Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	***Mandatory Bars to Asylum and Discretion***
Rev. Date	March 25, 2009
Lesson Description	This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is a refugee. This lesson also describes the circumstances under which it is appropriate to use discretion to refer or deny a request for asylum.
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to correctly determine when an applicant is ineligible to apply for asylum, when a refugee is ineligible for a grant of asylum, and when a discretionary denial or referral is warranted.
Academy Training Performance Objective	Given written and roleplay asylum scenarios, the trainee will correctly determine when an applicant is ineligible to apply for asylum, when a refugee is ineligible for a grant of asylum, and when a discretionary denial or referral is warranted.
Interim (Training) Performance Objectives	1. Locate the sections of the INA and regulations that apply to grounds for mandatory denials of asylum. 2. Identify the grounds of ineligibility to apply for asylum, and the exceptions to those grounds. 3. Identify who is subject to a mandatory denial or referral of asylum. 4. Identify the factors to consider in determining whether an individual is firmly resettled. 5. Identify the factors to consider in determining whether a discretionary denial or referral of asylum is warranted.
Instructional Methods	Lecture, discussion, practical exercises
Student Materials/ References	Participant Workbooks; INA; 8 C.F.R. §208; *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439 (1999)
Methods of Evaluation	Observed Lab exercise with critique from evaluator, Practical exercise exam, Written test
Background Reading	1. *Agreement Between the Government of the United States of America and the Government of Canada for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third*

Countries (Dec. 5, 2002), 5 pp. (attached); Final Rule on the Implementation of the Agreement, 69 FR 69480, November 29, 2004, 12 pp. (attached)

2. Cadman, Walter D. Investigations Branch, Office of Field Operations. *Investigative Referral of Suspected Human Rights Abusers,* Memorandum to District Directors, et al. (Washington, DC: Sept. 28, 2000), 2p. (attached)

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

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

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

6. Pearson, Michael A. Office of Field Operations. *Human Rights Abuse Memorandum of Understanding*, Memorandum to Regional Directors, et al. (Washington, DC: Sept. 29, 2000), 2p. plus attachments. (attached)

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

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

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

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

11. United Nations High Commissioner for Refugees, *Guidelines on*

International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. HCR/GIP/03/05, 4 September 2003, 9 pp. (attached)

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

CRITICAL TASKS

SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
013	Determine one-year filing deadline eligibility. (Determine whether an applicant has met, or is excepted from, the one-year filing deadline.)
024	Determine if applicant is a refugee.
025	Determine whether any bars apply.
SS 13	Ability to analyze complex issues.

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Presentation **References**

I. INTRODUCTION

This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is a refugee. This lesson also describes the circumstances under which it is appropriate to use discretion to refer or deny a request for asylum.

The students are not required to memorize all the specific crimes listed as bars to asylum. Rather, the students should become familiar with the broad category of crimes that preclude a grant of asylum, and the issues that must be considered when adjudicating the claim of an applicant who has committed a crime.

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

This lesson only introduces the bar to applying for asylum more than one year after the date of last arrival (the one-year filing deadline), and the bars to eligibility for persecutors, terrorists, and security risks. For in depth information on those bars, see the lessons *One-Year Filing Deadline* and *Bars to Asylum Relating to National Security Risks*.

II. OVERVIEW OF BARS

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

The *1951 Convention relating to the Status of Refugees* gives State signatories the authority to deny protection to certain refugees who are considered "persons who are not considered to be deserving of international protection." Specifically, the Convention does not apply to any person with respect to whom there are serious reasons for considering that he or she committed certain crimes (crime against peace, war crime, crime against humanity, or serious nonpolitical crime outside the country of refuge), or has been guilty of acts contrary to the purposes and principles of the United Nations.

In accordance with these provisions, United States law contains provisions that prohibit the granting of asylum (and/or withholding of removal) to certain individuals based on criminal activities and national security reasons. With the passage of the Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, Congress significantly revised the law relating to eligibility to apply for and to be granted asylum. Prior to the IIRIRA, the only bar to *applying* for asylum was conviction of an aggravated felony. A change occurred with enactment of IIRIRA so that a conviction of an aggravated felony is a bar to being *granted* asylum. Other circumstances discussed below are bars to *applying* for asylum. Consequently, an asylum applicant who applies for asylum on or after April 1, 1997 must first demonstrate eligibility to apply for asylum before the merits of the claim will be adjudicated.

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

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

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

A. Overview of Bars to Applying for Asylum

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

8 C.F.R. § 208.4(a)(1)

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

INA § 208(a)(2); 8 C.F.R. § 208.4(a)

- The asylum seeker could be returned to a "safe" third country, pursuant to a bilateral or multilateral agreement.
- The asylum seeker submitted an application more than one year after arrival in the United States or after April 1, 1998, whichever is later.
- The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

As will be discussed below, the first reason is not in effect, and there are exceptions for the second and third reasons.

Conviction of an aggravated felony is a prohibition on filing for asylum applications submitted prior to April 1, 1997.

B. Overview of Mandatory Bars to a Grant of Asylum

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

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

Each bar will be discussed in more detail below.

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

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

- Conviction of a particularly serious crime, including an aggravated felony
- Commission of a serious nonpolitical crime outside the United States
- Reasonable grounds exist for regarding the applicant a danger to the security of the United States
- Participation in terrorist activities or status as a representative of certain terrorist organizations
- Firm resettlement

III. BARS TO APPLYING FOR ASYLUM

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

A. Safe Third Country

INA § 208(a)(2)(A)

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

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

1. There must be a bilateral or multilateral agreement for removal with the third country;
2. It must be determined that, in the third country, the applicant's life or freedom would not be threatened on

account of a protected ground; and

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

4. Unaccompanied minors

   As of March 23, 2009, the provision in the INA that allows an individual to be barred from applying for asylum based on a safe third country agreement cannot be applied to an unaccompanied alien child.

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). *See also* INA § 208(a)(2)(A); lesson, *Guidelines for Children's Asylum Claims*

On December 5, 2002, the United States entered into a bilateral agreement for removal with Canada. As the agreement applies only at land border ports-of-entry and those transiting through one county while being removed by the other, asylum officers will not be considering this bar in adjudicating affirmative asylum requests.

See, lesson, *Safe Third Country Threshold Screening*; *Agreement for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*; Final Rule on the Implementation of the Agreement, 69 FR 69480 (November 29, 2004).

B. One-Year Filing Deadline

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

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

C. Previous Denial of Asylum

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

INA §§ 208(a)(2)(C) and (D); 8 C.F.R. §§ 208.4(a)(3) and (4)

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

attachments.

1. Jurisdiction

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

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

There are three circumstances in which the Asylum Program has jurisdiction over an I-589 filed after an IJ or BIA has denied the applicant asylum. In each circumstance, the applicant must have left the United States after having been denied asylum by an IJ or the BIA, returned to the United States, and then submitted the I-589 with USCIS.

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

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

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

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

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

2. Determination of changed circumstances

a. definition

The definition of "changed circumstances" as applied when analyzing whether the applicant may be permitted to apply for asylum after being denied

INA § 208(a)(2)(D); 8 CFR § 208.4(a)(4); *and see*, lesson, *One-Year Filing*

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

Deadline, section V.A., Changed Circumstances

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

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

Example: In 1995, an applicant claimed that he feared that he would be forcibly sterilized should he return to China. In January 1996 he was denied asylum by an IJ. He was granted voluntary departure by the IJ, left before the expiration period, and re-entered the country without inspection in August 1998. He files a second application for asylum. He establishes that there are changed circumstances since his prior denial that materially affect his eligibility for asylum (i.e. the codification of persecution based on resistance to a coercive population control program as persecution on account of political opinion by IIRIRA in 1996) and has, therefore, overcome the bar to applying after a previous denial.

Example: An applicant claiming that she would be persecuted on account of her political opinion should she be returned to Panama was denied asylum by an IJ in 1997. After departing the US under voluntary departure, she returned in 1999. She claims that since the time that she was denied asylum by the judge, she has had increased health problems relating to diabetes and can receive proper care only in the United States. Her illness does not amount to a changed circumstance materially affecting her eligibility for asylum and does not overcome the previous denial bar to applying.

b. Standard of proof

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

See, lesson, *Eligibility Part IV, Burden of Proof, Standards of Proof, and Evidence*

3. Review of previous decision

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

a. prior denial by asylum officer

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

b. prior denial by EOIR

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

4. Interview

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

5. Written analysis

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

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

6. One-Year Filing Deadline

All applicants who file an application for asylum on or after April 1, 1997, are subject to the one-year filing deadline rule, including those who were previously denied asylum by an IJ or the BIA.

INA § 208(a)(2)(B); 8 CFR 208.4(a)

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

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

a. Filing timely

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

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

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

See, lesson, *One-Year Filing Deadline*, section IV., *Determining whether the Application was Filed within the One-Year Period*

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

b. Exceptions to the one-year filing deadline

An applicant previously denied asylum who files an application for asylum more than one year after his or her last arrival may still be eligible for asylum if he or she can establish eligibility for an exception to the one-year filing deadline.

See, lesson, *One-Year Filing Deadline*, section V., *Exceptions to the One-Year Rule*

(i) changed circumstances

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

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

Example: An ethnic Albanian from Kosovo who feared persecution on account of his nationality was denied asylum by an IJ in March 1997. The applicant timely departed under voluntary departure and re-entered the US illegally in December 1997. The applicant filed for asylum in July 1999 (an untimely filing). The applicant established an exception to the previous denial bar on the basis of a substantial increase in hostilities against ethnic Albanians in Kosovo that began in mid-1998, developed into

ethnic cleansing in early 1999, and culminated in an attack on his town by Serbian police in April 1999. Because the worsening of conditions is material to the applicant's asylum eligibility, this also serves as a changed circumstance exception to the one-year filing deadline, provided that the applicant files within a reasonable period given the circumstances.

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

See, lesson, *One-Year Filing Deadline*, section V.A.1., *Changed Circumstances, General Considerations*

(ii) extraordinary circumstances

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

See, lesson, *One-Year Filing Deadline*, section V.B., *Extraordinary Circumstances*

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

c. Filing within a reasonable period of time

Once an applicant who applied untimely has established the requisite changed or extraordinary circumstances, a determination must be made as to

8 CFR §§ 208.4(a)(4)(ii) and (5); *See*, lesson, *One-Year Filing Deadline*, section VI.A., *Filing within*

whether the application was filed within a reasonable period of time given those circumstances. This requirement applies equally to applicants previously denied asylum who file more than one year after the date of last entry.

a Reasonable Period of Time, Overview

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

7. Dependents

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

8 C.F.R. § 208.14(f)

IV. BARS TO ELIGIBILITY FOR ASYLUM

A. Persecution of Others

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

INA § 101(a)(42); § 208(b)(2)(A)(i)

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

It has long been held that the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress. In a recent decision, the Supreme Court held,

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

the BIA misapplied *Fedorenko* as mandating that whether an alien is compelled to assist in persecution is immaterial for persecutor-bar purposes and remanded the case for agency interpretation of the statute in the first instance, free from this mistaken legal premise. At this time the issue of whether a "voluntariness requirement" in applying the persecutor bar exists is an open question.

Negusie v. Holder, 129 S.Ct. 1159 (2009)

See the lesson *Bars to Asylum Relating to National Security Risks* for an in-depth discussion on the definition and application of the persecutor bar.

B. Conviction of Particularly Serious Crime

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

INA § 208(b)(2)(A)(ii)

1. Filing date

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

   8 C.F.R. §§ 208.13(c)(1) and (2)(A)

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

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

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

2. Basic elements

   a. convicted by a final judgment

   b. crime is "particularly serious"

   c. the applicant constitutes a danger to the community

3. Definition of "conviction"

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

   INA § 101(a)(48)(A)

   a. a judge or jury has found the alien guilty or the alien has

entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and

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

4. Conviction must be final

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

A conviction is final for immigration purposes if direct appellate review has either been waived or exhausted.

If in doubt about the finality of a conviction, a Supervisory Asylum Officer should contact ICE Chief Counsel.

5. Juvenile convictions

Conviction as a juvenile will not constitute a conviction for a particularly serious crime under the INA, if the applicant is under 16 years of age or was tried as a juvenile (may be 16-18). However, commission of the crime may be a basis to exercise discretion to deny or refer the asylum request.

Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981)

6. What constitutes a particularly serious crime

a. aggravated felonies

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

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

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

In order to determine if the particularly serious crime bar is applicable, the asylum officer should first consider whether the conviction is of a crime specifically identified by statute or precedent caselaw as an aggravated felony or otherwise as a particularly serious crime. If no such identification is available, officers must consider whether the conviction meets the defining characteristics of a "particularly serious crime." In general, when cases where the issue of a possible bar arises, guidance should be sought from supervisors,

headquarters quality assurance and ICE Chief counsel as appropriate.

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

Prior to IIRIRA, the commission and conviction dates of the crime determined which definition of aggravated felony applied. As a result of IIRIRA, the current definition of aggravated felony at INA § 101(a)(43) applies regardless of commission or conviction date.
Instructor Note #1

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

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

INA § 101(a)(48)(B)

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

INA § 101(a)(43)

i. Drug related offenses

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

Lopez v. Gonzales, 127 S. Ct. 625_(2006). Finding that a South Dakota misdemeanor conviction for aiding and abetting another person's possession of cocaine is not a felony punishable under the CSA and is therefore not a drug trafficking crime within the meaning of 18 U.S.C. §924(c)(2)

the CSA."

ii. "Crime of violence"

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

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

In order to determine whether the conviction of a particular offense amounts to a "crime of violence" the officer must look to the requirements of the criminal statute and evaluate whether it includes a mens rea requirement.

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

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

b. other crimes – general

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

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

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

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

(i) the nature of the conviction;

(ii) the sentence imposed;

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

(iv) whether the type and circumstances of the crime

See, Section IV.B.7.,

indicate that the alien will be a danger to the community.

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

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

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

Crimes of violence are normally particularly serious crimes. A crime of violence causes harm or has reasonable chance of causing harm to people or property. Crimes of violence that are not purely political offenses for which the term of imprisonment is at least one year constitute aggravated felonies and therefore particularly serious crimes for asylum purposes.

18 U.S.C. § 16 (definition)

Note that a crime does not have to be a crime of violence to constitute a particularly serious crime.

7. Danger to the community

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

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

8. Examples

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

a. assault with a dangerous weapon

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

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

b. drug trafficking

INA § 101(a)(43)(B)

Generally a drug trafficking conviction constitutes an aggravated felony and therefore a particularly serious

See, *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N 270 (AG

	crime as a matter of law for asylum purposes. Even if there is some question as to whether a particular drug offense constitutes an aggravated felony, it is likely to meet the criteria for a particularly serious crime described above and thus bar the applicant from asylum eligibility.	2002*)* drug trafficking is also presumptively a particularly serious crime for purposes of withholding of removal. The Attorney General ruled that the presumption would only be overcome in "the most extenuating circumstances" that were "both extraordinary and compelling."
c.	battery with a dangerous weapon, or aggravated battery	*Matter of D-*, 20 I&N Dec. 827 (BIA 1994); *Matter of B-*, 20 I&N Dec. 427 (BIA 1991)
d.	rape	INA § 101(a)(43)(A); *See, Matter of B-*, 20 I&N Dec. 427 (BIA 1991)
e.	sexual abuse of a minor Sexual abuse of a minor constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Attempted sexual abuse of a child constitutes an aggravated felony and therefore a particularly serious crime for asylum purposes. Misdemeanor sexual abuse of a child also has been found to constitute an aggravated felony (and a particularly serious crime for asylum purposes).	INA § 101(a)(43)(A) *U.S. v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993); *Matter of Small*, 23 I&N Dec. 448 (BIA 2002) .
f.	armed robbery	*Matter of D-*, 20 I&N Dec. 827 (BIA 1994); *Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997)
g.	theft offenses (including receipt of stolen property) or burglary offenses Theft offenses (including receipt of stolen property) or burglary offenses for which the term of imprisonment is at least one year constitute aggravated felonies and therefore particularly serious crimes for asylum purposes. Theft offense," for which alien may be removed, includes crime of "aiding and abetting" a theft offense. Note that burglary may also constitute a particularly serious crime if it involves a threat to an individual.	INA § 101(a)(43)(G) *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986); *Matter of Frentescu*, 18 I&N Dec. 244; *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) Gonzales v. Duenas-Alvarez127 S.Ct. 815 (2007), holding that a conviction under a California statute prohibiting taking vehicle

without consent was "theft offense," for which alien could be removed

h. kidnapping (aggravated)

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

i. murder and manslaughter

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

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

9. Dependents

8 C.F.R. § 208.21(a)

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

C. Commission of Serious Nonpolitical Crime

INA § 208(b)(2)(A)(iii)

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

1. Filing Date

Previously, this was a mandatory bar to withholding of deportation, but not asylum.

See, Section VII., *Discretion*, below

This mandatory bar to asylum was added by the IIRIRA and therefore applies only to applications filed on or after April 1, 1997. However, commission of a serious nonpolitical crime may be considered as a serious adverse factor in the exercise of discretion, when adjudicating a request for asylum filed before April 1, 1997.

2. Definition

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

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

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

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

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

b. A "serious nonpolitical crime" is less serious than a "particularly serious crime."

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

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

McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986); *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439 (1999); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751 (8th Cir. 2004)

3. Requirements

a. There is no requirement that the serious nonpolitical crime resulted in a conviction. However, the adjudicator needs to find *probable cause* to believe that the crime was committed.

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

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

See, Black's Law Dictionary

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

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

determination that the applicant was barred from asylum.

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

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

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986)

4. Recruitment of Child Soldiers

The Child Soldiers Accountability Act of 2008 (CSAA), which was signed into law and became effective on October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers. Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA. These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code" is inadmissible and is removable.

Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). *See also* Lori Scialabba and Donald Neufeld, USCIS. *Initial Information Concerning the Child Soldiers Accountability Act, Public Law No. 110-340*, Memorandum to Field Leadership (Washington, DC: 31 December 2008). CSAA, sec. 2(b)-(c).

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

CSAA, sec. 2(d)(1). *See also* lesson, *Guidelines for Children's Asylum Claims*, *VI.E.4*

5. Dependents

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

8 C.F.R. § 208.21(a)

or her dependent (who committed a serious nonpolitical crime) is denied or referred because he or she is subject to a mandatory bar.

D. Security Risk

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

INA § 208(b)(2)(A)(iv)

See the lesson *Bars to Asylum Relating to National Security Risks* for an in-depth discussion on the definition and application of the security risk bar.

E. Terrorists

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

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

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

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

The IIRIRA redesignated the subclauses of INA section 212(a)(3)(B) and expanded the terrorist grounds for ineligibility for asylum. .

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

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

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

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

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

REAL ID Act of 2005 §103(a); See Lesson Plan *"Bars to Asylum Relating to National Security Matters"*

The statute also revised the Patriot Act's inapplicability provision for material support to a terrorist organization and added INA§212(d) to create an inapplicability provision for the material support ground, as well as for individuals or representatives of terrorist organizations who endorse or espouse terrorist activity.

2. Grounds of ineligibility

Section 208(b) of the INA, as amended by the REAL ID Act, prohibits the granting of asylum to anyone who

INA § 208(b)(2)(A)(v)

a. has engaged in terrorist activity;

INA § 212(a)(3)(B)(i)(I)

b. a consular officer or the Attorney General knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity;

INA § 212(a)(3)(B)(i)(II)

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

c. has, under any circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

INA § 212(a)(3)(B)(i)(III)

d. is a representative of

INA § 212(a)(3)(B)(i)(IV)

(i) a foreign terrorist organization, as defined in section 212(a)(3)(B)(vi) or

INA § 212(a)(3)(B)(i)(IV)(aa)

(ii) a political, social, or other group that endorses

or espouses terrorist activity;

INA §212(a)(3)(B)(i)(IV)(bb)

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

INA §212(a)(3)(B)(i)(V)

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

g. endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

INA §212(a)(3)(B)(i)(VII); INA §237(a)(4)(B); Note that this ground does not require that the statements be made under circumstances indicating an intention to cause death or serious bodily harm.

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

INA §212(a)(3)(B)(i)(VIII); INA §237(a)(4)(B); "military-type training is defined in 18 U.S.C. §2339D(c)(1)

i. Is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the past 5 years unless the spouse or child

INA §212(a)(3)(B)(ii)

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

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

j. who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines

INA §212(a)(3(F); INA §237(a)(4)(B)

has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States.

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

F. Firm Resettlement

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

INA § 208(b)(2)(A)(vi)
Note: This bar does not apply to derivatives. See 8 C.F.R. § 208.21(a).

1. Definition

An applicant "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."

8 C.F.R. § 208.15

2. Exceptions

An alien who has received an offer of some form of permanent resettlement nonetheless is **not** considered to be firmly resettled if:

a. entry into the third country was a necessary consequence of flight from persecution; ***and***

8 C.F.R. § 208.15(a)

the applicant remained only as long as necessary to arrange onward travel; ***and***

the applicant did not establish significant ties in that country;

or

b. the conditions of residence in that country were so substantially and consciously restricted by the authority of the country of refuge that the applicant cannot be considered to have been resettled there.

8 C.F.R. § 208.15(b)

To determine whether the conditions of an applicant's residence were so substantially and consciously restricted by authorities as to render the alien not firmly resettled, the asylum officer must consider the following factors:

(i) conditions under which other residents of the country live; — 8 C.F.R. § 208.15(b)

(ii) the type of housing, whether permanent or temporary, made available to the applicant;

(iii) the types and extent of employment available to the applicant; and

(iv) the extent to which the applicant received permission to hold property and enjoy other rights and privileges ordinarily available to others residing in the country, such as:

(a) travel documentation, including a right of entry or reentry;

(b) education;

(c) public relief; or

(d) naturalization.

3. The primary consideration in determining if an applicant was firmly resettled is whether an *offer* of *permanent* resident status, citizenship or some other type of permanent resettlement was made. — *Maharaj v. Gonzales*, 450 F. 3d 961 (9th Cir. 2006); *Abdille v. Ashcroft*, 242 F.3d 477 (3rd Cir. 2001) (rejecting a totality of the circumstances approach that would consider both the issuance of an offer and the existence of various non-offer based factors, such as length of residency or social and economic ties, as a whole to arrive at a conclusion regarding firm resettlement); *but see*, *Sall v. Gonzales*, 437 F.3d 229 (2nd Cir. 2006) (holding that a determination of firm resettlement must be based on a totality of the circumstances.)

Example: The Third Circuit found that documentary evidence indicating that an applicant had been granted asylum in South Africa, where the document demonstrating — *Abdille v. Ashcroft*, 242 F.3d 477 (3rd Cir. 2001)

that asylee status indicated that the asylee was required to apply for renewal every two years, was prima facie evidence that the applicant had not been offered **permanent** resettlement. Therefore, unless the INS could demonstrate that asylum in South Africa was permanent, the applicant was not firmly resettled.

a. DHS bears the initial burden of showing that the resettling country's government formally and affirmatively offered the applicant permanent resettlement.

Salazar v. Ashcroft, 359 F.3d 45 (1st Cir. 2004);

b. Upon an initial showing by DHS that an applicant is firmly resettled, the applicant may rebut the presumption of firm resettlement or establish an exception to the bar (see section 2.a., above).

Salazar v. Ashcroft, 359 F.3d 45 (1st Cir. 2004); *Maharaj v. Gonzales*, 450 F. 3d 961 (9th Cir. 2006);

Example: The First Circuit found that substantial evidence supported the decision of an immigration judge that a Peruvian applicant, who had obtained a Venezuelan passport and a resident stamp during his fourteen-month residency in that country, had twice re-entered Venezuela as a resident using that passport, and was married to a Venezuelan citizen, was firmly resettled. The applicant's testimony that he had paid an unidentified man for the residency stamp did not rebut the presumption of firm resettlement created by the government's initial showing, because there was no evidence that the stamp was not valid or that any irregularities would result from an eventual invalidation of the stamp by the Venezuelan government.

Salazar v. Ashcroft, 359 F.3d 45 (1st Cir. 2004)

4. Length of time spent in the third country

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

Matter of Soleimani, 20 I&N Dec. 99 (BIA 1989); *Matter of Portales*, 18 I&N Dec. 239 (BIA 1982); *Cheo v. INS*, 162 F.3d 1227 (9th Cir. 1998) ("[W]here the *duration* and *circumstances* indicate that the asylum seeker may remain in the third country, then it is incumbent upon him to show the contrary." emphasis added)

The Ninth Circuit has held that to meet its burden of proving that an offer of firm resettlement exists the USCIS must present either direct evidence of an offer of permanent resettlement or, if such evidence cannot be obtained,

Maharaj v. Gonzales, 450 F. 3d 961 (9th Cir. 2006)

indirect evidence of such an offer. Indirect factors may include the applicant's length of stay in the third country, intent to remain in the country and the social and economic ties developed during such stay. Relying on *Abdille v. Ashcroft*, the Court indicated that the indirect evidence used to establish non-offer firm resettlement must "rise to a sufficient level of clarity and force."

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

Abdille v. Ashcroft, 242 F.3d 477, 487 (3rd Cir. 2001)

5. Entry into the third country

The applicant must have received or been offered some form of permanent resident status in a third country *when the applicant entered or was in* the country. This means that an applicant cannot be considered firmly resettled in a country the applicant never entered.

6. Offer may suffice

The regulations indicate that the existence of an *offer* of permanent residence status may establish that an applicant was firmly resettled, even if the applicant never actually accepted the offer. However, the asylum officer must still consider the factors noted above regarding the circumstances of the applicant's stay in the country, because an applicant is not considered firmly resettled if entry into the country was a necessary consequence of flight and the applicant established no ties or was subject to substantial living restrictions. Refer to discussion in section 2 above.

7. Loss of residence rights

An applicant's loss of the right to return to a country in which he or she was firmly resettled does not necessarily remove the bar of firm resettlement. For example, an applicant who was firmly resettled in country X, but lost the right to return to country X because the applicant allowed a travel document to expire or remained outside of the country longer than permitted, would still be barred from a grant of asylum.

Vang v. INS, 146 F.3d 1114 (9th Cir. 1998); *See* also *Abdalla v. INS*, 43 F.3d 1397, 1400 (10th Cir.1994) (determining that expiration of petitioner's UAE residence permit after entry into United States did not affect finding that petitioner had firmly

resettled in UAE).

8. Minors

One court has held that, to determine whether a minor has firmly resettled in another country, the adjudicator should consider whether the minor's parents have firmly resettled in that country before coming to the United States, and then attribute the parents' status to the minor.

Vang v. INS, 146 F.3d 1114 (9th Cir. 1998)

In *Vang v. INS*, the applicant fled Laos with his family when he was 4 years old, and his family resettled in France. At the age of 16, the applicant came to the United States as a tourist. When he was 19, he applied for asylum. To determine whether the applicant was firmly resettled in France, the Court looked to the status of the applicant's parents when they lived in France.

9. Firm resettlement is not dual nationality

Firm resettlement is often confused with the issue of dual nationality because both situations involve the alien finding protection in a third country. Usually they can be easily distinguished because firm resettlement always requires that the alien will have entered into the third country and been given an offer of some kind of status, not necessarily citizenship. In dual nationality there are no requirements of presence in the third country or an offer, and the status must always be citizenship.

An applicant who is a dual national must establish that he or she meets the definition of a refugee as to *both* countries of nationality in order to be eligible for asylum. An applicant who is firmly resettled in a third country does not need to establish that he or she is a refugee as to the country of resettlement in order to remain eligible for asylum, *but must establish that he or she is eligible for one of the two exceptions to the firm resettlement bar as defined in 8 C.F.R. § 208.15(b).*

See lesson, *Eligibility Part I: Definition of Refugee*, section III.C., *Multiple Nationality*

8 C.F.R. § 208.15(b)

Instructor Note #2

V. BURDEN AND STANDARD OF PROOF

A. Mandatory Bars to Applying for Asylum

1. One-year filing deadline

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

INA §§ 208(a)(2)(B) and (D); 8 C.F.R. § 208.4(a)(2)(i)
Reminder: The one-year filing period is calculated from 4/1/97 or arrival in U.S., whichever is later. *See* lesson, *One-Year Filing Deadline*, section IV.A.,

or

Calculating the One-Year Period.

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

2. Previous denials

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

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

3. Explanation

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

See, *Black's Law Dictionary*, 5th Ed.; lesson, *Burden of Proof, Standards of Proof, and Evidence*

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

B. Mandatory Bars to Asylum

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

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

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

See, lesson, *Burden of Proof, Standards of Proof, and Evidence*

VI. MANDATORY NATURE OF BARS

If it is determined that a mandatory bar applies, the asylum officer has

no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible. As the term itself indicates, denial in such cases is mandatory. Therefore, the asylum request must be referred, or if appropriate, denied.

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

VII. DISCRETION

8 C.F.R. §§ 208.14(a) and (b)(1); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996).

Every grant of asylum to an individual who establishes refugee status is discretionary. Therefore, every grant of asylum involves two steps: 1) determination of whether the applicant is a refugee eligible for asylum and 2) determination of whether the applicant merits a favorable exercise of discretion. Generally, if it is determined that a refugee is eligible for asylum, discretion is exercised to grant asylum. However, there may be factors that fall short of a mandatory ground for denial that warrant the denial or referral of the asylum application, even if the applicant has established refugee status.

The converse is not true; the adjudicator can ***not*** exercise discretion to grant asylum to an applicant who fails to establish refugee status.

A. Application -- Balancing of Factors

Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996).

Zuh v. Mukasey, 547 F.3d 504, 511(4th Cir. 2008),

The sound exercise of discretion requires a balancing of the fact that the applicant qualifies as a refugee, along with any other positive factors, against any negative factors presented in the case.

1. A non-exhaustive list of factors that adjudicators should look to as part of the weighing process would include, on the positive side:

   a. Family, business, community, and employment ties to the United States, and length of residence and property ownership in this country;

   b. Evidence of hardship to the alien and his family if deported to any country, or if denied asylum such that the alien cannot be reunited with family members (as derivative asylees) in this country;

   c. Evidence of good character, value, or service to the community, including proof of genuine rehabilitation if a criminal record is present;

   d. General humanitarian reasons, such as age or health;

e. Evidence of severe past persecution and/or well-founded fear of future persecution, including consideration of other relief granted or denied the applicant (e.g., withholding of removal or CAT protection).

2. On the negative side, factors to consider would include:

   a. Nature and underlying circumstances of the exclusion ground;

   b. Presence of significant violations of immigration laws;

   c. Presence of a criminal record and the nature, recency, and seriousness of that record, including evidence of recidivism;

   d. Lack of candor with immigration officials, including an actual adverse credibility finding by the [adjudicator];

   e. Other evidence that indicates bad character or undesirability for permanent residence in the United States.

3. Lack of adverse factors

   In the absence of adverse factors, discretion should be exercised to grant asylum to eligible applicants.

   Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987)

4. Likelihood of future persecution

   The likelihood of future persecution is an important factor in the exercise of discretion. A reasonable possibility of future persecution weighs heavily in favor of exercising discretion to grant asylum. The BIA has held that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."

   Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)

   A finding that there is no reasonable possibility of future persecution (no well-founded fear) is a heavy adverse factor that must lead to an adverse exercise of discretion, unless

   8 C.F.R. § 208.13(b)(1)(ii); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); *Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998)

   a. there are compelling reasons the applicant is unwilling to return arising out of the severity of the past persecution, or

b. a reasonable possibility of the applicant suffering other serious harm.

5. Severe past persecution

Discretion should generally be exercised to grant asylum to a refugee who no longer has a well-founded fear if the applicant suffered severe or atrocious persecution in the past.

Matter of Chen, 20 I&N Dec. 16 (BIA 1989); 8 C.F.R.§ 208.13(b)(1)(iii)(A)

6. Other serious harm

Discretion should generally be exercised to grant asylum to a refugee who no longer has a well-founded fear if there is a reasonable possibility that the applicant may suffer other serious harm upon removal to that country.

8 C.F.R.§ 208.13(b)(1)(iii)(B)

By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution. Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."

B. Examples of Adverse Factors

1. Criminal or terrorist conduct may be grounds for a discretionary denial or referral (note the conduct may or may not present a mandatory bar).

Dhine v. Slattery, 3 F.3d 613 (2nd Cir. 1993) (numerous small crimes in the United States warranted a discretionary denial); *Matter of Jean*, 23 I&N Dec. 373, 385 (BIA 2002) (when the applicant has been convicted of a crime of violence, discretion to grant will not be exercised, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of relief would result in exceptional and extremely unusual hardship); *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984)

2. Fraud in entering the United States is a factor to consider, but normally will not alone warrant a discretionary denial or referral of asylum, unless there are other significant negative factors.

Matter of Pula, 19 I&N Dec. 467 (BIA 1987); *Matter of Soleimani*, 20 I&N Dec. 99 (BIA 1989); *Alsagladi v. Gonzales*, 450 F.3d 700 (7th

Cir. 2006) (upholding discretionary denial of asylum to an applicant who gratuitously committed fraud in his visa application and when he was interviewed by consular officials so that he could get to the US more quickly. There was no need for the applicant to commit fraud: he had been living with his brother safely in Saudi Arabia, outside the country of feared persecution, the Saudi government was not pressing him to leave and he could have continued to live there until he went through the slower process entailed in the review of a truthful visa application requesting refugee status.)

3. Circumvention of established procedures for overseas refugee processing may constitute an adverse factor, but alone usually would not warrant a discretionary denial or referral. The entire circumstances must be considered.

Matter of Pula, 19 I&N Dec. 467 (BIA 1987) (explicitly withdrawing from its position in prior cases)

VIII. DEPENDENTS

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

8 C.F.R. § 208.21(a)

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

IX. SUMMARY

A. Bars to Applying for Asylum

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

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

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

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

   The filing date is calculated from April 1, 1997 or the date of last arrival, whichever is later. This bar does not apply if the applicant establishes changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay.

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

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

B. Mandatory Bars to a Grant of Asylum

The following are mandatory bars to a grant of asylum:

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

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

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

3. Commission of a serious nonpolitical crime outside the United States

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

4. Risk to the security of the United States

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

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

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

6. Firm resettlement

   An applicant is considered firmly resettled if the applicant entered into another country with, or while there received, an

offer of permanent resident status, citizenship, or some other type of permanent resettlement when in that country.

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

C. Burden of Proof

1. Prohibition on Filing

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

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

2. Bars to asylum

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

D. Mandatory Nature of Bars

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

E. Dependents

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

F. Discretionary Denials/Referrals

1. Asylum may be denied in the exercise of discretion, even if the applicant is a refugee and no mandatory bar applies. In the absence of adverse factors, asylum should be granted in the exercise of discretion.

2. The sound exercise of discretion requires a balancing of all the positive factors against any negative factors; the danger of persecution generally outweighs all but the most egregious of

adverse factors.

Mandatory Bars to Asylum and Discretion
Instructor Guide

Instructional Methods Lecture, Practical Exercises

Instructional Equipment Overhead projector / LCD projector

Training Aids Overhead Transparencies / Powerpoint Presentation:

1-2. Objectives
3. Background
4. Bars to Applying for Asylum
5. Bars to Eligibility for Asylum
6. Safe Third Country
7. Filing Deadline
8. Filing Deadline – Exceptions
9. Previous Denial of Asylum
10. Persecution of Others
11. Particularly Serious Crime – Filing Date
12. Particularly Serious Crime – Final Conviction
13. Aggravated Felonies
14. Particularly Serious Crime – General Factors
15. Particularly Serious Crime – Examples
16. Serious Nonpolitical Crime – Filing Date
17. Serious Nonpolitical Crime – Definition
18. Serious Nonpolitical Crime – Requirements
19. Security Risk
20. Terrorists
21. Firm Resettlement – Definition
22. Firm Resettlement – Exceptions
23. Burden of Proof
24. Discretion
25. Discretion – Application
26-32. Summary A-F

Instructor Notes

1. Review INA section 101(a)(43) with students, highlighting the types of crimes listed.

2. **Practical Exercises –** Students discuss fact patterns in small groups, then large group discussion. Note that many of these fact patterns are also included with the lesson *Bars to Asylum Relating to National Security*. Instructor of this lesson should consult with the instructor of the other lesson to determine which fact patterns are appropriate to discuss as part of this lesson.