CHAPTER NINE

ASYLUM, WITHHOLDING OF REMOVAL, AND PROTECTION UNDER THE CONVENTION AGAINST TERROR

Three important defenses to removal are asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Both asylum and withholding of removal are premised on a fear of persecution on account of one of five factors:

- Race;
- Religion;
- Nationality;
- Membership in a particular social group; or
- Political opinion.

Persecution is defined as “a threat to life or freedom of or infliction of suffering or harm upon those who differ in a way regarded as offensive.”

Protection under the CAT is premised on fear of torture by the government or with the government’s acquiescence, and does not require a showing that the feared torture is on account of one of the five protected grounds. Part One of this chapter will cover asylum and withholding of removal, including changes introduced by the REAL ID Act of 2005 (REAL ID). Part Two will cover protection under the CAT.

PART ONE: ASYLUM AND WITHHOLDING OF REMOVAL

Asylum vs. Withholding

Asylum provides protection from removal to any country in the world, and the noncitizen cannot be removed to any country while in valid asylee status. Withholding provides country-specific protection, meaning that the applicant still can be removed to a country other than the one in which persecution is claimed. However, individuals may be removed only to a country that has agreed to accept them, generally the country of birth, citizenship, or nationality.

Asylum may be converted to lawful permanent resident (LPR) status once the asylee has had asylum status for one year. Withholding of removal, on the other hand, cannot be converted into any kind of permanent residence.

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Asylum applicants can include their spouse and unmarried children less than 21 years of age in their asylum applications. They are known as derivatives on the principal’s asylum application. The derivative relatives included on the principal’s application also are granted asylum when the principal applicant is granted asylum. Previously, when an included child turned 21 years of age while the application was pending, he or she aged out and lost derivative status, although he or she still could submit an asylum application on his or her own. However, the Child Status Protection Act (CSPA) of 2002 amended the definition of child under the Immigration and Nationality Act (INA) to provide that derivative children on an asylum application would not lose their derivative status if they turn 21 years of age after the asylum application is filed but before it is adjudicated (i.e., the child must be under 21 years of age on the date that the parent, who is the principal asylum applicant, filed the asylum application). The child need not have been included on the asylum application at the time of filing as long as he or she is included on it at the time of adjudication. The date on which U.S. Citizenship and Immigration Services (USCIS) receives the asylum application is the filing date. Withholding, on the other hand, is available just to the applicant—it does not cover any spouses or children of the applicant.

Asylum-seekers must show past persecution or a well-founded fear of future persecution. Withholding requires a showing of a clear probability of persecution. Asylum, however, is discretionary, while withholding is mandatory if a clear probability of persecution is established. Clear probability is solely an objective test: the foreign national has to show a greater than 50 percent likelihood of persecution. On the other hand, well-founded fear has both subjective and objective components. The objective component is satisfied if there is as little as a 10 percent chance of persecution.

Asylum applications may be filed in one of two ways. Affirmative applications are made before the USCIS asylum office. If the application is denied, the asylum office will refer the applicant to the office of the immigration judge (IJ) for a removal hearing. Alternatively, if the person did not apply affirmatively, he or she still may request asylum in removal proceedings.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) mandated that the asylum application be filed within one year of the foreign national’s arrival in the United States. Moreover, no application that is filed by a foreign national who has previously applied for asylum and been denied will be entertained. The interim regulations made it clear that these prohibitions apply to asylum only, and do

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5 Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 et seq.).
7 INA §101(a)(42).
11 8 CFR §1208.4(a)(2)(ii).
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not preclude an application for withholding of removal. Exceptions to the one-year deadline exist for foreign nationals who meet the well-founded fear standard by virtue of changed circumstances in their country of nationality or last residence after their arrival in the United States and those who can show that extraordinary circumstances occasioned the delay in filing.12

The regulations provided more guidance on the one-year deadline,13 including an interpretation of exceptions to the one-year filing deadline for asylum claims.14 Although the filing deadline may be waived only if the applicant can show either changed circumstances that affect his or her eligibility for asylum or extraordinary circumstances relating to the delay in filing, the regulations do provide certain safeguards for the late filing of asylum applications:

- First, the regulations provide that an asylum officer or IJ must question an asylum applicant before rejecting an application as untimely filed. The applicant will have the opportunity to present any information bearing on whether he or she fits within either exception to the one-year deadline. Also, the IJ then can determine whether the applicant is eligible for withholding of removal or CAT relief, to which the one-year deadline does not apply.

- Second, the regulations provide for additional factors that the decision-maker may consider, such as the death or serious illness of the applicant’s lawyer or immediate family member, ineffective assistance of counsel, and maintaining valid immigrant or nonimmigrant status, including temporary protected status (TPS).15 The regulations define a reasonable period to be a relatively short period.16

- Third, the regulations state that the list of circumstances that may constitute changed or extraordinary circumstances is not all-inclusive, and that other situations may fit within the exceptions. For changed circumstances, the applicant must show that those changes affect the applicant’s eligibility for asylum.17 For extraordinary circumstances, the asylum seeker must show that the circumstances directly relate to the applicant’s failure to file within the one-year deadline.18

- Fourth, for applications filed with USCIS, in cases where the one-year deadline otherwise is not met, if the applicant can prove by clear and convincing evidence that the application was mailed within the one-year period, the mailing date shall be considered the filing date.19

In Matter of Y–C–,20 the Board of Immigration Appeals (BIA) relied on the regulations—particularly 8 CFR §208.4(a)(5)—to determine whether an unaccompanied minor

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12 8 CFR §1208.4(a)(4).
14 8 CFR §208.4.
15 8 CFR §208.4(a)(5).
16 Id.
17 8 CFR §208.4(a)(4).
18 8 CFR §208.4(a)(5).
who failed to file his asylum application within one year of arrival in the United States was precluded from apply for asylum thereafter. The BIA noted that not only did the regulations define *extraordinary circumstances* that could delay filing of the asylum application, they also specifically included as an example of *extraordinary circumstances* an applicant for asylum who is an unaccompanied minor during the one-year period. Nevertheless, the BIA concluded that the precisely on-point example found in the regulations did not require it to find that extraordinary circumstances existed in this particular case. Instead, the BIA stated that it must conduct individualized determinations in each case to determine whether extraordinary circumstances exist to pardon a failure to file within one year. Specifically, it held that the applicant for asylum who failed to file the application within one year of arrival must demonstrate that an extraordinary circumstance existed, that the circumstance directly related to the applicant’s failure to file the application within the one-year period, and that the delay in filing was reasonable under the circumstances.

In *Matter of Y–C–*, the BIA determined that the respondent demonstrated all of the above because he was a minor during the entire one-year period, he was detained by the Immigration and Naturalization Service (legacy INS) during the entire period, and he did not intentionally create, through his own action or inaction, these circumstances relating directly to his failure to meet the filing deadline. Accordingly, the BIA determined that extraordinary circumstances excused his failure to file within one year.

In evaluating the one-year bar issue, it’s important to determine whether the calculation regarding the one-year bar is correct. In *Lumataw v. Holder*, the U.S. Court of Appeals for the First Circuit held that the IJ committed legal error when he found that the asylum applicant did not timely file the application without recognizing either “the absence of a filing deadline for the first few years of that period, or the undisputed record fact of Lumataw’s inclusion in his wife’s January 2003 asylum application.” There also may be significant changed circumstances or extraordinary circumstances in the applicant’s life and or in the applicant’s home country that may constitute an exception to the one-year deadline. In *Vahora v. Holder*, the U.S. Court of Appeals for the Ninth Circuit held that religious rioting that began after the applicant left India, and its subsequent impact on the applicant’s family, constituted changed circumstances to excuse the late filing of asylum application.

**Standards of Proof, Evidentiary Considerations, and the REAL ID Act of 2005**

An asylum applicant has the burden of proving eligibility for asylum. Asylum and withholding applicants must establish eligibility by a preponderance of the evidence. Of particular importance is the nexus between the persecution feared and one of the five statutory grounds stated above. For applications filed before May 11, 2005, the past or anticipated persecution must be “on account of” one or more of the five grounds. For applications filed on or after May 11, 2005, the REAL ID Act of 2005 created a new nexus

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21 *Id.*
22 *Lumataw v. Holder*, 582 F.3d 78, 86 (1st Cir. 2009).
23 *Vahora v. Holder*, 641 F.3d 1038, 1042 (9th Cir. 2011).
24 8 CFR §208.13(a).
standard, requiring that an applicant establish that one of the five grounds was or will be at least one central reason for persecuting the applicant. To demonstrate that a protected ground was “at least one central reason” for persecution, an applicant must prove that such ground was a cause of the persecutors’ acts. The persecutors’ motivation may be established by direct or circumstantial evidence.25

Asylum applicants must prove by a preponderance of the evidence that they have suffered past persecution, or that there is at least a 10 percent likelihood that they will be persecuted in the future on account of one of the five protected grounds.

Withholding applicants must prove by a preponderance of the evidence that it is more likely than not that they will be persecuted in the future on account of one of the five protected grounds. As discussed below, REAL ID has made it potentially more difficult to meet these burdens of proof.

“Persecution” is not defined by statute, but instead by case law. The BIA defined persecution as objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.26 The harm or suffering need not be physical (though it can be), and may include other violations of human rights, including psychological torture, the imposition of severe economic disadvantage, or the deprivations of liberty, food, housing, employment, and other essentials.27 Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution.28 However, minor disadvantages or trivial inconveniences do not rise to the level of persecution.29

Either a well-founded fear of future persecution or past persecution provides eligibility for a discretionary grant of asylum.30 In other words, an applicant is eligible for asylum if he or she has suffered past persecution on account of a protected ground or has a well-founded fear of future persecution.

Where an applicant makes a showing of past persecution, he or she is presumed to have a well-founded fear of future persecution unless a preponderance of the evidence establishes that since the time the persecution occurred “conditions in the applicant’s country ... have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return.”31 Thus, if an asylum seeker demonstrates past persecution, this creates a presumption that the applicant has a well-founded fear of future persecution. The burden then shifts to the agency to demonstrate by a preponderance of the evidence that there has been a change in circumstances.

The regulations provide that, in past persecution cases, the burden of proof is on the government trial attorney to establish, by a preponderance of the evidence (more than 50

28 Mashiri v. Ashcroft, 383 F.3d 1112, 1120-21 (9th Cir. 2004).
29 Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969).
30 8 CFR §1208.13(b)(1).
31 Cigaran v. Heston, 159 F.3d 355 (8th Cir. 1998).
percent), that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear. The fundamental change can be in country conditions or even in changes in the applicant’s personal circumstances. The rules further provide that an applicant may be granted asylum where the applicant can demonstrate that he or she would suffer other serious harm if removed to that country. The rules place the burden on the applicant to show that any fear of persecution unrelated to past persecution is well founded, or, in withholding cases, that the applicant would suffer a threat to life or freedom.

Even if it is shown that future persecution is unlikely, an applicant still may be granted asylum in a favorable exercise of discretion if the past punishment he or she suffered was of such an unconscionable nature that the applicant should not be repatriated in any case. In exercising discretion, the IJ should consider the totality of the circumstances. Favorable factors include such humanitarian considerations as the applicant’s age, health, and family ties in the United States; negative factors may be found in the foreign national’s actions in fleeing to the United States. The BIA has interpreted this form of relief to require an applicant first to show “severe harm” and “long-lasting effects.” In contrast, withholding cannot be granted if future persecution is unlikely.

In Matter of L–S–, the BIA reviewed a request for a grant of humanitarian asylum in light of the severity of the respondent’s past persecution in Albania to determine whether he had shown “compelling reasons” for the request despite the finding of changed country conditions. The BIA found that the factors to be considered in this request included the “nature, severity, and duration of the beatings and all mistreatment that the respondent endured, as well as any aftereffects he may now suffer, should be considered to determine if ‘compelling reasons’ exist for granting asylum, notwithstanding the rebuttal of the presumption of a well-founded fear, as contemplated by 8 CFR §1208.13(b)(1)(iii)(A).”

The regulations also provide that in past persecution cases, the U.S. Department of Homeland Security (DHS) can overcome the presumption of well-founded fear if it can show that the asylum seeker could avoid persecution by relocating to another part of the country. Similarly, in claims based on a well-founded fear of future persecution, an asylum seeker is deemed not to have a well-founded fear of persecution if the applicant could avoid persecution by relocating internally, and if, under all the circumstances, it would be

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33 8 CFR §1208.4(a)(4).
34 8 CFR §1208.13(b)(1)(iii).
35 8 CFR §§208.13(a), 1208.16(b).
39 Id. at 716.
40 8 CFR §208.13(b)(1)(i)(B).
reasonable to expect him or her to do so.\footnote{8 CFR §208.13(b)(2)(ii).} Where the persecutor is not a state actor, the asylum seeker has the burden of showing it would not be possible to relocate.\footnote{8 CFR §208.13(b)(3)(ii).}

In preparing and presenting an asylum or withholding claim, great care should be taken to make the asylum or withholding application both internally consistent and consistent with testimony, to provide supporting documentation whenever available, and to explain its absence if it is not available. While case law previously has indicated the importance of such factors, the recent passage of REAL ID has made such considerations even more critical in presenting a successful claim.

The REAL ID Act of 2005

REAL ID,\footnote{REAL ID, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23.} enacted on May 11, 2005, contains asylum and withholding provisions that cover applications filed on or after that date. Although it eliminated the 10,000 persons per year quota on asylee adjustments and the 1,000 persons per year quota on coercive population control asylum claims, its other changes institute difficult and problematic standards concerning motivation of the persecutor and credibility.

**Persecutor’s Motivation**

REAL ID requires that the applicant “must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”\footnote{REAL ID §101(a)(3)(B)(i), codified at INA §208(b)(1)(B)(i).} The word “central” requires applicants to show, not just that a protected status played some part in motivating a persecutor but that it played more than a superficial or minor part. This standard is higher than the one previously imposed by much of the relevant case law, which required a showing that the persecution be “at least in part” on account of a protected ground and that the applicant provide some evidence of the persecutor’s motivation, direct or circumstantial.\footnote{INS v. Elias-Zacarias, 502 U.S. 478 (1992).} The BIA clarified this standard in \textit{Matter of J–B–N– & S–M–},\footnote{Matter of J–B–N– & S–M–, 24 I&N Dec. 208 (BIA 2007).} stating that “an applicant does not bear the unreasonable burden of establishing the exact motivation of a persecutor where different reasons for actions are possible.” The “one central reason” standard applies both to asylum and withholding of removal.\footnote{Matter of C–T–L–, 25 I&N Dec. 341 (BIA 2010).} However, a persecutor may have mixed motives for inflicting harm on an applicant.\footnote{Shaikh v. Holder, 702 F.3d 897, 901 (7th Cir. 2012); Mohideen v. Gonzales, 416 F.3d 567, 570 (7th Cir. 2005).} The Real ID Act modifies mixed-motive cases only to require that among that mix of motives, a protected ground must be a central reason, although that ground may be a secondary (or tertiary, etc.) reason and still justify asylum.\footnote{Parussimova v. Mukasey, 555 F.3d 734, 740-41 (9th Cir. 2009).}
Corroboration

The REAL ID statute also states, “Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” 50 Under this standard, the applicant must produce evidence to corroborate his or her testimony if the IJ requires it and if it can reasonably be obtained. An IJ must identify the particular pieces of missing, relevant documentation, and show that the documentation at issue was reasonably available to the respondent, before concluding the asylum claim has not been established. 51

Credibility Determinations

The REAL ID statute specifies that the standard to be applied is the totality of the circumstances, where the adjudicator may look to demeanor, candor, responsiveness, plausibility, consistency, or any other relevant factor. 52 The consistency of the evidence must be examined based on comparisons between any written and oral statements, consideration of whether they were made under oath or not, and consideration of the circumstances in which the statements were made. The internal consistency of a statement, and its consistency with other evidence of record, shall be considered. Inaccuracies and falsehoods in such statements will be weighed in such a credibility determination. Significantly, even an inconsistency, inaccuracy, or falsehood that does not go to the heart of the applicant’s claim can be considered in making a credibility determination. 53 Before REAL ID, incidental or minor inconsistencies that did not go to the heart of the application would not destroy an otherwise strong asylum or withholding claim. In Matter of J–Y–C–, 54 the BIA interpreted this provision of REAL ID and upheld a negative credibility determination by an IJ despite the fact that the inconsistencies did not go to the heart of the claim. The First Circuit Court of Appeals, in Qun Lin v. Mukasey, held that even though the inconsistencies did not go to the heart of the respondent’s claims, the record supported a finding that there were internal contradictions in the respondent’s testimony and that was sufficient to establish negative credibility. 55 However, the Ninth Circuit Court of Appeals has since reiterated that in the absence of a negative credibility finding, the applicant’s factual contentions must be considered to be true. 56

Burden of Proof

On the issue of the applicant’s testimony and burden of proof, REAL ID states that testimony may be sufficient without corroboration, “but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.” 57

52 See INA §208(b)(1)(B)(iii).
53 Id.
55 Qun Lin v. Mukasey, 521 F.3d 22 (1st Cir. 2008).
56 Cole v. Holder, 659 F.3d 762, 770 (9th Cir. 2011).
Judicial Review

REAL ID also altered judicial review provisions. See Chapter Thirteen for a summary of these changes. 58

Elements of Persecution

Economic Refugee

Economic reasons alone usually cannot form the basis for asylum. A claim will be denied where the exclusive motive for coming to the United States is to improve one’s economic lot or to obtain better employment. However, an applicant may establish a claim where the government has deliberately imposed a substantial economic disadvantage and this disadvantage was imposed on account of one of the five statutory grounds. 59

Persecution by Groups That the Government Cannot Control

Persecution can be imposed either by the government or by a group that the government is unwilling or unable to control. 60 Cases decided under the Refugee Act of 1980 61 have been consistent in applying this principle. Accordingly, it has been recognized that, for example, that the persecution of an individual by Muslims because he proselytized as a Baptist preacher in predominantly Muslim areas of Ghana supported an application for political asylum. 62

Internal Flight Alternative

The final asylum regulations state that an asylum seeker is deemed not to have a well-founded fear of persecution if the applicant could avoid persecution by relocating internally and if, under all the circumstances, it would be reasonable to expect her or him to do so. 63 Where the persecutor is a non-state actor, the asylum seeker has the burden of showing it would not be possible to relocate. 64 Where the persecutor is a state actor, it is presumed that internal relocation would not be reasonable unless U.S. Immigration and Customs Enforcement (ICE) establishes by a preponderance of the evidence that it would in fact be rea-

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59 See Baballah v. Ashcroft, 367 F.3d 1067, 1076 (9th Cir. 2004) (holding severe harassment, threats, violence and discrimination made it virtually impossible for Israeli Arab to earn a living); Gonzalez v. INS, 82 F.3d 903, 910 (9th Cir. 1996) (holding that having suffered economic persecution in addition to threats of physical violence established a well-founded fear of persecution); Matter of T–Z–, 24 I&N Dec. 163 (BIA 2007) (discussion of when economic harm would amount to persecution).

60 Khattak v. Holder, 704 F.3d 197 (1st Cir. 2013).


62 Afrive v. Holder, 613 F.3d 924 (9th Cir. 2010)

63 8 CFR §208.13(b)(3).

64 Id. Compare Da Silva v. Ashcroft, 394 F.3d 1 (1st Cir. 2005) with Sepulveda v. U.S. Att’y Gen., 378 F.3d 1260 (11th Cir. 2005) (finding that the applicant had not provided affirmative evidence that internal relocation could prevent persecution by non-state guerrilla groups) opinion withdrawn and replaced by 401 F.3d 1226 (11th Cir. 2005) (finding the JI’s determination that internal relocation was sufficient to avoid persecution was at odds with the evidence upon which that finding was based, given the guerilla group’s operation throughout the country).
sonable. In *Matter of M–Z–M–R–*, the BIA found that in assessing an asylum applicant’s ability to relocate internally, the IJ must evaluate whether, based on all the circumstances, it would be reasonable to expect the applicant to relocate and whether there was an area of the country where circumstances were substantially better.

**Persecution vs. Prosecution**

Prosecution, the neutral application of criminal statutes, is not protected by immigration law unless it crosses the line from legitimate investigation to persecution, serious harm, or suffering that is inflicted because of a characteristic of the victim. For example, in Burma, Aung San Suu Kyi, leader of the opposition to military rule, was arrested and charged with violating the rules of her house arrest; in Zimbabwe, human rights lawyer Alec Muchadehama was arrested for obstruction of justice. Mr. Muchadehama’s “crime” was speaking to the court clerk in an attempt to free three political prisoners. While punishment for refusing to serve in the national army has been considered prosecution, a disproportionately severe punishment might be persecution. The general rule is that fear of prosecution is not enough to support a claim of asylum. Punishments that are inflicted for expressions of political opinion, race, religion, nationality, or social group membership are persecution.

**Coercive Family-Planning Programs**

In 1989, the BIA, in *Matter of Chang*, determined that violations of China’s coercive family-planning policy did not give rise to a claim of asylum. Fundamental to this ruling was the BIA’s finding that China’s “one couple, one child” family program was not specifically designed to punish individuals on account of a ground that is recognized in the refugee definition, but instead was aimed at containing China’s burgeoning population crisis. As such, the law complained about was not discriminatory, but was based instead on putatively legitimate public policy.

This long-standing interpretation was overturned with IIRAIRA in 1996. The definition of “refugee” in INA §101(a)(42) now contains language stating that a person who was forced to terminate a pregnancy or undergo involuntary sterilization, or who was persecuted for having failed to comply with a coercive population control program, shall be deemed to have been persecuted on account of political opinion. Similarly, an individual shall be deemed to have a well-founded fear of persecution on account of political opinion upon showing that he or she would be made the subject of involuntary sterilization or forced abortion, or otherwise punished for failing to comply with a coercive population control program.

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65 8 CFR §208.13(b)(3)(ii); see also *Singh v. Moschorak*, 53 F.3d 1031 (9th Cir. 1995); *Mazariegos v. United States AG*, 241 F.3d 1320 (11th Cir. 2001) at 1326, note 3.
After IIRAIRA amended the definition of refugee to include people with asylum claims based on opposition to coercive population control policies, the BIA issued its decision in *Matter of X–G–W–*, allowing the reopening of proceedings to pursue asylum claims based on coercive population control policies. Under this decision, the BIA would grant reopening where the respondent presented persuasive evidence of persecution based on China’s “one couple, one child” policy, and where the BIA previously had denied the asylum based on *Matter of Chang*. The decision in *Matter of X–G–W–* in effect resulted in an exception to the time-and-number limits on motions to reopen for people with asylum claims that were based on coercive population control policies. Four years later, in *Matter of G–C–L–*, the BIA stated that it was ceasing the policy started in *Matter of X–G–W–*, effective 90 days after issuance of the decision. Therefore, the policy of granting untimely motions to reopen to apply for asylum based on coercive population control policies ended on July 9, 2002.

In *Li v. Ashcroft*, the Ninth Circuit Court of Appeals held that a forced pregnancy examination constituted persecution, given the timing and physical force involved in the procedure. The BIA held in *Matter of C–Y–Z–* that a spouse of a person who suffered a forced abortion or sterilization could make a claim for asylum as well. In *Matter of S–L–L–*, the BIA clarified its holding in *Matter of C–Y–Z–* and held that applicants who sought asylum based on the forced sterilization or abortion of a spouse must be legally married to that person under Chinese law. Also, the asylum applicant must not have encouraged or supported a spouse’s abortion or sterilization.

**Neutrality and Imputed Political Opinion**

A deliberate choice not to side with any political faction may also demonstrate political opinion. Considerable case law has developed on the question of what constitutes political opinion where the country of putative persecution is enmeshed in civil war. The Ninth Circuit long held that fear of retaliation because of a reluctance to be recruited by guerrillas would give rise to an asylum claim on one of two theories:

- The reluctance to be conscripted would give rise to an inference that the applicant was politically neutral, an expression of political opinion for which the guerrillas would punish him or her; or
- The guerrillas would *impute* to the applicant an opinion of hostility to the guerrillas for which they would punish him or her. The U.S. Supreme Court has ruled, however, that such a set of facts does not necessarily make out a claim.

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74 *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc).
78 *Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997).
The theory of imputed political opinion views the situation from the perspective of the persecutor. Essentially, the doctrine asserts that, irrespective of the political opinions actually maintained by the applicant, if the persecutor views the victim as possessing a political opinion, then he or she will be deemed to possess a political opinion as a matter of law.

A clear example of the doctrine in practice is the case of Desir v. Ilchert.79 In Desir, the applicant had been threatened by the Ton Ton Macoutes as the result of his refusal to cooperate in extortion demands. The Ton Ton Macoutes treated the applicant’s refusal as an act of political insubordination. The Ninth Circuit held: “We must view Desir as possessing a political opinion because his persecutors, the Ton Ton Macoutes, both attributed subversive views to Desir and treated him as a subversive.” Similarly, the U.S. Court of Appeals for the Seventh Circuit has recognized that persecution may result when the persecutor attributes a political opinion to the asylum applicant.80

The doctrine of imputed or attributed political opinion may arise in a number of contexts. It is most important to note that where there is little or no evidence of the applicant’s political opinion, but an abundance of evidence regarding the persecutor’s intent and willingness to ascribe views to the applicant, attributed or imputed political opinion is an appropriate way in which to present the applicant’s claim.

In Ruqiang Yu v. Holder, the U.S. Court of Appeals for the Second Circuit considered whether the harm an applicant suffered at the hands of the police following his activities to expose corruption in China constituted persecution on account of political opinion and imputed political opinion.81 The respondent had complained about workers not receiving their pay because of governmental corruption and the Chinese government, by arresting respondent and jailing him for fourteen days, viewed his complaint as a political challenge.82 The BIA also considered opposition to corruption in the context of imputed political opinion.83

On the other hand, the imputation of an opinion to an asylum applicant may not be inferred where there are other nonpolitical explanations for the persecutor’s conduct. It also would seem that if neutrality is to be the theory on which the asylum case is presented, that the applicant must have expressed, while in his or her home country, a principled position of neutrality. It also should be shown that this position will trigger persecution in the foreign national’s country, as evidenced by the experience of others who are similarly situated.

In Matter of S–P–,84 the BIA determined that extrajudicial punishment was tantamount to persecution based on imputed political opinion, rather than mistreatment arising from acts committed by the persecutor.

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79 Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988), but cf. Dorisme v. U.S. Att’y Gen., 203 Fed. Appx. 945 (11th Cir. 2006), (holding that under Sanchez v. U.S. Att’y Gen., 392 F.3d 434, 437–38 (11th Cir. 2004), noncooperation or participation was not a sufficient basis from which to establish a political opinion or imputed political opinion for which the applicant could claim persecution, citing INS v. Elias-Zacarias, 502 U.S. 478 (1992) for support).

80 Nabkibuka v. Gonzales, 421 F.3d 473 (7th Cir. 2005); Tolasa v. Ashcroft, 384 F.3d 906 (7th Cir. 2004).

81 Ruqiang Yu v. Holder, 693 F.3d 294, 299 (2d Cir. 2012).

82 Id.


out of intelligence gathering. Distinguishing its earlier decisions, the BIA ruled that an asylum seeker is not under a burden to establish the exact motivation of the persecutor, but only to adduce some evidence showing that persecution on one of the protected grounds is reasonable. In that case, the BIA also pointed to the criteria it would consider in determining whether serious harm had been imposed on account of an enumerated ground:

- Indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct (e.g., statements or actions by the perpetrators or abuse out of proportion to nonpolitical ends);
- Treatment of others in the population who might be confronted by government agents in similar circumstances;
- Conformity to procedures for criminal prosecution or military law, including developing international norms regarding the law of war;
- The extent to which antiterrorism laws are defined and applied to suppress political opinion, as well as illegal conduct; and
- The extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse.

**Conscription by the Government**

Conscription by the government, or a fear thereof, does not itself give rise to a claim of persecution. If the applicant can show that punishment will be disproportionate, however, a claim of asylum may be sustained. In addition, if the type of military action that the application is avoiding is condemned by the international community as contrary to basic rules of conduct, punishment for desertion or draft evasion could be considered persecution.

If the nation from which the applicant seeks asylum status is an egregious humanitarian law violator, an asylum applicant may be successful if he or she establishes the following:

- The military practices complained of constitute official policy of government;
- The applicant would be singled out for punishment for refusal because of his or her political beliefs;
- The acts that are said to be condemned by the international community have been so adjudged by international governmental bodies; and
- The applicant would be subject to disproportionate and severe punishment.

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Legacy INS’s *Basic Law Manual*\(^{87}\) also states that violations of the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War (Geneva Convention)\(^{88}\) may provide the basis for an asylum claim. The *Basic Law Manual* does not specify how such violations are to be proved, suggesting that any probative evidence, including reports by private human rights groups, will be relevant. The Geneva Convention contains humanitarian rules prohibiting acts of war against noncombatants.

The Ninth Circuit has been far more willing to entertain asylum claims that are premised on refusal to be inducted into the army for reasons of conscience. In this respect, the Ninth Circuit has upheld such claims in the following circumstances:

- Members of the Jehovah’s Witnesses who showed they would be punished as the result of their conscientious religious aversion to military service generally were granted asylum;\(^{89}\) and
- Persons who showed conscientious aversion to inhuman acts—in this case, paid assassination—were eligible for asylum.\(^{90}\)

### Membership in a Particular Social Group

Membership in a particular social group now constitutes one of the most vital and flexible bases for refugee status. Although the BIA originally interpreted this category in a restricted manner, the “particular social group” basis of persecution is now the foundation for many of the most interesting cases being decided by the BIA and the courts.

In *Matter of Acosta*,\(^{91}\) the BIA set forth its formulation of the particular social group rubric. According to the BIA, a particular social group either is based on an immutable characteristic (something the applicant cannot change) or one that is so fundamental to the applicant’s identity or conscience that he or she ought not be required to change it. The BIA also included certain past associations (*i.e.*, prior military service or the ownership of land) that, because they are viewed as being linked permanently to the applicant, will, under specific conditions, satisfy the particular social group criteria.

Under this definition, the family has been held to be a particular social group.\(^{92}\) Homosexuals who have been targeted in the country of claimed persecution also may qualify under the particular social group category.\(^{93}\) And, in *Matter of H–*,\(^{94}\) the BIA deter-

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\(^{89}\) *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), vacated and remanded by *INS v. Canas-Segovia*, 502 U.S. 1086 (1992) in light of *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992) (finding, on reconsideration, that compulsory conscription was not religious persecution solely because of applicant’s religious objections to military service, but finding the applicant could claim fear of persecution because of his imputed political beliefs).

\(^{90}\) *Barranza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990), but cf. *Gomez-Mejia v. INS*, 56 F.3d 700 (5th Cir. 1995) at note 1 (dismissing *Barranza-Rivera* as persuasive authority for the proposition cited).


\(^{92}\) *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993).


mined that members of the Darood clan and of the Marehan sub-clan in Somalia are members of a particular social group, and can claim eligibility for asylum under this category. In contrast, the BIA held that a group of “former noncriminal drug informants working against the Cali drug cartel” did not have the requisite social visibility to constitute a particular social group. In so holding, the BIA identified the “social visibility of the members of a claimed social group” as an important consideration in identifying the existence of a particular social group.

In 2006, in its decision, Matter of C–A–, the BIA reinterpreted the elements of membership in a social group and expanded the requirements to include “social visibility” and “particularity.” This case involved a group of noncriminal drug informants who were working against the Cali cartel. The BIA held that because the group was not highly visible and recognizable by others, it did not have the requisite social visibility or particularity. Subsequent BIA cases, Matter of S–E–G–, and Matter of E–A–G–, imposed the social visibility and particularity tests on gang members refusing gang recruitment resulting in the denial of asylum in these cases.

Several circuit courts of appeals have accepted the BIA’s social visibility and particularity criteria. However, the U.S. Courts of Appeals for the Third and Seventh Circuits have rejected social visibility as an unreasonable interpretation; the Third Circuit Court of Appeals also rejected the particularity requirement as simply a different articulation of social visibility. The Ninth Circuit Court of Appeals, although it did not reach the ultimate question of whether the criteria are themselves valid, held that the BIA failed to evaluate its own standards properly in a case involving an asylum applicant who had testified in a criminal trial against members of a gang who killed her father in El Salvador.

Membership in a particular social group has served as the basis for the emerging gender-based persecution claims now dominating much of modern asylum law. In Perdomo v. Holder, the Ninth Circuit Court of Appeals held that the BIA decision finding that “all women in Guatemala” could not constitute a cognizable social group was contrary to

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96 See also Matter of E–A–G–, 24 I&N Dec. 591 (BIA 2008) (holding that a young Honduran male failed to establish that he was a member of a particular social group of “persons resistant to gang membership,” as the evidence failed to establish that members of Honduran society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group); Matter of S–E–G–, 24 I&N Dec. 579 (BIA 2008) (holding that neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities nor the family members of such Salvadoran youth constitute a particular social group).
100 Gaitan v. Holder, 671 F.3d 678, 681 (8th Cir. 2012); Rivera-Barrientos v. Holder, 666 F.3d 641, 649-52 (10th Cir. 2012); Scatambuli v. Holder, 558 F.3d 53–60 (1st Cir. 2009).
101 Valdiviezo-Galdamez v. At’t’y Gen.of U.S., 663 F.3d 582, 606–07 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009).
102 Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013).
Ninth Circuit law and the BIA’s own decision in *Matter of Acosta*, 19 I&N Dec 211, 233 (BIA 1985). The court held that the size and breadth of a group alone does not preclude a group from qualifying as a social group. In *Fatin v. INS*, the Third Circuit ruled that the applicant’s claim that she would be persecuted simply because she is a woman may be sufficient to satisfy the requirements for asylum.

In *Safaie v. INS*, the applicant alleged persecution arising from her opposition to the Khomeini regime and its treatment of women. The court found that the particular social group under which the applicant sought to establish her claim (Iranian women) was overly broad, and that no fact finder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender. The court did conclude, however, that the particular social group definition might well be satisfied by a formulation that included women who refuse to conform and who chose opposition even when they would suffer severe consequences.

The BIA, in its seminal case on female genital mutilation (FGM), *Matter of Kasinga*, found that FGM constituted persecution within the meaning of the refugee standard. The BIA concluded that the claimant had established that she had a well-founded fear of persecution on account of a statutory ground—namely, membership in a particular social group. The BIA defined the protected class as young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by their tribe, and who oppose the practice.

In *Matter of A–T–*, the BIA reconsidered its FGM ruling following the U.S. attorney general’s vacation of the original decision. In its second *Matter of A–T–* decision, the BIA concluded that the applicant’s evidence that she had been subjected to a severe form of FGM and expressed her opposition to the practice was sufficient to establish past persecution.

In *Matter of A–K–*, the BIA held that an asylum applicant cannot prove fear of future persecution based solely on the fear that the applicant’s daughter will suffer future persecution in the home country. However, the BIA left open the possibility of humanitarian asylum—under 8 CFR §208.13(b)(1)(ii)(A)—for persons who have suffered FGM in aggravated circumstances, because a grant in such case would not require the applicant to prove likelihood of future persecution.

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103 Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010).
104 *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1994). See also *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002) (finding that Christian non-conforming women could constitute a group subject to persecution in Iran but that the applicant failed to demonstrate a reasonable fear of persecution).
105 *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994).
107 *Matter of A–T–*, 24 I&N Dec. 4 (BIA 2009) (the BIA’s second decision was in contrast to its first, *Matter of A–T–*, 24 I&N Dec. 296 (BIA 2007), which held that an applicant who already suffered female genital mutilation (FGM) cannot prove future persecution because the FGM that she suffered could not occur twice.)
Reading these cases together, it appears that gender alone is generally not sufficient to establish a conventional gender-based asylum claim that is based on a discriminatory cultural or social code. However, where the asylum seeker can show that he or she openly defied that code, and that serious harm will flow as a result, the applicant can make out a claim of persecution either based on the political opinion ground or as the member of a particular social group.

These gender-based claims continue to develop in federal case law. In granting asylum to a Chinese applicant who fled a proposed forced marriage, the Second Circuit Court of Appeals found that “women who have been forced into marriage and who live in a feudal community in China where forced marriage is condoned” did constitute a particular social group. In articulating this social group, the Second Circuit noted that this group “shared more than a common gender.” The Supreme Court vacated the Second Circuit’s decision in Gao and remanded the case to the Second Circuit for further consideration in light of Gonzales v. Thomas.

Another growing class of gender-related claims arises in the area of household domestic violence. In Matter of L.R., the government agreed that in some cases a victim of domestic violence may be a member of a cognizable particular social group and be able to demonstrate that her abuse was or would be persecution on account of such membership. A number of IJs have written strong decisions granting asylum, under limited conditions, to women who have been subject to domestic abuse and other violations of protected human rights. One example of such adjudications has been Matter of A– and Z–, where the IJ awarded asylum to a Jordanian woman based on the fact that her husband mistreated her by beating her in front of friends, seeking to control her activities, and isolating her. The IJ found the applicant to be a member of a particular social group, consisting of women who espouse western values and are unwilling to live their lives at the mercy of their husbands, their society, or their government.

The BIA case Matter of R–A– illustrates the difficult progress made in the jurisprudence on asylum and domestic violence. After a 14-year battle involving the BIA overturning an IJ’s grant of asylum, an attorney general (AG) order requiring the BIA to reconsider, and

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100 Gao v. Gonzales, 440 F. 3d 62 (2d Cir. 2006).
111 Id.
112 Gonzales v. Thomas, 547 U.S. 183 (2006) (vacating the Ninth Circuit’s decision regarding family as a social group and directing the Ninth Circuit to remand to the agency to permit the agency to make a legal determination regarding social group).
a remand to the IJ, the applicant was finally granted asylum in December 2009. Notwithstanding this tortuous path, a handful of gender-related asylum claims, some based on domestic violence, have been granted by the asylum office, IJs, and the BIA. Advocates also may view summaries of gender-related asylum decisions on the Center for Gender and Refugee Studies website.

Without final rules, future asylum claims based on domestic violence should look to the DHS brief in Matter of L.R. to determine the government’s position in this area of asylum law. For clients who are in removal proceedings and have no other options, asylum may well be a remedy worth pursuing. For clients who are not in proceedings but are facing the one-year filing deadline, it will depend on the strength of their case. They may wish to go ahead and file, recognizing that it will be an uphill battle. It is very important that clients make this decision themselves, and that their attorneys and representatives fully advise them of the risks and consequences.

Another emerging area of particular social group asylum cases are claims based on sexual orientation and sexual identity. In Matter of Toboso-Alfonso, the BIA concluded that a Cuban homosexual man established membership in a particular social group. Similarly, the circuit courts have recognized that persecution on account of sexual orientation is the basis for asylum. The Eleventh Circuit, in Ayala v. U.S. Attorney General, held that the BIA erred in finding that a Venezuelan gay, HIV-positive applicant who had been beaten and abused by the authorities had not established past persecution. The U.S. courts of appeals for the Seventh, Ninth, Tenth, and other circuits also have granted asylum cases involving persecution based on sexual orientation and identity.

Proposed Regulations

The proposed regulations have been pending since December 7, 2000. The lengthy delay in the issuance of the final rules has caused practitioners to rely on the DHS brief in Matter of L.R. for insight into DHS’s perspective on gender-based persecution.

117 See discussion of Matter of R–A– at http://cgrs.uchastings.edu/campaigns/alvarado.php. DHS itself filed a brief with the attorney general, John Ashcroft, in Matter of R–A–, stating its support for Ms. Alvarado’s claim, although it urged Mr. Ashcroft to dispose of the case without a detailed precedent-breaking decision.


122 Ayala v. U.S. Att’y Gen., 605 F.3d 941 (11th Cir. 2010).

123 Rzakane v. Holder, 562 F.3d 1283 (10th Cir. 2008); Moab v. Gonzales, 500 F.3d 656 (7th Cir. 2007); Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).
The proposed regulations would codify the BIA’s ruling in *Matter of Kasinga*\(^{124}\) that a subjective intent to harm or punish, although usually present, is not required for persecution to exist. Rather, the asylum seeker must demonstrate that:

- The harm or suffering is objectively serious; and
- It has been experienced subjectively by the applicant as serious harm.

Persecution normally relates to actions by government authorities. It also may emanate from groups or individuals the government is unable or unwilling to control. In evaluating whether the government is unable or unwilling to control the infliction of harm or suffering by a non-state actor, the proposed rules call on the IJ or asylum officer to determine whether the government has taken reasonable steps to control the infliction of harm or suffering, and whether the applicant has reasonable access to state protection. The applicant has the burden of proving that the harm or suffering was inflicted by the government or an entity it was unable or unwilling to control. Evidence can include:

- Government complicity with respect to the infliction of harm or suffering;
- Attempts by the applicant to obtain protection by government officials and the government’s response to such efforts;
- Official action that is perfunctory;
- A pattern of government unresponsiveness;
- General country conditions and the denial of services;
- Government policies regarding the harm at issue; and
- Any steps the government has taken to prevent such harm or suffering.

The applicant must demonstrate that the persecution was inflicted on account of the applicant’s race, religion, nationality, membership in a particular social group, or political opinion. The Supreme Court held in *Elias Zacarias v. INS*\(^{125}\) that the applicant must present evidence that the persecutor seeks to harm the victim because of the victim’s possession of a protected characteristic. This decision has raised difficult interpretive issues. The proposed rule seeks to provide guidance in this area.

In recent case law, both the BIA and the federal courts have recognized that a persecutor may have mixed motives and that the on account of requirement is met if the persecutor acted at least in part because of a protected characteristic. The proposed rules would allow for the possibility of mixed motives, but require that “the applicant’s protected characteristic [be] central to the persecutor’s motivation to act against the applicant.” REAL ID,\(^{126}\) enacted on May 11, 2005, already has narrowed the mixed-motive doctrine in a similar way, stating that an applicant “must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”

The proposed rules also provide that an applicant may satisfy the “on account of” requirement if the persecutor acts against the victim on account of what the persecutor per-

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ceives to be the applicant’s race, religion, nationality, membership in a particular social
group, or political opinion. The rule thus would codify the doctrine of imputed political
opinion and extend it to the other grounds. Many courts and the BIA already have recog-
nized that each of the grounds can be imputed.

In the first decision in Matter of R–A–, the BIA found that the violence against the
applicant was not on account of a particular social group because there was no evidence
that the applicant’s husband would harm any other member of the asserted social group.
In other words, there was no evidence that the abuser would seek to harm other women
living with abusive partners.

The proposed rules seek to modify the BIA’s former position in Matter of R–A– by
providing that “[e]vidence that the persecutor seeks to act against other individuals who
share the applicant’s characteristic is relevant and may be considered but shall not be re-
quired.” The proposed rules also would codify the BIA’s decision in Matter of Acosta by
providing that “a particular social group is composed of members who share a com-
mon, immutable characteristic, such as sex, color, kinship ties, or past experience, that a
member either cannot change or that is so fundamental to the identity or conscience of
the member that he or she should not be required to change it.” The proposed rules are
groundbreaking in that they explicitly recognize gender as the basis for membership in a
particular social group.

The rules underscore, however, that a particular social group must exist inde-
dependently of the persecution. For example, in domestic violence cases, a social group
could not be defined as “women who have been battered.”

If past experience defines a particular social group, the rules provide that the expe-
rience must be one that, at the time it occurred, the member either could not have changed
or should not have been required to change. For example, the rules indicate that past
membership in a violent gang would not qualify because the applicant could have re-
frained from joining. On the other hand, an applicant’s marital status or involvement in
an intimate relationship could be considered an immutable characteristic if evidence indi-
cates that the victim reasonably could not be expected to leave the marriage or relation-
ship.

**Particular Social Groups Under the Proposed Rules**

The rules provide that the following factors may be considered in determining wheth-
er a particular social group exists:

- Members of the group are closely affiliated with each other;
- Members are driven by a common motive or interest;
- Voluntary associational relationship exists among members;
- The group is recognized as a societal faction or recognized segment of the popula-
tion;

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127 Matter of R–A–, 24 I&N Dec. 629 (BIA 2008); Matter of R–A–, 22 I&N Dec. 906 (BIA 1999), va-
cated and remanded for reconsideration (AG 2001).
128 Id.
- Members view themselves as members of the group; or
- The society distinguishes members of the group for different treatment or status.

The first three factors are from the Ninth Circuit’s decision in *Sanchez Trujillo v. INS*, which held that a particular social group implied a collection of people closely affiliated with each other who were actuated by some common impulse or interest. The last three factors are from the BIA’s decision in *Matter of R–A–*. The BIA found no evidence that the claimed particular social group in the case—Guatemalan women intimately involved with male partners who believe women should live under male domination—was a group recognized or understood to be a societal faction, or that victims of spousal abuse viewed themselves as members of this group.

The proposed rules indicate that, although each of these factors may be considerations, they are not prerequisites. The proposed regulations also suggest that it would be relevant to consider evidence of societal attitudes toward group members. In asylum claims based on domestic violence, for example, do societal institutions—i.e., the courts and police—fail to intervene because they view domestic violence as a private family matter? Do they offer fewer protections or benefits to women trapped in abusive relationships than to other victims of crimes?

**Exercise of Discretion**

Asylum is a discretionary remedy. The determination that an applicant is statutorily eligible for asylum is the first step in the process. Then the attorney general must, by a proper exercise of discretion, determine whether to grant that relief. Under prior law, if the applicant sought entry with false documents, it was considered to be a basis for discretionary denial. Now, however, the decision-maker is obligated to take into account “the totality of the circumstances and actions of the foreign national in his flight from the country in which he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted.” In conducting this analysis, the BIA has directed that the “danger of persecution should outweigh all but the most egregious factors.”

In *Matter of A–H–*, the attorney general denied asylum in the exercise of discretion to the exiled leader of an Algerian group associated with other groups that persecuted others and committed acts of terrorism in Algeria. The AG found that it was inconsistent for the United States to actively oppose persecution and terrorism on the one hand, and provide safe haven to those with connections to such actions on the other.

In the Ninth Circuit, the BIA must consider both favorable and unfavorable factors, including the severity of the past persecution suffered, in exercising its discretion.

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130 *Sanchez Trujillo v. INS*, 801 F.2d 1572 (9th Cir. 1986).
132 *Navas v. INS*, 217 F.3d 646 (9th Cir. 2000).
135 *Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995).
Ineligible Classes

Certain classes of foreign nationals are ineligible for asylum and withholding of removal.

Ineligible for Asylum

Under INA §208(b)(2)(A), the following persons are ineligible for asylum:

- Persons who have participated in the persecution of others;
- Persons who having been convicted of a particularly serious crime and who constitute a danger to the community of the United States (foreign nationals who have been convicted of an aggravated felony will be considered to have been convicted of a particularly serious crime);
- Persons who have committed a serious nonpolitical crime outside the United States;
- Persons who can reasonably be regarded as a security risk to the United States;
- Persons who are inadmissible on security grounds or are removable as terrorists; and
- Persons who have been firmly resettled in a third country before coming to the United States.

Persons Who Have Participated in the Persecution of Others

A person who “ordered, incited, assisted, or otherwise participated in the persecution” of any person on account of one of the five grounds may not be granted asylum. However, there must be an evaluation and determination of both personal involvement and purposeful assistance in order to ascertain culpability. In Negusie v. Holder, the Supreme Court held that the BIA failed to exercise its authority to interpret the statute and misapplied Fedorenko as mandating that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes. The Court remanded, explaining that the BIA must interpret the statute in the first instance to determine whether the statute permits such an interpretation based on a different course of reasoning. The Second Circuit Court of Appeals has held that a nurse employed in a Chinese state general hospital that sometimes performed forced abortions pursuant to China’s family planning policy did not fall under the persecutor-of-others bar to asylum.

Persons Inadmissible on Security Grounds or Removable as Terrorists

If a person is ineligible to apply for asylum because he or she is inadmissible as a terrorist, INA §208(b)(2)(A)(v) sets forth the prohibition and refers specifically to the ground of inadmissibility in INA§212(a)(3)(B)(i)(II) (i.e., terrorist activities).

INA §212(a)(3)(B)(i)(II), in turn, provides that a foreign national is inadmissible if the consular officer or the immigration officer knows, or has a reasonable ground to believe, that he or she is engaged, or is likely to engage after entry, in any terrorist activity.

In addition to the prohibition against granting asylum to terrorists, the INA includes a similar provision to prevent granting withholding of removal to terrorists. INA

137 Yan Yan Lin v. Holder, 584 F.3d 75 (2d Cir. 2009).
§241(b)(3)(B)(iv) specifically restricts granting withholding where “there are reasonable grounds to believe that the foreign national is a danger to the security of the United States.”

In Matter of U–H–, an applicant for asylum and withholding of removal argued that §412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 set a new and higher standard for the government to determine whether a person was ineligible for asylum and withholding of removal pursuant to INA §§208(b)(2)(A)(v) and 241(b)(3)(B)(iv).

Looking at the plain language of the statute, the BIA determined that §412 did not establish a new or higher standard for determining whether an applicant for asylum and withholding of removal was ineligible for such relief. Instead, the BIA pointed out that §412 merely created another avenue for the AG to detain suspected terrorists. In other words, the reasonable ground to believe standard remained the same as before the enactment of the USA PATRIOT Act.

The BIA also noted, however, that the reasonable ground to believe standard in §§208(b)(2)(A)(v), 212(a)(3)(B)(i)(II), and 241(a)(3)(B)(iv) were all the same, and that the standard was “akin to the familiar probable cause standard.” The BIA further stated that the reasonable ground to believe “may be formed if the evidence is sufficient to justify a reasonable person in the belief that the foreign national falls within the proscribed category.”

In Matter of S–K–, the BIA held that an applicant’s monetary contribution over an 11-month period to the Chin National Front—identified by statute as a terrorist organization—was substantial enough to constitute material support to a terrorist organization under INA §212(a)(3)(B)(iv)(VI), thus barring the applicant from both asylum and withholding of removal. The BIA held that the language of INA §212(a)(3)(B) did not permit consideration of certain factors—i.e., the democratic goals of the organization, or the nature of the regime it opposes—in determining whether an organization is a terrorist organization. The BIA also stated that it did not consider a foreign national’s intent in making a donation, or the intended use of the donation, in determining whether the foreign national has provided material support.

In a follow-up precedent decision, Matter of S–K–, the BIA discussed INA §212(a)(3)(B) and the effect of the passage of the Consolidated Appropriations Act (CAA) of 2008 on December 26, 2007, which stated that certain groups shall not be considered to be a terrorist organization on the basis of any act or event occurring before December 26, 2007. Although the respondent in the case was deemed to have provided material support to the Chin National Front/Chin National Army, this group was not considered a terrorist organization after passage of the CAA, so the respondent was no longer ineligible for asylum.

based on the material support to terrorism bar. The BIA added, however, that its decision in *Matter of S–K–* 143 still was the law with respect to the material support bar to asylum and withholding of removal. Therefore, persons who have given support to other organizations deemed to be terrorist organizations, regardless of the level of support, are inadmissible under this ground. 144

In *Malkandi v. Mukasey*, the Ninth Circuit Court of Appeals reviewed a case involving a danger to national security grounds based on the asylum applicant’s documented connection with, and his role in facilitating medical documentation for, al Qaeda. 145 The court held that the government had to show that there were reasonable grounds, akin to probable cause, for believing that the applicant posed a danger to the United States. The IJ’s finding, which was supported by multiple, substantial references in the record, coupled with concrete evidence of the immigrants’ contacts with terrorists, was that the government had established the reasonable grounds required for the security ground bar. 146

**Firm Resettlement**

The regulatory provision for determining firm resettlement replaces the common law discretionary consideration laid out in *Matter of Pula*, 147 regarding whether a respondent has found a safe haven in another country. 148 The regulations define firmly resettled as the foreign national having been offered permanent residence (or its equivalent) in a third country. 149

In examining whether the applicant was resettled, it is important to determine whether the applicant was offered permanent resettlement, restricted residing in specific locations, allowed to attend schools or obtain employment, threatened with repatriation, or otherwise limited in establishing a life in a third country.

A presumption of firm resettlement can be rebutted by a showing that the asylum applicant remained in the third country “only as long as was necessary to arrange onward travel” and “did not establish significant ties in that country.” 150 In *Matter of D–X– & Y–Z–*, the respondent obtained status to remain in Belize, traveled to the United States, and then voluntarily returned to Belize. The BIA found that the applicant did remain in Belize only as long as necessary to arrange travel to the United States. 151 An asylum applicant also can rebut evidence of a firm resettlement offer by showing by a preponderance of the

144 For a detailed discussion of the changes in this ground, consult Human Rights First, “Refugees at Risk Under Sweeping ‘Terrorism’ Bar,” available with other information and relevant documents, at www.humanrightsfirst.org/asylum/asylum_refugee.asp.
145 *Malkandi v. Mukasey*, 544 F.3d 1029 (9th Cir. 2008).
146 Id.
148 *Tandia v. Gonzales*, 437 F.3d 245 (2d Cir. 2006); *Andrasian v. INS*, 180 F.3d 1033 (9th Cir. 1999) (explaining that 8 CFR §208.15 replaced the *Matter of Pula* standard).
149 8 CFR §208.15.
151 Id.
evidence that such an offer has not been made or that the applicant’s circumstances would render him or her ineligible for such an offer of permanent residence.152

Exceptions to firm resettlement exist where:

- The foreign national’s stay in a third country is really a part of an unbroken chain of flight, and the asylum seeker remained in the third country only so long as was necessary to arrange travel to another country; or
- The foreign national was subject to discriminatory treatment in the third country, so that he or she was not given equal access to such basic rights as housing, employment, or food rations.

**Safe Third Country**

Foreign nationals may not apply for asylum if the AG concludes that there exists a safe third country to which the asylum seeker may be removed under a bilateral or multilateral agreement providing for a full and fair procedure governing the determination of refugee status. A safe third-country agreement between the United States and Canada came into effect on December 29, 2004. Asylum officers in the United States, therefore, will conduct a threshold screening of arriving asylum seekers at U.S.–Canada land and border ports of entry. The interviewer will determine whether the individual qualifies for an exception or will be returned to Canada to pursue his or her asylum claim there.153

**Particularly Serious Crime in the Asylum Context**

An applicant is precluded from receiving a grant of asylum if the person, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.”154 A crime is particularly serious if the nature of the conviction, the underlying facts and circumstances, and the sentence imposed justify the presumption that the convicted immigrant is a danger to the community.155 Most circuit courts and the BIA have held that there is no need for a separate determination of dangerousness to the community if a person is convicted of a particularly serious crime.156

When it comes to eligibility for asylum, a person convicted of an aggravated felony as defined in INA §101(a)(43) is considered to have been convicted of a particularly serious crime.157 For withholding of removal and relief under the Convention Against Torture, however, only an aggravated felony (or felonies) for which a person was sentenced to a term of at least five years automatically constitutes a particularly serious crime.158 Lesser

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155 Delgado v. Holder, 648 F.3d 1095 (9th Cir. 2011) (en banc); Matter of Frentescu, 18 I&N Dec. 244, 245 (BIA 1982).
157 INA §208(b)(2)(B).
158 INA §241(b)(3)(B); 8 CFR §§208.16(d)(2), 1208.16(d)(2).
sentences still may lead to a finding that the aggravated felony was a particularly serious crime. 159

An offense can be deemed a particularly serious crime even if it is not an aggravated felony. 160 There had been a split in authority on this issue stemming from a decision by the Third Circuit Court of Appeals. 161 Relying on the U.S. Supreme Court case, Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005), the BIA found that the circuit court must accord deference to the BIA’s decision in Matter of N–A–M–, because the circuit court did not determine that the statute’s language was unambiguous. 162 Therefore, the BIA rule that an individual need not be convicted of an aggravated felony before the particularly serious crime bar will prevent a grant of asylum and withholding of removal now applies to all immigration cases. 163 Defining a particularly serious crime requires an examination of the elements of the offense; if the elements bring the offense within the possible realm of “particularly serious crimes,” the immigration court examines underlying circumstances of the conviction. 164 Crimes against persons are much more likely to be considered particularly serious than crimes against property. 165

Unlike other areas of immigration law, in which the focus is on the specific criminal statute, the particularly serious crime analysis focuses more on the surrounding facts. In Matter of Y–L–, A–G–, R–S–R–, 166 the attorney general held that an aggravated felony involving drug trafficking is presumptively a particularly serious crime even if the alien was sentenced to less than five years for the offense. Under this decision, “[o]nly under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible.”

In Matter of Y–L–, the attorney general made clear that it will be the rare person with a drug trafficking offense who can establish the necessary extenuating circumstances to overcome the particularly serious crime bar. As detailed in the decision, such circumstances would need to include, at a minimum, “(1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associ-

159 See Denis v. Att’y Gen of U.S., 633 F.3d 201 (3d Cir. 2011) (sentence of one-and-one third to four years for conviction of tampering with physical evidence was an aggravated felony and a particularly serious crime).
161 Compare Alaka v. Att’y Gen.of U.S., 456 F. 3d 88 (3d Cir. 2006) (a conviction must be an aggravated felony in order to constitute a particularly serious crime) with Delgado v. Holder, 648 F.3d 1095 (9th Cir., 2011) (en banc) (citing with approval the BIA’s “reasonable interpretation” of INA §241(b)(3)(B) in Matter of N–A–M–, 24 I&N Dec. 336 (BIA 2007), that a particularly serious crime need not be an aggravated felony); Arbid v. Holder, 700 F.3d 379 (9th Cir. 2012) (affirming Delgado and finding that determining whether a crime is a particularly serious crime is an inherently discretionary decision); and Gao v. Holder, 595 F.3d 549 (4th Cir. 2010).
163 Id.
165 See Denis v. Att’y Gen., 633 F.3d 201, n.20 (3d Cir. 2011) (collecting cases).
166 23 I&N Dec. 270 (BIA 2002).
ated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.”

Ineligible for Withholding

Under INA §241(b)(3), the following persons are ineligible for withholding of removal:

- Persons who have participated in the persecution of others;
- Persons who having been convicted of a particularly serious crime and who constitute a danger to the community;
- Persons who have committed a serious nonpolitical crime outside the United States; and
- Persons who can reasonably be regarded as a security risk to the United States.

Particularly Serious Crime in the Withholding Context

A foreign national who has been convicted of an aggravated felony (or felonies) for which he or she has been sentenced to an aggregate term of imprisonment of at least five years will be considered to have committed a particularly serious crime for purposes of withholding.167 As with asylum, the length of sentence will not preclude the AG from determining that an offense is a particularly serious crime.168 However, a conviction for an aggravated felony is not automatically a bar to relief in the form of withholding of removal. The aggravated felony conviction prevents an alien from being eligible for withholding only if the crime constitutes a particularly serious crime.169

In Matter of Y–L–, A–G–, and R–S–R–,170 the AG had the BIA refer three cases to him where the BIA had determined that the aggravated felonies involved in each case did not amount to particularly serious crimes. All three cases involved convictions for trafficking in cocaine.

In reviewing the three cases, the AG determined that the BIA had given too much weight to the relatively short sentences of incarceration the respondents had received for their aggravated felony convictions rather than looking at the nature or category of the crime that resulted in the conviction. He then held that aggravated felonies involving unlawful trafficking in controlled substances presumptively constituted “particularly serious crimes” within the meaning of INA §241(b)(3)(B)(ii). He went on to state that this was now a rule rendering all convictions for unlawful trafficking in controlled substances per se

167 INA §241(b)(3)(B).
168 Matter of N–A–M–, 24 I&N Dec. 336 (BIA 2007). The Third Circuit has held that a conviction must be for an aggravated felony with the requisite sentence in order to constitute a particularly serious crime. See Alaka v. Att’y Gen., 456 F.3d 88 (3d Cir. 2006) (holding that conviction must be an aggravated felony with the requisite sentence in order to constitute a particularly serious crime). However, the Second Circuit, Fourth Circuit, and Seventh Circuit Courts of Appeals have all declined to adopt this position. See Nethgani v. Mukasey, 532 F.3d 150 (2d Cir. 2008); Zhan Gao v. Holder, 2010 U.S. App. LEXIS 3741 (4th Cir. 2010); Ali v. Achim, 468 F.3d 462, 470 (7th Cir. 2006).
169 8 CFR §1208.16(d)(2); Lopez-Cardona v. Holder, 662 F.3d 1110, 1111–12 (9th Cir. 2011).
particularly serious crimes. He held, however, that “only under the most extenuating circum-
cumstances that are both extraordinary and compelling would departure from this interpre-
tation be warranted or permissible.”

Although he did not set bright-line boundaries as to when a drug-trafficking conviction
would not constitute a particularly serious crime, the AG did provide some guide-
lines on when extenuating circumstances might be considered extraordinary and compel-
ling enough to find that a drug-trafficking crime is not a particularly serious crime. These
are:

At a minimum, for a drug-trafficking conviction to be considered not particularly seri-
ous, an applicant for withholding of removal must demonstrate all of the following:

- A very small quantity of controlled substance (e.g., it was de minimis or inconse-
  quential);
- A very modest amount of money paid for the drugs in the offending transaction
  (e.g., it was de minimis or inconsequential);
- Merely peripheral involvement by the foreign national in the criminal activity, trans-
  action, or conspiracy;
- The absence of any violence or threat of violence, implicit or otherwise, associated
  with the offense;
- The absence of any organized crime or terrorist organization involvement, direct or
  indirect, in relation to the offending activity; and
- The absence of any adverse or harmful effect of the activity or transaction on juve-
niles.

The AG emphasized that commonplace circumstances—e.g., cooperation with law en-
forcement authorities; limited criminal histories; downward departures at sentencing; and
post-arrest (let alone post-conviction) claims of contrition or innocence—do not justify
departure from the general rule that drug-trafficking convictions are to be considered par-
ticularly serious crimes.

The Ninth Circuit held that “all reliable information may be considered in making a
particularly serious crime determination, including the conviction records and sentencing
information, as well as other information outside the confines of a record of convic-
tion.”

Serious Nonpolitical Crime

If there are serious reasons to believe that the respondent has been convicted of a ser i-
ous non-political crime outside the United States, the respondent is barred from eligibility
for withholding of removal. In Matter of E–A–, the BIA considered the withholding
claim of an applicant from the Ivory Coast who participated in a pro-democracy political
organization. He participated with others in the group who burned passenger buses and
cars, threw stones, pushed baskets of food off the heads of merchants as they walked on
the streets, and threw merchandise off of merchants’ tables in the market. He testified that

171 Anaya-Ortiz v. Holder, 594 F.3d 673, 677–78 (9th Cir. 2010) (quoting Matter of N–A–M–, 24 I&N
no one was ever hurt. The BIA’s inquiry in this case looked at whether the applicant’s criminal conduct was disproportionate to, and thus outweighed, its political nature. The BIA held that on balance, the criminal conduct outweighed the political nature of the offense.

**Termination of Asylum or Withholding**

A foreign national who has been granted asylum may not be deported or removed unless asylum status is terminated.\(^{173}\) Similarly, a foreign national granted withholding of removal cannot be removed to the country to which removal has been ordered withheld unless the withholding order is terminated. Upon termination, U.S. Immigration and Customs Enforcement (ICE) will commence exclusion, deportation, or removal proceedings, as appropriate.\(^{174}\) In reality, however, although it is certainly possible, it is relatively rare for asylum or even withholding status to be terminated.

An asylum officer can terminate asylum that was granted by USCIS if there was fraud in the application, or the foreign national was not eligible for the relief at the time it was granted.\(^ {175}\) In addition, for applications made on or after April 1, 1997, the asylum officer can terminate asylum if:

- The foreign national no longer has a well-founded fear of persecution because of a fundamental change in circumstances;
- There exists a safe third country to which the asylum seeker may be removed under a bilateral or multilateral agreement providing for a full and fair procedure governing the determination of refugee status;
- The foreign national voluntarily has availed himself or herself of the foreign national’s country of nationality or last residence (if there is no nationality);
- The foreign national has acquired a new nationality and has availed himself or herself of its protection; or
- The foreign national becomes subject to a mandatory ground of disqualification.

With regard to applications filed before April 1, 1997, the asylum officer may terminate asylum if the foreign national becomes subject to a mandatory ground of denial in effect at that time (e.g., the foreign national is convicted of a particularly serious crime).

USCIS may terminate a grant of withholding of deportation or removal (made under its jurisdiction) if:

- It determines that the foreign national no longer meets the statutory standard for the remedy;
- There was fraud in the application or the foreign national was not eligible for the relief at the time it was granted;
- The foreign national has committed some act that constitutes a mandatory ground of denial (e.g., has been convicted of a “particularly serious crime” under new INA §241(b)(3); or

\(^{173}\) INA §208(c).

\(^{174}\) 8 CFR §1208.24(e).

\(^{175}\) 8 CFR §1208.24(a).
For claims filed before April 1, 1997, the foreign national has committed some act that would have been a ground of ineligibility under former INA §243(h)(2).

**Credible Fear Process**

Arriving aliens, or those apprehended within 100 miles of the border within 14 days of entry who present false documents or no documents, will be removed expeditiously unless they either indicate a desire to apply for asylum or express a fear of returning. Those who make such an indication will be placed in a credible-fear interview. An arriving alien who is determined to have a credible fear of persecution shall be detained for further consideration of his or her claim in a removal proceeding.

Credible fear of persecution is defined narrowly. The foreign national must prove that there is a significant possibility that he or she could meet the refugee standard, bearing in mind his or her credibility and other facts known to the officer. A determination that the foreign national does not meet the credible-fear standard may be reviewed promptly by an IJ (either personally or telephonically). This review must be held expeditiously and in no case later than seven days after the initial negative determination on the credible-fear standard. The foreign national will be detained meanwhile. A foreign nationals who is deemed not to have a credible fear will be summarily removed.

**PART TWO: PROTECTION UNDER THE CAT**

Article 3 of the CAT provides broad protection to potential victims of torture. The CAT prohibits one country from sending a person to another country where he or she would be in danger of torture. There are no exceptions to this protection; CAT protects a violent criminal, terrorist, or torturer from removal to a country where he or she would be tortured. In addition, a person seeking protection under CAT does not have to prove that the torture would be on account of the enumerated grounds of political opinion, religion, nationality, race, or membership in a particular social group. This distinguishes CAT from the current law on asylum and withholding of removal under INA §241(b)(3), law that limits eligibility for certain groups and requires that persecution be on account of one of the five enumerated grounds.

Although CAT protection is broad, its benefits in the United States are narrow. The United States became a party to the CAT in 1994, and legacy INS activated an interim rule to implement the convention on March 22, 1999.

The rule creates two different forms of protection for those who seek CAT relief. The first is essentially the same as withholding of removal under INA §241(b)(3). It is known as Article 3 withholding (so-called for the section of the CAT that applies). It provides

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176 INA §235(b)(1)(A); 8 CFR §208.30.
177 INA §235(b)(1)(B)(ii)(IV).
178 INA §235(b)(1)(B)(v).
181 8 CFR §208.16.
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protection for those individuals who are not barred from eligibility for having been convicted of a “particularly serious crime” or of an aggravated felony for which the term of imprisonment is at least five years. The second is deferral of removal; this is a very limited protection for foreign nationals who do not qualify for withholding, 182 those who are entitled to protection but subject to mandatory denial of withholding. Under these rules, ICE may attempt to terminate deferral of removal at any time. The difference between withholding and deferral of removal is explained in more detail below. Neither status leads to permanent residency, and neither provides any mechanism for family members to join the protected person. Finally, neither prohibits removal to a safe third country.

Definitions

An applicant for protection under the CAT must meet the definition of torture to be eligible for protection. Torture is defined at 8 CFR §208.18 as:

- An act that inflicts severe pain or suffering, mental or physical;
- That is intentional;
- That is done with the consent, instigation, or acquiescence of a person acting in an official capacity;
- On a person or a third person who is in the custody or control of the torturer; and
- Committed for such purposes as coercing, intimidating, or punishing the person or a third person, or obtaining a confession or information from the person or a third person.

All of these elements must be present for a person to establish eligibility for protection under CAT.

In some cases, it may be difficult to prove that a government official acquiesced to the torture. “Acquiescence” of the public official is defined in the regulation as prior awareness of the torture, plus a subsequent breach of the legal responsibility to intervene to prevent the torture—in other words, the official knew about the torture but did not try to stop it. 183 It is helpful to document, through country conditions reports and expert witnesses, the knowledge of the public officials. These cases will be harder to prove than those in which the public official is clearly the torturer. 184

Torture does not include acts that unintentionally cause severe pain and suffering, or acts that constitute lawful sanctions. The rule offers a circular definition of lawful sanctions, describing them as “legally imposed sanctions ... that do not defeat the object and

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182 8 CFR §208.17.
183 8 CFR §208.18(a)(7).
184 See Matter of S–V–, 22 I&N Dec. 1306 (BIA 2000); but see Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (finding that it is only necessary to prove “awareness” by the government officials—i.e., “willful blindness” is sufficient); Silvia-Rengifo v. Att’y Gen., 473 F.3d 58 (3d Cir. 2007) (agreeing with the Ninth Circuit’s holding in Zheng); Villegas v. Mukasey, 523 F.3d 984 at 988–89 (9th Cir. 2008) (expanding upon Zheng and detailing how government inaction can transform into “willful blindness” necessary to prove acquiescence).
purpose of the CAT to prohibit torture.” So as not to conflict with practices in the United States, the death penalty specifically is included as a lawful sanction.

Mental torture is defined in greater detail than physical torture. To constitute torture, mental pain or suffering must be:

- Prolonged mental harm;
- Caused by the intentional or threatened infliction of:
  - Severe pain;
  - The use or threat of serious mind-altering substances or procedures;
  - The threat of death; or
  - The threat that another person will be subject to these harms.

The applicant must prove that the physical or mental harm he or she likely would suffer meets the definition of torture.

In Matter of J–E–, the BIA considered whether a Haitian citizen in removal proceedings demonstrated that it was more likely than not he would be tortured if he were deported to Haiti. Mr. J–E–, the respondent, had a Florida state conviction for sale of cocaine. Legacy INS placed him in removal proceedings for having a conviction for a controlled substance violation, as well as for being present in the United States without admission or parole. While he was before the IJ, Mr. J–E– applied for asylum, withholding of removal, and protection under CAT.

Mr. J-E- claimed that, as a deportee with a criminal conviction, he would be subjected to torture by the Haitian authorities by being detained indefinitely in inhumane conditions in police holding cells. Moreover, he feared torture through police mistreatment. Mr. J–E– submitted evidence of the inhuman prison conditions in Haiti. The evidence showed that prison facilities were overcrowded and inadequate, and that inmates were deprived of adequate food, water, medical care, sanitation, and exercise. The evidence also indicated that many prisoners in Haiti suffered, and even died, from malnourishment. Finally, the evidence submitted demonstrated that the Haitian government indefinitely detained deportees with criminal convictions.

The IJ determined that Mr. J–E– was statutorily ineligible for asylum and withholding of removal because of his aggravated felony conviction. The IJ also denied the application for deferral of removal under CAT, finding that Mr. J–E– had failed to prove that it was more likely than not that he would be tortured by the Haitian authorities if he were returned to Haiti. Mr. J–E– appealed the denial of the CAT claim to the BIA.

In considering Mr. J–E–’s claim, the BIA noted that the definition of torture is intended to cover only extreme forms of cruel, inhuman, or degrading treatment or punishment, and should exclude “other acts of cruel, inhuman or degrading treatment or punishment.”

185 8 CFR §208.18(a)(3).
186 Id.
187 8 CFR §208.18(a)(4).
To wit, torture differs from acts other than torture in the severity of the pain and suffering inflicted.

Relying on the definition of torture in the regulations, the BIA considered whether the acts Mr. J–E– feared—indefinite detention; inhuman prison conditions; and police mistreatment—amounted to torture.

First, the BIA held that indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of the regulations where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture. The BIA came to this conclusion because it found that the Haitian government’s policy of detaining deportees with criminal convictions was a law enforcement act authorized by law to prevent crime and insecurity. Therefore, as a lawful sanction, the policy of indefinite detention was not intended specifically to inflict severe physical or mental pain or suffering. The BIA also noted that there was no evidence to indicate that the policy of indefinitely detaining criminal deportees was inflicted on them for a prescribed purpose.

Second, the BIA held that substandard prison conditions in Haiti do not constitute torture within the meaning of the regulations where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture. Here, the BIA determined that, although the Haitian authorities detained people in facilities which they knew were substandard, there was no evidence to indicate that the Haitian government intentionally and deliberately created and maintained those substandard conditions in order to inflict torture on the inmates.

Finally, the BIA held that evidence of the occurrence in Haitian prisons of isolated instances of mistreatment that may rise to the level of torture (as defined in the CAT) is insufficient to establish that it is more likely than not that Mr. J–E– would be tortured if returned to Haiti. Although the BIA acknowledged that there was some evidence of mistreatment by Haitian authorities of indefinitely detained people, it determined that Mr. J–E– failed to submit sufficient evidence to show that these isolated instances of mistreatment were so pervasive as to establish a probability that Mr. J–E– would be subjected to torture.

At the circuit court level, only the First, Second, Third, and Eleventh Circuits have decided cases of Haitian applicants for deferral of removal under CAT who attempted to distinguish Matter of J–E– based on their medical or mental health conditions. The Third and Eleventh Circuits have remanded cases where Haitian petitioners with mental or physical illnesses were denied deferral of removal under CAT by the BIA. In both cases, the circuit courts reasoned that the IJ and BIA could not merely rubber-stamp the holding in Matter of J–E–; rather, the agency was required to determine whether respondents with these physical or mental health issues could distinguish Matter of J–E–. The Third Circuit, in Lavira, also suggested that specific intent to cause severe pain and suffering could be proven through evidence of willful blindness by the Haitian gov-

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189 Id.
190 Jean-Pierre v. Att’y Gen., 500 F.3d 1315 (11th Cir. 2007); Lavira v. Att’y Gen., 478 F.3d 158 (3d Cir. 2007).
191 Lavira v. Att’y Gen., 478 F.3d 158 (3d Cir. 2007).
The Second Circuit Court of Appeals upheld the agency’s denial of deferral of removal under CAT because the IJ already had made a finding that the respondent presented insufficient evidence that persons with his physical condition would suffer torture in the Haitian prison. Similarly, the First Circuit Court of Appeals, in Gourdet v. Holder, concluded that the general detention conditions in Haiti, although grossly inadequate, were not sufficiently severe to rise to the level of torture. The court also concluded that the acts of mistreatment that petitioner would likely be subjected to in detention, such as rough treatment by police officers, did not amount to torture.

In Matter of G–A–, the BIA considered the case of an Iranian Christian citizen of Armenian heritage, Mr. G–A–, who feared torture by the authorities in Iran on account of his religion, his heritage, his lengthy residence in the United States, and because he had a drug trafficking conviction. Mr. G–A– applied for deferral of removal under CAT.

Specifically, the BIA considered that fact that Mr. G–A– was an Armenian Christian who had lived in the United States for more than 25 and who had a felony conviction for a controlled-substance violation. The BIA noted that the evidence supported Mr. G–A–’s claim that the Iranian authorities subject Armenian Christians to harsh discrimination and abuse, and that people with narcotics violations “face particularly severe punishment.” Moreover, the BIA noted that the evidence indicated that people such as Mr. G–A–, who have lived for a long period of time in the United States, “are perceived to be opponents of the Iranian Government or even Pro-American spies.” The BIA noted the widespread use of torture in Iran. Taking this all into consideration, the BIA determined that it was more likely than not Mr. G–A– would be subject to torture if he were forced to return to Iran.

Establishing Eligibility

Burden of Proof

The regulatory provisions for the burden of proof in CAT cases are found at 8 CFR §208.16(c)(2). The applicant has the burden of establishing eligibility for protection under CAT. He or she must prove it is more likely than not that he or she would be tortured if returned to the proposed country of removal. Credible testimony alone may sustain the burden of proof. The IJ must consider “all evidence relevant to the possibility of future torture.” This includes, but is not limited to:

- Evidence of past torture;
- Evidence on whether the person could relocate to a safe part of the country;
- Evidence of country conditions; and

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192 See Lavira v. Att’y Gen., 478 F.3d 158 (3d Cir. 2007); but see Pierre v. Att’y Gen., 528 F.3d 180, 189–91 (3d Cir. 2008) (disagreeing with the Lavira court’s speculation that specific intent could be proven through evidence of willful blindness alone and upholding denial of CAT relief to applicant who suffered from physical ailment and feared conditions in Haitian detention where the applicant could not show that he was specifically targeted by government inaction).


194 Gourdet v. Holder, 587 F.3d 1 (1st Cir. 2009).

195 Id.

Evidence of “gross, flagrant or mass violations of human rights” in the country.

The evidentiary burden to qualify for CAT protection is substantially similar to the burden to prove asylum or withholding of removal under current law. The new provisions contained in REAL ID\(^{197}\) regarding corroboration and credibility also apply to CAT claims.

In *Matter of J–F–F–*,\(^{198}\) the BIA held that a Dominican man was not eligible for deferral of removal under the CAT because he could not show that it was more likely than not he would suffer torture on return to the Dominican Republic. The respondent argued that upon his return to the Dominican Republic, he might not have been able to take his psychiatric medications, which then would cause him to become “rowdy.” This, then, might lead to his subsequent arrest by Dominican police, resulting in a likelihood of torture once in jail. The BIA held, however, that an applicant cannot string together a series of suppositions to show that it is more likely than not that torture will result when the evidence does not show that each step in the hypothetical chain of events is more likely than not to happen.

The Ninth Circuit Court of Appeals reviewed an application for CAT relief by a citizen of Eritrea who had been a member of the Eritrean Liberation Front (ELF), an organization that fought for Eritrea’s independence from Ethiopia.\(^{199}\) The applicant believed that because she refused a local official’s marriage offer, the official would have her killed if she returned. The court determined that the applicant was ineligible for asylum, withholding of removal, and protection under CAT in the form of withholding because the ELF was a terrorist organization and the applicant had been engaged in terrorist activities. However, the court held that she was entitled to deferral of removal under the CAT because there was substantial, uncontroverted evidence that she had been targeted, because of her ELF membership, by a powerful government official in Eritrea, and she presented a strong motive for why the local government would continue to pursue her if she were returned.\(^{200}\)

### Article 3 Withholding or Deferral of Removal

After the IJ decides that a person is entitled to protection under the CAT, he or she must consider whether any bars prohibit withholding of removal. If a bar applies, the IJ must grant deferral of removal (8 CFR §208.16 governs withholding and 8 CFR §208.17 governs deferral of removal). The mandatory bars to Article 3 withholding are the same as the bars in current withholding law. These are contained in INA §241(b)(3)(B), and include the following:

- Persecutors of others;
- Persons convicted of a particularly serious crime;
- Persons who pose a danger to the community or to the security of the United States; and

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\(^{199}\) *Haile v. Holder*, 658 F.3d 1122 (9th Cir. 2011).

\(^{200}\) *Id.*
• Persons about whom there are serious reasons to believe they have committed a serious nonpolitical crime outside the United States.

If one of the bars applies to a person otherwise eligible for CAT protection, the IJ must grant deferral of removal. Deferral is an extremely limited protection that is subject to termination. The IJ must notify the person that deferral does not confer any lawful or permanent immigration status. Furthermore, it does not mean the person will be released from custody, and the status may be terminated at any time if the IJ finds there is no longer a likelihood of torture in the person’s country.\textsuperscript{201} However, persons who are granted deferral of removal and who cannot be removed to any third country cannot be detained indefinitely, and are subject to the post-final order of removal custody determination process detailed in 8 CFR §241.13–14.

Termination of deferral is an easy process for ICE to conclude and a difficult one for the person who had been granted deferral to defend against. ICE may file a motion to schedule a hearing on whether deferral should be terminated. There is no time or number limit on the motions ICE may file. The IJ must grant the ICE motion if it is accompanied by “evidence that is relevant to the possibility that the foreign national would be tortured ... that was not presented at the previous hearing.” The IJ will notify the person of the hearing, and the person must prove again, for a de novo review by the IJ, that he or she is more likely than not to be tortured if removed to his or her country. If deferral is terminated, the person may appeal to the BIA.\textsuperscript{202}

Procedures

In general, the procedures to determine whether a person is eligible for CAT protection track the asylum procedures. There are provisions in the law on “reasonable fear” determinations.\textsuperscript{203}

**Persons Arriving at a Port of Entry**

Persons who present false or no documents at the border, or within 100 miles of the border, within 14 days of entry are subject to expedited removal proceedings.\textsuperscript{204} In general, the review of eligibility for relief under CAT follows the same process as the review of asylum and withholding cases. If the person indicates a fear of persecution or torture during the expedited removal process, he or she will be referred for a credible fear interview by an asylum officer. If the asylum officer finds credible fear, the person is referred for a §240 removal proceeding. If the asylum officer finds there is no credible fear, the person may request a review by the IJ, and the IJ will review the decision de novo. If the IJ finds the person has no credible fear, the person will be removed (per INA §235(b)(1)(B)(iii)(1)), with no further review of the decision. If the IJ determines that credible fear exists, the IJ will place the person in §240 removal proceedings. The process is slightly different for stowaways.

\textsuperscript{201} 8 CFR §208.17(b)(1).
\textsuperscript{202} 8 CFR 208.17(d).
\textsuperscript{203} 8 CFR §208.31.
\textsuperscript{204} INA §235(b)(1).
Persons in Removal Proceedings

The IJ’s consideration of a request for CAT protection is described above. For the most part, consideration of the new protection from torture fits into the existing process for asylum and withholding. The applicant for asylum and withholding also will be considered for CAT protection if he or she requests such consideration, or if the evidence indicates that he or she may be tortured. Asylum applicants who filed on or after April 1, 1997, and are ineligible for asylum because of the one-year filing deadline now will be considered for both types of withholding. In addition, the provision at 8 CFR §208.16(e) states that asylum will be reconsidered in some cases if it was denied for discretionary reasons and the person is later granted CAT withholding. This is significant because a spouse or minor child cannot join a person who is granted only withholding.

Persons Who Apply Affirmatively for Asylum and Withholding

Applicants who are present in the United States, not in deportation or removal proceedings, and apply for asylum are interviewed first by an asylum officer. If the officer finds that the person is ineligible for asylum, the case is referred to an IJ. The asylum officer will not reach the question of whether the applicant is eligible for withholding unless the person otherwise is eligible for asylum but also subject to the 1,000 persons per year quota on coercive population control asylum claims.

Persons Ordered Removed or Those Who Had Final Orders of Removal Before March 22, 1999

This group includes persons who were ordered removed by the IJ and appealed to the BIA, or persons who have a final order from the IJ or the BIA. Such persons had 90 days from March 22, 1999, to move to reopen their cases for CAT relief under more generous reopening provisions. In general, the motions had to comply with the regulations on reopening in 8 CFR §§1003.23 and 1003.2. However, the usual time and numerical limits regarding the motions did not apply, nor did the requirement to demonstrate that the evidence was unavailable at the previous hearing. The motion had to include evidence of a prima facie case for eligibility. A motion to reopen under these provisions was due by June 21, 1999.

Nothing in the CAT regulations prohibits a person from moving to reopen under the regular, more limited reopening procedures.

Persons Who Had CAT Cases Pending with Legacy INS On or Before March 22, 1999

If legacy INS had not yet decided the case by March 22, 1999, it was required to provide a notice to persons affected, telling them they must file a motion to reopen with the IJ or the BIA. The notice gave the person a 30-day stay of removal. The motion to reopen for the limited purpose of Article 3 withholding or deferral was not subject to the §§1003.2 and 1003.23 limitations on motions to reopen. The motion was to be granted if it was accompanied by the notice from legacy INS about this procedure, or accompanied by other proof that the person filed for CAT relief prior to March 22, 1999. The filing of the motion extended the stay of removal during the pendency of the motion.

To avoid execution of any final order of removal, a person who had a CAT case pending on March 22, 1999, was required to file the motion to reopen within 30 days of receiving the notice from legacy INS.
Persons Whose Previous Removal Order Is Reinstated and Persons Who Are Not LPR Aggravated Felons

The regulations created a reasonable fear process that applies to persons ordered removed under INA §238(b), which governs expedited removal of person convicted of aggravated felonies who are not LPRs, and persons whose removal is reinstated under INA §241(a)(5), which governs persons who re-entered after a removal order. It applies to the new CAT cases and to persons with CAT cases pending on March 22, 1999. ICE is required to inform a person subject to §§238(b) or 241(a)(5) of his or her right to apply for withholding or deferral of removal if there is a fear of torture or persecution.

A person in one of these proceedings who indicates a fear of torture or persecution will be referred to an asylum officer for a reasonable fear determination. The determination should be made within 10 days of the referral. The reasonable fear interview is set up much like a credible fear interview in that:

- It is a non-adversarial procedure;
- The asylum officer must be sure the person understands the process;
- A lawyer may be present;
- An interpreter may be present if necessary; and
- The asylum officer will issue a written record.

A reasonable fear is established if there is a reasonable possibility that a person would be tortured, or that he or she would be persecuted on account of one of the five enumerated grounds.

If the asylum officer finds there is a reasonable fear, the case is referred to the IJ for adjudication within 10 days to determine whether the person is eligible for withholding of removal. The IJ’s decision can be appealed to the BIA.

If the asylum officer finds there is no reasonable fear, the person may appeal to the IJ. If the IJ agrees with the asylum officer, the person is removed. If the IJ believes there is reasonable fear, the person may submit a Form I-589, Application for Asylum and Withholding of Removal, and the IJ will adjudicate the withholding of removal eligibility. At that point, the IJ’s decision on whether to grant withholding or deferral of removal can be appealed to the BIA. This is very similar to the current process for persons who undergo credible-fear determinations.

Persons Who Are Subject to Administrative Removal per INA §235(c)

INA §235(c) governs removal procedures for persons who are inadmissible on security or related grounds. If a person in these proceedings requests Article 3 protection, ICE will assess the applicability of Article 3 to ensure that a removal order would not violate the obligations of the United States under CAT. There is no review by an IJ, asylum officer, or the BIA. Those who already have a §235(c) removal order may be considered for deferral under the new regime. However, they will not be able to request a review by an IJ.

205 8 CFR §208.31.

206 8 CFR §208.31.
Diplomatic Assurances

The CAT interim rule contains a provision that would allow the U.S. Department of State to obtain assurances from the government of another country that it will not torture a person returned by the United States. The AG, the AG’s deputy, or the top immigration officer then may decide to remove a person to that country. There would be no consideration of the matter by an IJ, asylum officer, or the BIA.\textsuperscript{207}

\textsuperscript{207} 8 CFR §208.18(c).