dissident-murder-cia-help/> (accessed on July 13, 2022).

You testified that you were not forced to engage in the persecutory acts, such as killing Taliban members. You testified that you followed orders from commanders and directly participated in killing Taliban members.

You testified that you killed Taliban members and that you killed approximately 30-40 members as a soldier with the NDS. You also testified to killing Taliban members with the ACF, but did not know how many Taliban members you killed. You killed the Taliban members with your weapon.

You did not claim that you were under duress when you participated in the persecutory acts.

Therefore, you are barred from a grant of asylum. Additionally, you do not meet the statutory definition of "refugee" because the term "does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42).

For the reasons explained above, USCIS has found that you are not eligible for asylum and USCIS does not exercise its discretion to grant asylum status in the United States.

You can provide a rebuttal to this notice in support of your request. You have sixteen (16) days [6 days total for mail included] from the date of this notice to submit such rebuttal or new evidence. Failure to respond to this notice within this allotted time may result in the denial of your request for asylum.

Please direct any response to the address on this letterhead. Mark both the envelope and the contents as follows:

Attention: File Number A-[REDACTED] Rebuttal -- ZSF [REDACTED]