Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Credible Fear***
Rev. Date	February 28, 2014
Lesson Description	The purpose of this lesson is to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture using the credible fear standard.
Terminal Performance Objective	The Asylum Officer will be able to correctly make a credible fear determination consistent with the policies, procedures, and regulations that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.
Enabling Performance Objectives	1. Identify which persons are subject to expedited removal. (ACRR7)(OK4)(ACRR2)(ACRR11)(APT2) 2. Examine the function of credible fear screening. (ACRR7)(OK1)(OK2)(OK3) 3. Define the standard of proof required to establish a credible fear of persecution. (ACRR7) 4. Identify the elements of "torture" as defined in the *Convention Against Torture* and the regulations that are applicable to a credible fear of torture determination (ACRR7) 5. Describe the types of harm that constitute "torture" as defined in the *Convention Against Torture* and the regulations. (ACRR7) 6. Define the standard of proof required to establish a credible fear of torture. (ACRR7) 7. Identify the applicability of bars to asylum and withholding of removal in the credible fear context. (ACRR3)(ACRR7)
Instructional Methods	Lecture, practical exercises
Student Materials/ References	Lesson Plan; Procedures Manual, Credible Fear Process (Draft, Nov., 2003); INA § 208; INA § 235; 8 C.F.R. §§ 208.16-18; 8 C.F.R. § 208.30; 8 C.F.R. § 235.3. Credible Fear Forms: **Form I-860**: Notice and Order of Expedited Removal; **Form I-867-A&B**: Record of Sworn Statement; **Form I-869**: Record of Negative Credible Fear Finding and Request for Review by

Immigration Judge; **Form I-863**: Notice of Referral to Immigration Judge; **Form I-870**: Record of Determination/Credible Fear Worksheet; **Form M-444**: Information about Credible Fear Interview

Method of Evaluation Written test

Background Reading

1. Immigration and Naturalization Service, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312 (March 6, 1997).

2. Bo Cooper, *Procedures for Expedited Removal and Asylum Screening under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1503 (1997).

3. Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (February 19, 1999).

4. Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (November 13, 2002).

5. Customs and Border Protection, *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48877 (August 11, 2004).

6. U.S. Committee on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal – Report on Credible Fear Determinations*, (Feb. 2005).

7. Customs and Border Protection, *Treatment of Cuban Asylum Seekers at Land Border Ports of Entry*, Memorandum for Directors, Field Operations, (Washington, DC: 10 June 2005).

8. Joseph E. Langlois, Asylum Division, Office of International Affairs, *Increase of Quality Assurance Review for Positive Credible Fear Determinations and Release of Updated Asylum Officer Basic Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 17 April 2006).

9. Joseph E. Langlois, Asylum Division, Refugee, Asylum and International Operations Directorate, *Revised Credible Fear Quality Assurance Review Categories and Procedures*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 December 2008).

10. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, ICE Directive No. 11002.1 (effective Jan. 4, 2010).

CRITICAL TASKS

Critical Tasks

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

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Presentation **References**

I. INTRODUCTION

The purpose of this lesson plan is to explain how to determine whether an alien seeking admission to the U.S., who is subject to expedited removal or is an arriving stowaway, has a credible fear of persecution or torture using the credible fear standard defined in the Immigration and Nationality Act (INA or the Act), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and implementing regulations.

II. BACKGROUND

The expedited removal provisions of the INA, were added by section 302 of IIRIRA, and became effective April 1, 1997.

INA § 235(a)(2); § 235 (b)(1).

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by the Department of Homeland Security (DHS), unless they indicate an intention to apply for asylum or express a fear of persecution or torture or a fear of return to their home country. Aliens who are present in the U.S., and who have not been admitted, are treated as applicants for admission. Aliens subject to expedited removal are not entitled to an immigration hearing or further review unless they are able to establish a credible fear of persecution or torture.

INA § 235(a)(1).

INA section 235 and its implementing regulations provide that certain categories of aliens are subject to expedited removal. These include: arriving stowaways; certain arriving aliens at ports of entry who are inadmissible under INA section 212(a)(6)(C) (because they have presented fraudulent documents or made a false claim to U.S. citizenship or other material misrepresentations to gain admission or other immigration benefits) or 212(a)(7) (because they lack proper documents to gain admission); and certain designated aliens who have not been admitted or paroled into the U.S.

Those aliens subject to expedited removal who indicate an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their home country are referred to asylum officers to determine whether they have a credible fear of persecution or torture. An asylum officer will then conduct a credible fear interview to determine if there is a significant possibility that the alien can establish eligibility for asylum under section 208 of the INA. Pursuant to

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

regulations implementing the Convention Against Torture (CAT) and the Foreign Affairs Reform and Restructuring Act of 1998, if an alien does not establish a credible fear of persecution, the asylum officer will then determine whether there is a significant possibility the alien can establish eligibility for protection under the Convention Against Torture through withholding of removal or deferral of removal.

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

A. Aliens Subject to Expedited Removal

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

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

   8 C.F.R. § 235.3(b)(1)(i); *see* 8 C.F.R. § 1.2 for the definition of an "arriving alien."

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

   8 C.F.R. § 208.30(e)(6). *See also,* ADOTC Lesson Plan, *Safe Third Country Threshold Screening*.

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

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

   8 C.F.R. § 1.2; *see also* Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (Nov. 13, 2002).

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

   This provision encompasses those aliens paroled for urgent humanitarian or significant public benefit reasons.

   This category does not include those who were given advance parole as described in Subsection B (7) below.

4. Aliens who have arrived in the United States by sea (either by boat or by other means) who have not been admitted or paroled, and who have not been physically present in the U.S. continuously for the two-year period prior to the inadmissibility determination.

   Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (Nov. 13, 2002).

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

Customs and Border Protection, *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48877 (Aug. 11, 2004).

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

The following categories of aliens are exempt from expedited removal:

1. Stowaways

   Stowaways are not eligible to apply for admission to the U.S., and therefore they are not subject to the expedited removal program under INA section 235(b)(1)(A)(i). They are also not eligible for a full hearing in removal proceedings under INA section 240. However, if a stowaway indicates an intention to apply for asylum under INA section 208 or a fear of persecution, an asylum officer will conduct a credible fear interview and refer the case to an immigration judge for an asylum and/or Convention Against Torture hearing if the stowaway meets the credible fear standard.

INA § 235(a)(2).

2. Cubans citizens or nationals

INA § 235(b)(1)(F) (Cubans arriving at a POE by air); Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (Cubans arriving by sea); Customs and Border Protection, *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48877 (Cubans apprehended within 100 air miles of the border and within 14 days of entry without inspection); Customs and Border Protection, *Treatment of Cuban Asylum Seekers at*

Land Border Ports of Entry, Memorandum for Directors, Field Operations, (Washington, DC: 10 June 2005) (Cubans arriving at a land border port of entry).

3. Persons granted asylum status under INA Section 208 — 8 C.F.R. § 235.3(b)(5)(iii).

4. Persons admitted to the United States as refugees under INA Section 207 — 8 C.F.R. § 235.3(b)(5)(iii).

5. Persons admitted to the United States as lawful permanent residents — 8 C.F.R. § 235.3(b)(5)(ii).

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

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

8. Persons denied admission on charges other than or in addition to INA Section 212(a)(6)(C) or 212(a)(7) — 8 C.F.R. § 235.3(b)(3).

9. Persons applying for admission under INA Section 217, Visa Waiver Program for Certain Visitors ("VWP") — 8 C.F.R. § 235.3(b)(10); *see also Matter of Kanagasundram*, 22 I&N Dec. 963 (BIA 1999); Procedures Manual, Credible Fear Process (Draft, Nov., 2003), sec. IV.L., "Visa Waiver Permanent Program"; and Pearson, Michael A. Executive Associate Commissioner, Office of Field Operations. Visa Waiver Pilot Program (VWPP) Contingency Plan, Wire #2 (Washington DC: April 28, 2000).

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

   Individuals seeking admission under the Guam and Northern Mariana Islands visa waiver program under INA section 212(l) are not exempt from expedited removal provisions of the INA.

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

8 C.F.R. § 208.30(e)(6).

C. Historical Background

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

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

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

3. In 1996, the INA was amended to allow for the expedited removal of certain inadmissible aliens, who would not be entitled to an immigration hearing or further review unless they were able to establish a credible fear of persecution. At the outset, expedited removal was mandatory for "arriving aliens," and the Attorney General was given the discretion to designate applicability to certain other aliens who have not been admitted or paroled and who have not established to the satisfaction of an immigration officer continuous physical presence in the United States for the two-year period immediately prior to the date of the inadmissibility determination. Initially, expedited removal was only applied to "arriving aliens."

Immigration and Naturalization Service, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10313 (Mar. 6, 1997).

4. The credible fear screening process was expanded to include the credible fear of torture standard with the promulgation of regulations concerning the Convention against Torture, effective March 22, 1999.

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999); 8 C.F.R. § 208.30(e)(3).

5. Designation of other groups of aliens for expedited removal

   a. In November 2002, the Department of Justice expanded the application of the expedited removal provisions of the INA to certain aliens who arrived in the United States by sea, who have not been admitted or paroled and who have not been physically present

Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the*

in the United States continuously for the two year-period prior to the inadmissibility determination.

Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).

b. On August 11, 2004, DHS further expanded the application of expedited removal to aliens determined to be inadmissible under sections 212 (a)(6)(C) or (7) of the INA who are physically present in the U.S. without having been admitted or paroled, who are apprehended within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the apprehension.

INA §212(a)(6)(C), (a)(7); Customs and Border Protection, *Designating Aliens For Expedited Removal*, 69 Fed. Reg. 48877 (Aug. 11, 2004).

6. The expedited removal provisions of the INA require that all aliens subject to expedited removal be detained through the credible fear determination until removal, unless found to have a credible fear of persecution, or a credible fear of torture. However, the governing regulation permits the parole of an individual in expedited removal, in the exercise of discretion, if such parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective. After a positive credible fear determination, Immigration and Customs Enforcement (ICE) may exercise discretion to parole the alien out of detention, and has issued pertinent guidance on consideration of parole for arriving aliens found to have a credible fear. Therefore, the credible fear interview process also provides a mechanism for DHS to gather information that may be used by ICE to make parole determinations.

INA § 235(b)(1)(B)(iii)(IV).

8 C.F.R. § 235.3(b)(2)(iii); *see also, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture,"* ICE Directive No. 11002.1 (effective Jan. 4, 2010).

III. FUNCTION OF CREDIBLE FEAR SCREENING

In applying the credible fear standard, it is critical to understand the function of the credible fear screening process. As explained by the Department of Justice when issuing regulations adding Convention Against Torture screening to the credible fear process, the process attempts to "to quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch.… If an alien passes this threshold-screening standard, his or her claim for protection…will be further examined by an immigration judge in the context of removal proceedings under section 240 of the Act. The screening mechanism also allows for the expeditious review by an immigration judge of a negative screening determination and the quick removal of an alien with no credible claim to protection."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999).

"Essentially, the asylum officer is applying a threshold screening standard to decide whether an asylum [or torture] claim holds enough promise that it should be heard through the regular, full process or whether, instead, the person's removal should be effected through the expedited process."

Bo Cooper, *Procedures for Expedited Removal and Asylum Screening under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1503 (1997).

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

A. Definition of Credible Fear of Persecution

According to statute, the term credible fear of persecution means that "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208 [of the INA]."

INA § 235(b)(1)(B)(v).

B. Definition of Credible Fear of Torture

Regulations provide that the applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 C.F.R. § 208.16 or § 208.17.

8 C.F.R. § 208.30(e)(3).

V. BURDEN OF PROOF AND STANDARD OF PROOF FOR CREDIBLE FEAR DETERMINATIONS

A. Burden of Proof / Testimony as Evidence

See RAIO Training Module, *Evidence*.

The applicant bears the burden of proof to establish a credible fear of persecution or torture. This means that the applicant must produce sufficiently convincing evidence that establishes the facts of the case, and that those facts must meet the relevant legal standard.

Because of the non-adversarial nature of credible fear interviews, while the burden is always on the applicant to establish eligibility, there is a shared aspect of that burden in which asylum officers have an affirmative duty to elicit all information relevant to the legal determination. The burden is on the applicant to establish a credible fear, but asylum officers must

fully develop the record to support a legally sufficient determination.

An applicant's testimony is evidence to be considered and weighed along with all other evidence presented. Often times, in the credible fear context of expedited removal and detention, an applicant will not be able to provide additional evidence corroborating his or her otherwise credible testimony. An applicant may establish a credible fear with testimony alone if that testimony is detailed, consistent, and plausible.

INA § 208(b)(1)(B)(ii).

According to the INA, the applicant's testimony may be sufficient to sustain the applicant's burden of proof if it is "credible, is persuasive, and refers to specific facts." To give effect to the plain meaning of the statute and each of the terms therein, an applicant's testimony must satisfy all three prongs of the "credible, persuasive, and … specific" test in order to establish his or her burden of proof without corroboration. Therefore, the terms "persuasive" and "specific facts" must have independent meaning above and beyond the first term "credible." An applicant may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. "Specific facts" are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the asylum officer must distinguish between fact and opinion testimony and determine how much weight to assign to each of the two forms of testimony.

INA § 208(b)(1)(B)(ii).

After developing a sufficient record by eliciting all relevant testimony, an asylum officer must analyze whether the applicant's testimony is sufficiently credible, persuasive, and specific to be accorded sufficient evidentiary weight to meet the significant possibility standard.

Additionally, pursuant to the statutory definition of "credible fear of persecution", the asylum officer must take account of "such other facts as are known to the officer." Such "other facts" include relevant country conditions information.

INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2); *see* RAIO Training Module, *Country Conditions Research*.

Similarly, country conditions information should be considered when evaluating a credible fear of torture. The Convention Against Torture and implementing regulations require consideration of "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and [o]ther relevant information regarding conditions in the country of removal."

8 C.F.R. §§ 208.16(c)(3)(iii), (iv).

B. Credible Fear Standard of Proof: Significant Possibility

The party who bears the burden of proof must persuade the adjudicator of the existence of certain factual elements according to a specified "standard of proof," or degree of certainty. The relevant standard of proof specifies how convincing or probative the applicant's evidence must be.

In order to establish a credible fear of persecution or torture, the applicant must show a "significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or deferral of removal.

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

When interim regulations were issued to implement the credible fear process, the Department of Justice described the credible fear "significant possibility" standard as one that sets "a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum." Nonetheless, in the initial regulations, the Department declined suggestions to "adopt regulatory language emphasizing that the credible fear standard is a low one and that cases of certain types should necessarily meet that standard."

Immigration and Naturalization Service, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10317-20 (Mar. 6, 1997).

In fact, the showing required to meet the "significant possibility" standard is higher than the "not manifestly unfounded" screening standard favored by the Office of the United Nations High Commissioner for Refugees ("UNHCR") Executive Committee. **A claim that has no possibility, or only a minimal or mere possibility, of success, would not meet the "significant possibility" standard.**

See U.S. Committee on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal – Report on Credible Fear Determinations*, pg. 170 (Feb. 2005); UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, pp. 438-40, 6th Ed., June 2011. "Not manifestly unfounded" claims are (1) "not clearly fraudulent" and (2) "not related to the criteria for the granting of refugee status." 142 CONG. REC. H11071, H11081 (daily ed. Sept. 25, 1996) (statement of Rep. Hyde) (noting that the credible fear standard was "redrafted in the conference document to address fully concerns that the 'more probable than not' language in the original House version

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

was too restrictive").

In a non-immigration case, the "significant possibility" standard of proof has been described to require the person bearing the burden of proof to "demonstrate a *substantial and realistic possibility* of succeeding." While this articulation of the "significant possibility" standard was provided in a non-immigration context, the "*substantial and realistic possibility*" of success description is a helpful articulation of the "significant possibility" standard as applied in the credible fear process.

See Holmes v. Amerex Rent-a-Car, 180 F.3d 294, 297 (D.C. Cir. 1999) (quoting *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846, 852 (D.C. 1998)) (emphasis added).

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

Id.

In sum, "the credible fear 'significant possibility' standard of proof can be best understood as requiring that the applicant 'demonstrate a *substantial and realistic possibility* of succeeding,' but not requiring the applicant to show that he or she is more likely than not going to succeed when before an immigration judge."

Joseph E. Langlois. Asylum Division, Office of International Affairs, *Increase of Quality Assurance Review for Positive Credible Fear Determinations and Release of Updated Asylum Officer Basic Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 17 April 2006).

C. Important Considerations in Interpreting and Applying the Standard

1. The "significant possibility" standard of proof required to establish a credible fear of persecution or torture must be applied in conjunction with the standard of proof required for the ultimate determination on eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.

   For instance, in order to establish a credible fear of torture, an applicant must show a "significant possibility" that he or she could establish eligibility for protection under the Convention Against Torture, i.e. a "significant possibility" that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. This is a higher standard to meet than for an applicant

attempting to establish a "significant possibility" that he or she could establish eligibility for asylum based upon a well-founded fear of persecution on account of a protected characteristic, i.e. a "significant possibility" that he or she could establish a "reasonable possibility" of suffering persecution on account of a protected characteristic if returned to his or her home country.

2. Questions as to how the standard is applied should be considered in light of the nature of the standard as a *screening standard* to identify persons who could qualify for asylum or protection under the Convention against Torture.

3. When there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination. The questions at issue can be addressed in a full hearing before an immigration judge.

4. In determining whether the alien has a credible fear of persecution or a credible fear of torture, the asylum officer shall consider whether the applicant's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

8 C.F.R.§ 208.30(e)(4).

5. Similarly, where there is:

   a. disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; or,

   b. the claim otherwise raises an unresolved issue of law; **and,**

   c. there is <u>no DHS or Asylum Division policy or guidance</u> on the issue, then

   generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.

D. Identity

1. An applicant must establish his or her identity with a reasonable degree of certainty. Credible testimony alone can establish identity.

See RAIO Training Module, *Refugee Definition*

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

3. After the credible fear interview, the information obtained by the asylum officer may be used by other DHS officials in determining whether to parole a detained alien. Immigration officials in charge of detaining the alien must be satisfied that identity is established before granting parole.

See "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," ICE Directive No. 11002.1 (effective Jan. 4, 2010).

VI. CREDIBILITY

A. Credibility Standard

In making a credible fear determination, asylum officers are specifically instructed by statute to "[take] into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer."

INA § 235 (b)(1)(B)(v).

To meet the credible fear standard, an applicant must establish that there is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing. This means that there is "a substantial and realistic possibility" that the applicant will be found credible in a full hearing.

B. Evaluating Credibility in a Credible Fear Interview

1. General Considerations

See RAIO Training Module, *Credibility*.

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

b. The asylum officer must gather sufficient information to determine whether the alien has a credible fear of persecution or torture. The applicant's credibility

should be evaluated (1) only after all information relevant to the claim is elicited and (2) in light of "the totality of the circumstances, and all relevant factors."

INA § 208(b)(1)(B)(iii).

c. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The purpose of evaluating the credibility of an applicant is solely to determine eligibility for a full asylum or withholding hearing. The asylum officer's personal opinions or moral views regarding an applicant should not affect the officer's decision.

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

2. Properly Identifying and Probing Credibility Concerns During the Credible Fear Interview

See RAIO Training Module, *Credibility*.

a. *Identifying Credibility Concerns*

Section 208 of the Act provides a non-exhaustive list of factors that may be used in a credibility determination in the asylum context. These include: internal consistency, external consistency, plausibility, demeanor, candor, and responsiveness.

INA § 208(b)(1)(B)(iii); *See also*, RAIO Training Module, *Credibility*, for a more detailed discussion of these factors.

An adjudicator may base a negative credible fear determination on lack of credibility. A general lack of detail is another commonly accepted basis for an adverse credibility determination in the asylum context, though the limited scope of the credible fear screening interview may make such a finding less prevalent in the credible fear process.

While demeanor, candor, and responsiveness may be taken into account in the asylum context, they may be of limited reliability in the credible fear context because of cross-cultural factors, effects of trauma, and the nature of non-adversarial interviews. The nature of expedited removal and the credible fear interview process—including detention, relatively brief and often telephonic interviews, etc.— further limits the reliability of and ability to evaluate these three factors in the credible fear context. Therefore,

demeanor, candor, and responsiveness will normally not be significant factors in credible fear determinations.

b. *Informing the Applicant of the Concern and Giving the Applicant an Opportunity to Explain*

When credibility concerns present themselves during the course of the credible fear interview, the applicant must be given an opportunity to address and explain them. The asylum officer must follow up on all credibility concerns by making the applicant aware of each portion of the testimony, or his or her conduct, that raises credibility concerns, and the reasons the applicant's credibility is in question. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

C. Assessing Credibility in Credible Fear

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

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

(i) trauma the applicant has endured;
(ii) passage of a significant amount of time since the described events occurred;
(iii) certain cultural factors, and the challenges inherent in cross-cultural communication;
(iv) detention of the applicant;
(v) problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other difference that may affect

See also RAIO Training Module, *Interviewing- Survivors of Torture;* RAIO Training Module, *Interviewing- Working with an Interpreter*.

Asylum officers must ensure that persons with potential biases against applicants on the grounds of race, religion, nationality, membership in a

the objectivity of the interpreter or the applicant's comfort level; and

(vi) unfamiliarity with speakerphone technology, the use of an interpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.

particular social group, or political opinion are not used as interpreters. *See International Religious Freedom Act of 1998*, 22 U.S.C. § 6473(a); RAIO Training Module, *IRFA (International Religious Freedom Act)*.

3. The asylum officer must have followed up on all credibility concerns during the interview by making the applicant aware of each concern, and the reasons the applicant's testimony is in question. The applicant must have been given an opportunity to address and explain all such concerns during the credible fear interview.

4. Trivial or minor inconsistencies will not be sufficient to find an applicant not credible in the credible fear context. These inconsistencies can be explored by the immigration judge in the full asylum and withholding hearing. Material or significant inconsistencies that have not been adequately resolved by the applicant during the credible fear interview may be sufficient to support a negative credible fear determination.

5. Inconsistencies between the applicant's initial statement to the CBP or ICE official and his or her testimony before the asylum officer must be probed during the interview. Such inconsistencies may provide support for a negative credibility finding if, taking into account an explanation offered by the applicant, there is not a significant possibility that the applicant could establish in a full hearing that the claim is credible.

   The sworn statement completed by CBP (Form I-867A/B) is not intended, however, to record detailed information about any fear of persecution or torture. The interview statement is intended to record whether or not the individual has a fear, not the nature or details surrounding that fear. However, in some cases, the asylum officer may find that the CBP officer did, in fact, gather additional information from the applicant regarding the nature of his or her claim. In such cases, the applicant's prior statements can inform the asylum officer's line of questioning in the credible fear interview, and any inconsistencies between these prior statements and the statements being made during the credible fear interview should be probed and

See 8 C.F.R. § 235.3(b)(4) (stating that if an applicant indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the "examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern," and should then refer the alien for a credible fear interview).

assessed.

A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien's statement to an inspector is taken when considering whether an applicant's later testimony is consistent with the earlier statement. Factors to keep in mind include: 1) whether the questions posed at the port of entry or place of apprehension were designed to elicit the details of an asylum claim, and whether the immigration officer asked relevant follow-up questions; 2) whether the alien was reluctant or afraid to reveal information during the first meeting with U.S. officials because of past abuse; and 3) whether the interview was conducted in a language other than the applicant's native language.

See Balasubramanrim v. INS, 143 F.3d 157 (3d Cir. 1998); *cf. Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) (discussing in detail the limitations inherent in the initial interview process, and holding that the BIA was entitled to rely on fundamental inconsistencies between the applicant's airport interview statements and his hearing testimony where the applicant was provided with an interpreter, and given ample opportunity to explain his fear of persecution in a careful and non-coercive interview).

6. All reasonable explanations must be considered when assessing the applicant's credibility. The asylum officer need not credit an unreasonable explanation.

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

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

D. Documenting a Credibility Determination

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

2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony found not credible, including the specific

inconsistencies, lack of detail or other factors, along with the applicant's explanation and the reason the explanation is deemed not to be reasonable.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the credible fear determination, a follow-up interview must be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information. Unresolved credibility issues should not form the basis of a negative credibility determination.

VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION

For the most recent Asylum Division guidance on eligibility for asylum under section 208 of the INA, please consult the latest applicable RAIO Training Module.

A. General Considerations in Credible Fear

8 C.F.R. § 208.30(e)(2).

1. An applicant will be found to have a credible fear of persecution if there is a significant possibility the applicant can establish eligibility for asylum under section 208 of the Act.

2. In general, a finding that there is a significant possibility that the applicant experienced past persecution on account of a protected characteristic is sufficient to satisfy the credible fear standard. This is because the applicant in such a case has shown a significant possibility of establishing that he or she is a refugee under section 208 of the Act and a full asylum hearing provides the appropriate venue to evaluate whether or not the applicant merits a favorable exercise of discretion to grant asylum.

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

3. When an applicant does not claim to have suffered any past harm or where the evidence is insufficient to establish a significant possibility of past persecution under section

208 of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under section 208 of the Act.

B. Past Persecution

See RAIO Training Module, *Persecution*.

1. Severity of Harm: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the harm the applicant experienced was sufficiently serious to amount to persecution.

    a. There is no requirement that an individual suffer serious injuries to be found to have suffered persecution. However, the presence or absence of physical harm is relevant in determining whether the harm suffered by the applicant rises to the level of persecution.

    b. Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.

    c. Violations of "core" or "fundamental" human rights, prohibited by international law, may constitute harm amounting to persecution.

    d. While less preferential treatment and other forms of discrimination and harassment generally are not considered persecution, discrimination or harassment may amount to persecution if the adverse practices accumulate or increase in severity to the extent that it leads to consequences of a substantially prejudicial nature. Asylum officers should evaluate the entire scope of harm experienced by the applicant to determine if he or she was persecuted, taking into account the individual circumstances of each case.

    e. Generally, a brief detention, for legitimate law enforcement reasons, without mistreatment, will not constitute persecution. Prolonged detention is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Evidence of mistreatment during detention also may establish persecution.

    f. To rise to the level of persecution, economic harm must be deliberately imposed and severe.

g. Psychological harm alone may rise to the level of persecution. Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.

h. Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.

i. Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm is serious enough to amount to persecution, and also where the persecutor's motivation in harming the third party is to act against the applicant.

2. Motivation: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the persecutor was motivated to harm him or her on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

See RAIO Training Modules, *Nexus and the Protected Grounds (minus PSG)* and *Nexus – Particular Social Group*.

a. Nexus analysis requires officers to determine: (1) whether the applicant possesses or is perceived to possess a protected characteristic; and (2) whether the persecution or feared persecution is on account of that protected characteristic.

b. A "punitive" or "malignant" intent is not required for harm to constitute persecution. Persecution can consist of objectively serious harm or suffering that was inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intended the victim to experience the harm as harm.

See Matter of Kasinga, 21 I&N Dec. 357, 366-67 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

c. The applicant does not bear the burden of establishing the persecutor's exact motivation. For cases where no nexus to a protected ground is immediately apparent, the asylum officer in credible fear interviews should ask questions related to all five grounds to ensure that no nexus issues are overlooked.

d. Although the applicant bears the burden of proof to establish a nexus between the harm and the protected ground, asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Evidence of motive can be either direct or circumstantial. Reasonable inferences regarding the motivations of persecutors should be made, taking into consideration the culture and patterns of persecution within the applicant's country of origin and any relevant country of origin information, especially if the applicant is having difficulty answering questions regarding motivation.

e. There is no requirement that the persecutor be motivated only by the protected belief or characteristic of the applicant. As long as there is a significant possibility that at least one central reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic, the applicant may establish the harm is "on account of" a protected characteristic in the credible fear context.

f. Particular Social Groups: The area of law surrounding particular social groups is evolving rapidly, and it is important for asylum officers to be informed about current DHS and Asylum Division guidance, as well as current case law and regulatory changes.

See RAIO Training Module, *Nexus – Particular Social Group* for a non-exhaustive list of precedent decisions that have identified certain groups that are particular social groups and other groups that were found not to be particular social groups based on the facts of each case.

To determine whether the applicant belongs to a viable particular social group where there are no precedent decisions on point, asylum officers must analyze the facts using the BIA test for evaluating whether a group meets the definition of a particular social group:

See Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

(i) First, the group must comprise individuals who share a common, immutable characteristic, which is either a characteristic that members cannot change or is a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it.

(ii) Second, the group must be defined with particularity; it "must be defined by characteristics that provide a clear benchmark for

Matter of M-E-V-G-, 26 I&N Dec. 227, 239 (BIA 2014).

determining who falls within the group."

(iii) Third, the group must be socially distinct within the society in question. Social distinction involves examining whether "those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." Social distinction relates to society's, not the persecutor's, perception, though the persecutor's perceptions may be relevant to social distinction

Id. at 238.

Id. at 242.

Certain circuit courts have rejected the Board's application of a social distinction requirement in cases before them on petition for review. *See Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). Those decisions, however, question the way the Board applied social visibility in those cases and do not preclude the interpretation of precedent as imposing a social distinction requirement.

3. Persecutor: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the entity that harmed the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.

See RAIO Training Module, *Persecution*.

   a. Evidence that the government is unwilling or unable to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.

   b. No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. A determination of whether a government is unable to

control the entity that harmed the applicant requires evaluation of country of origin information and the applicant's circumstances. A government in the midst of a civil war or one that is unable to exercise its authority over portions of the country may be unable to control the persecutor in areas of the country where its influence does not extend. In order to establish a significant possibility of past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis. The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

c. To demonstrate that the government is unable or unwilling to protect an applicant, the applicant must show that he or she sought the protection of the government, or provide a reasonable explanation as to why he or she did not seek that protection. Reasonable explanations for not seeking government protection include evidence that the government has shown itself unable or unwilling to act in similar situations or that the applicant would have increased his or her risk by affirmatively seeking protection. In determining whether an applicant's failure to seek protection is reasonable, asylum officers should consult and consider country of origin information, in addition to the applicant's testimony.

C. Well-founded Fear of Persecution

See RAIO Training Module, *Well Founded Fear*.

1. When an applicant does not claim to have suffered any past harm or where the evidence is insufficient to establish a significant possibility of past persecution on account of a protected characteristic under section 101(a)(42)(A) of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution under section 208 of the Act.

2. To establish a well-founded fear of persecution on account of a protected characteristic, an applicant must show that he or she has: 1) a subjective fear of persecution; and 2) that the fear has an objective basis.

   a. The applicant satisfies the subjective element if he or

See RAIO Training Module,

she credibly articulates a genuine fear of return. Fear has been defined as an apprehension or awareness of danger.

Well-Founded Fear.

b. The applicant will meet the credible fear standard based on a fear of future harm if there is a significant possibility that he or she could establish that there is a reasonable possibility that he or she will be persecuted on account of a protected ground upon return to his or her country of origin.

3. The Mogharrabi Test: *Matter of Mogharrabi* lays out a four-part test for determining well-founded fear. To establish a credible fear of persecution on account of a protected characteristic based on future harm, there must be a significant possibility that the applicant can establish each of the following elements:

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

a. *Possession* (or imputed possession of a protected characteristic)

(i) The applicant must possess, or be believed to possess, a protected characteristic that the persecutor seeks to overcome. The BIA later modified this definition and explicitly recognized that a "punitive" or "malignant" intent is not required for harm to constitute persecution. The BIA concluded that persecution can consist of 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.

See Matter of Kasinga, 21 I&N Dec. 357, 366-67 (BIA 1996) (explaining that because FGM was used "at least in some significant part" to overcome a protected characteristic of the applicant, the persecution the applicant fears is "on account of" her status as a member of the defined social group); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

(ii) This analysis requires officers to determine: (1) whether the applicant possesses or is perceived to possess a protected characteristic; and (2) whether the persecution or feared persecution is on account of that protected characteristic.

(iii) For cases where no nexus to a protected ground is immediately apparent, the asylum officer in credible fear interviews must ask questions related to all five grounds to ensure that no nexus issues are overlooked.

(iv) Asylum officers have an affirmative duty to elicit all information relevant to the nexus determination. Officers should make reasonable inferences, keeping in mind the difficulty, in many cases, of establishing with precision a persecutor's motives.

(v) To determine whether the applicant belongs to a viable particular social group where there are no precedent decisions on point, asylum officers must analyze the facts using the BIA test for evaluating whether a group meets the definition of a particular social group.

b. *Awareness* (the persecutor is aware or could become aware the applicant possesses the characteristic)

(i) Relevant lines of inquiry include: how someone would know or recognize that the applicant had the protected characteristic and how the persecutor would know that the applicant had returned to his or her country.

(ii) The applicant is not required to hide his or her possession of a protected characteristic in order to avoid awareness.

c. *Capability* (the persecutor has the capability to persecute the applicant)

(i) If the persecutor is a governmental entity, asylum officers should consider the extent of the government's power or authority and whether the applicant can seek protection from another government entity within the country.

(ii) If the persecutor is a non-governmental entity, relevant factors include: the extent to which the government is able or willing to control the entity, whether the government is able to or would want to protect the applicant; whether the applicant reported the non-governmental actor to the police; and whether the police or government could or would offer any protection to the applicant.

(iii) The extent to which the persecutor has the ability

to enforce his or her will throughout the country is also relevant when evaluating whether the persecutor is capable of persecuting the applicant.

d. *Inclination* (the persecutor has the inclination to persecute the applicant)

(i) Factors to consider when evaluating inclination include: any previous threats or harm from the persecutor, the persecutor's treatment of individuals similarly situated to the applicant who have remained in the home country or who have returned to the home country, and any time passed between the last threats received and flight from his or her home country.

(ii) For both capability and inclination, if the applicant is unable to answer questions regarding whether the persecutor is capable or inclined to persecute him or her, the asylum officer may use country of origin information to help determine the persecutor's capability and inclination to persecute the applicant.

4. Pattern or Practice

See RAIO Training Module, *Well Founded Fear*.

8 C.F.R. § 208.13(b)(2)(iii).

a. The applicant need not show that he or she will be singled out individually for persecution, if the applicant shows a significant possibility that he or she could establish:

(i) There is a pattern or practice of persecution on account of any of the protected grounds of a group of persons similarly situated to the applicant.

(ii) The applicant is included in and is identified with the persecuted group, such that a reasonable person in the applicant's position would fear persecution.

5. Persecution of Individuals Closely Related to the Applicant

The persecution of family members or other individuals closely associated with the applicant may provide objective evidence that the applicant's fear of future persecution is well-founded, even if there is no

pattern or practice of persecution of such individuals. On the other hand, continued safety of individuals similarly situated to the applicant may, in some cases, be evidence that the applicant's fear is not well-founded. Furthermore, the applicant must establish some connection between such persecution and the persecution the applicant fears.

6. Threats without Harm

   A threat (anonymous or otherwise) may also be sufficient to establish a well-founded fear of persecution. The evidence must show that the threat is serious and that there is a reasonable possibility the threat will be carried out.

7. Applicant Remains in Country after Threats or Harm

   a. A significant lapse of time between the occurrence of incidents that form the basis of the claim and an applicant's departure from the country may be evidence that the applicant's fear is not well-founded. The lapse of time may indicate that the applicant does not possess a genuine fear of harm or the persecutor does not possess the ability or the inclination to harm the applicant.

   b. However, there may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or being harmed, including: lack of funds to arrange for departure from the country and time to arrange for the safety of family members, belief that the situation would improve, promotion of a cause within the home country, and temporary disinclination by the persecutor to harm the applicant.

8. Return to Country of Persecution

   An applicant's return to the country of feared persecution generally weakens the applicant's claim of a well-founded fear of persecution. It may indicate that the applicant does not possess a genuine (subjective) fear of persecution or that the applicant's fear is not objectively reasonable. Consideration must be given to the reasons the applicant returned and what happened to the applicant once he or she returned. Return to the country of feared persecution

does not necessarily defeat an applicant's claim.

9. Internal Relocation

a. In cases in which the feared persecutor is a government or is government-sponsored, there is a presumption that there is no reasonable internal relocation option. This presumption may be overcome if a preponderance of the evidence shows that, under all the circumstances, the applicant could avoid future persecution by relocating to another part of the applicant's country and that it would be reasonable to expect the applicant to relocate.

8 C.F.R. § 208.13(b)(2)(ii); 8 C.F.R. § 208.13(b)(3)(ii).

b. If the persecutor is a non-governmental entity, there must be a significant possibility that the applicant can demonstrate that there is no reasonable internal relocation option.

c. In assessing an applicant's well-founded fear and internal relocation, apply the following two-step approach:

(i) Determine if an applicant could avoid future persecution by relocating to another part of the applicant's home country. If the applicant will not be persecuted in another part of the country, then:

(ii) Determine if an applicant's relocation, *under all the circumstances*, would be reasonable.

d. In determining the reasonableness of internal relocation in relation to a well-founded fear claim, asylum officers should consider the following factors:

(i) Whether the applicant would face other serious harm that may not be inflicted on account of one of the five protected grounds in the refugee definition, but is so serious that it equals the severity of persecution;
(ii) Any ongoing civil strife such as a civil war occurring in parts of the country;
(iii) Administrative, economic, or judicial infrastructure that may make it very difficult for an individual to live in another part of the country;
(iv) Geographical limitations that could present

barriers to accessing a safe part of a country or where an individual would have difficulty surviving due to the geography;

(v) Social and cultural constraints such as age, gender, health, and social and familial ties or whether the applicant possess a characteristic, such as a particular language or a unique physical appearance, that would readily distinguish the applicant from the general population and affect his or her safety in the new location; and

(vi) any other factors specific to the case that would make it unreasonable for the applicant to relocate should be considered.

There is no requirement that an applicant first attempt to relocate in his or her country before flight. However, the fact that an applicant lived safely in another part of his or her country for a significant period of time before leaving the country may be evidence that the threat of persecution does not exist countrywide, and that the applicant can reasonably relocate within the country to avoid future persecution.

D. Multiple Citizenship

Persons holding multiple citizenship or nationalities must demonstrate a credible fear of persecution or torture from at least one country in which they are a citizen or national to be eligible for referral to immigration court for a full asylum or withholding of removal hearing. If the country of removal indicated is different from the applicant's country of citizenship or nationality, fear from the indicated country of removal must also be evaluated.

See RAIO Training Module, *Refugee Definition*, for more detailed information about determining an applicant's nationality, dual nationality, and statelessness.

Although the applicant would not be eligible for asylum unless he or she establishes eligibility with respect to all countries of citizenship or nationality, he or she might be entitled to withholding of removal with respect to one country and not the others. Therefore, the protection claim must be referred for a full hearing to determine this question.

In addition, if the applicant demonstrates a credible fear with respect to another country, aside from the country of citizenship or nationality, in which the applicant was firmly resettled prior to arriving in the United States, the applicant should be referred to the Immigration Judge for a full proceeding, since he or she may be removed to that country as well.

E. Statelessness/Last Habitual Residence

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

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

VIII. ESTABLISHING A CREDIBLE FEAR OF TORTURE

An applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 C.F.R. §§ 208.16 or 208.17. In order to be eligible for withholding or deferral of removal under CAT, an applicant must establish that it is more likely than not that he or she would be tortured in the country of removal. The credible fear process is a "screening mechanism" that attempts to identify whether there is a significant possibility that an applicant can establish that it is more likely than not that he or she would be tortured in the country in question.

See ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations* for a detailed discussion of the background of CAT and legal elements of the definition of torture; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8484 (Feb. 19, 1999).

Because in the withholding or deferral of removal hearing the applicant will have to establish that it is more likely than not that he or she will be tortured in the country of removal, **a significant possibility of establishing eligibility for withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of eligibility for asylum**. In other words, to establish a credible fear of torture, the applicant must show there is a significant possibility that he or she could establish in a full hearing that it is more likely than not he or she would be tortured in that country.

A. Definition of Torture

8 C.F.R. § 208.18(a) defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining

8 C.F.R. § 208.18(a); ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture*

from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Determinations.

B. General Considerations

1. U.S. regulations require that several elements be met before an act is found to constitute torture. Because credible fear of torture interviews are employed as "screening mechanisms to quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch," parts of the torture definition that require complex legal and factual analyses may be more appropriately considered in a full hearing before an immigration judge.

8 C.F.R. §§ 208.18(a)(1-8).

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999).

2. After establishing that the applicant's claim would be found credible, the applicant satisfies the credible fear of torture standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that:

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

   a. the torturer specifically intends to inflict severe physical or mental pain or suffering;

8 C.F.R. §§ 208.18(a)(5).

   b. the harm constitutes severe pain or suffering;

   c. the torturer is a public official or other person acting in an official capacity, or someone acting at the instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and

Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. 8 C.F.R. §§ 208.18(a)(2).

   d. the applicant is in the torturer's custody or physical control.

8 C.F.R. §§ 208.18(a)(6).

   e. Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. However, sanctions that defeat the object and purpose of the Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

8 C.F.R. §§ 208.18(a)(3).

C. Specific Intent

1. For an act to constitute torture, the applicant must establish that it is more likely than not that the act is specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain and suffering is not torture under the Convention definition.

   8 C.F.R. §§ 208.18(a)(1), (5).

2. The specific intent requirement is met when the evidence shows that an applicant may be specifically targeted for punishment or intentionally singled out for harsh treatment that may rise to the level of torture.

   .

3. The Convention Against Torture does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

D. Degree of Harm

1. For harm to constitute torture, the applicant must establish that it is more likely than not that the harm rises to the level of severity of torture.

2. Torture requires severe pain or suffering, whether physical or mental. "Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. Therefore, certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

   8 C.F.R. § 208.18(a)(1); 8 C.F.R. § 208.18(a)(2).

3. Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. Whether harm constitutes torture often depends on the severity and cumulative effect.

4. For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:

   a. The intentional infliction or threatened infliction of severe physical pain or suffering;

      8 C.F.R. § 208.18(a)(4).

   b. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt

profoundly the senses or the personality;

c. The threat of imminent death; or

d. The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

E. Identity of the Torturer

1. For an act to constitute torture, the applicant must establish that it is more likely than not that the harm he or she fears would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. § 208.18(a)(1).

2. Harm by a Public Official

See ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations* for a more extensive discussion on this element of CAT eligibility.

a. Generally, in the credible fear context, if there is a significant possibility the applicant can establish that it is more likely than not that he or she was or would be harmed by a public official, the applicant has met the public official requirement for a credible fear of torture.

b. The term "public official" is broader than the "government" or "police" and can include any person acting in an official capacity or under color of law. A public official can include any person acting on behalf of a national or local authority.

c. In the withholding or deferral of removal setting, when a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition is not satisfied. On this topic, the Second Circuit provided that, "[a]s two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, *it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.*"

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (emphasis added).

d. A public official is acting in an official capacity when "he misuses power possessed by virtue of law and

Ramirez Peyro v. Holder, 574 F.3d 893 (8th Cir. 2009).

made possible only because he was clothed with the authority of law." To establish whether a public official is acting in under the color of law, the applicant must establish a nexus between the public official's authority and the harmful conduct inflicted on the applicant by the public official. Such an inquiry is fact intensive and includes considerations like "whether the officers are on duty and in uniform, the motivation behind the officer's actions and whether the officers had access to the victim because of their positions, among others." The Fifth Circuit also addressed "acting in an official capacity" by positing "[w]e have recognized on numerous occasions that acts motivated by an officer's personal objectives are 'under color of law' when the officer uses his official capacity to further those objectives."

Id. at 901.

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

3. Acquiescence

   a. When the "torturer" is not a public official, a successful CAT claim requires that a public official or other person acting in an official capacity instigates, consents, or acquiesces to the torture.

   b. Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

8 C.F.R. § 208.18(a)(7).

      (i) The Senate ratification history for the Convention explains that the term "awareness" was used to clarify that government acquiescence may be established by evidence of *either* actual knowledge or willful blindness. "Willful blindness" imputes knowledge to a government official who has a duty to prevent misconduct and "deliberately closes his eyes to what would otherwise have been obvious to him."

136 CONG. REC. at S17,491 (daily ed. Oct. 27, 1990); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Doc. No. 101-30, at 9 (1990); *see also* S. Hrg 101-718 (Jan. 30, 1990), *Statement of Mark Richard, Dep. Asst. Attorney General, DOJ Criminal Division*, at 14.

      (ii) While circuit courts of appeals are split with regards to the BIA's "willful acceptance" phrase in favor of the more precise "willful blindness," for purposes of threshold credible fear screenings, asylum officers must use the willful blindness standard.

c. There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture.

8 C.F.R. § 208.18(a)(7).

d. In the context of government consent or acquiescence, the court in *Ramirez-Peyro v. Holder* reiterated its prior holding that "use of official authority by low level officials, such a[s] police officers, can work to place actions under the color of law even when they act without state sanction." Therefore, even if country conditions show that a national government is fighting against corruption, that fact will not necessarily preclude a finding of consent/acquiescence by a local public official.

Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009).

e. Evidence that private actors have general support in some sectors of the government, without more, may be insufficient to establish that the officials would acquiesce to torture by the private actors.

See Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354-55 (5th Cir. 2002).

4. Consent or Acquiescence vs. Unable or Unwilling to Control

a. The public official requirement under CAT is distinct from the inquiry into a government's ability or willingness to control standard applied under the refugee definition.

b. A finding that a government is unable to control a particular person(s) is not dispositive of whether a public official would instigate, consent or acquiesce to the feared torture.

Reyes-Sanchez v. U.S. Atty. Gen., 369 F.3d 1239 (11th Cir. 2004) ("That the police did not catch the culprits does not mean that they acquiesced in the harm.")

c. A more relevant query is whether or not a public official who has a legal duty to intervene would be unwilling to do so. In these circumstances, the public official would also have to be aware or deliberately avoid being aware of the harm in order for the action or inaction to qualify as acquiescence under CAT.

d. The willingness in certain levels of a government to combat harm is not necessarily responsive to the question of whether torture would be inflicted with the consent or acquiescence of a public official. In *De La Rosa v. Holder*, the Second Circuit stated, "[i]n short, it is not clear to this Court why the preventative efforts

De La Rosa v. Holder, 598 F.3d 103, 110 (2d Cir. 2010)

of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'"

e. Similarly, the Third Circuit has indicated that the fact that the government of Colombia was engaged in war against the FARC did not in itself establish that it could not be consenting or acquiescing to torture by members of the FARC.

Pieschacon-Villegas v. Attorney General, 671 F.3d 303, 312 (3d Cir. 2011); *Gomez-Zuluaga v. Attorney General*, 527 F.3d 330, 351 (3d Cir. 2008).

F. Past Harm

Unlike a finding of past persecution, a finding that an applicant suffered torture in the past does not raise a *presumption* that it is *more likely than not* the applicant will be subject to torture in the future. However, regulations require that any past torture be *considered* in evaluating whether the applicant is likely to be tortured, because an applicant's experience of past torture may be *probative* of whether the applicant would be subject to torture in the future.

8 C.F.R. § 208.16(c)(3)(i); Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999).

Credible evidence of past torture is strong evidence in support of a claim for protection based on fear of future torture. For that reason, an applicant who establishes that he or she suffered past torture will establish a credible fear of torture, unless changes in circumstances are so substantial that the applicant has no significant possibility of future torture as a result of the change.

G. Internal Relocation

1. Regulations require immigration judges to consider evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured, in assessing whether the applicant is eligible for withholding or deferral of removal under the Convention

8 C.F.R. § 208.16(c)(3)(ii).

Against Torture. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in credible fear of torture determinations.

2. Under the Convention Against Torture, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of relocation. Therefore, as the Ninth Circuit wrote in *Hasan v. Ashcroft*, "in the CAT context, unlike asylum, the petitioners have the burden of presenting evidence to show that internal relocation is not a possibility." In contrast, "in the asylum context, once the petitioner has established past persecution on account of an enumerated ground, the burden is on the government to prove that the applicant could avoid persecution by relocating to another part of the country and that it would be reasonable to expect her to do so."

8 C.F.R. § 208.16(c)(3)(ii).

Hasan v. Ashcroft, 380 F.3d 1114, 1123 (9th Cir. 2004).

Id. at 1122.; 8 C.F.R. § 208.13(b)(3)(ii).

3. Credible evidence that the feared torturer is a public official will normally be sufficient evidence that there is no safe internal relocation option in the credible fear context.

See e.g., *Comollari v. Ashcroft*, 378 F.3d 694, 697-8 (7th Cir. 2004).

4. Unlike the persecution context, the regulations implementing CAT do not explicitly reference the need to evaluate the reasonableness of internal relocation. Nonetheless, the regulations provide that "all evidence of relevant to the possibility of future torture shall be considered…" Therefore, asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

8 C.F.R. § 208.16(c)(3)(iv).

8 C.F.R. § 208.13(b)(3); *See* RAIO Training Module, *Well Founded Fear*.

IX. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

Please consult the appropriate RAIO Training Module for a full discussion on mandatory bars.

A. No Bars Apply

8 C.F.R. § 208.30(e)(5).

Pursuant to regulations, evidence that the applicant is, or may be, subject to a bar to asylum or withholding of removal does not have an impact on a credible fear finding.

B. Asylum Officer Must Elicit Testimony

INA § 208(b)(2); INA §

Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether or not a bar to asylum or withholding applies. The immigration judge is responsible for finally adjudicating whether or not the applicant is barred from receiving asylum or withholding of removal.

241(b)(3).

There are no bars to a grant of deferral of removal to a country where the applicant would be tortured.

8 C.F.R. § 208.17(a).

Information should be elicited about whether the applicant:

1. participated in the persecution of others;

2. has been convicted by a final judgment of a particularly serious crime (including an aggravated felony), and constitutes a danger to the community of the US;

INA § 208(b)(2)(B)(i).

3. is a danger to the security of the US;

4. is subject to the inadmissibility or deportability grounds relating to terrorist activity as identified in INA section 208(b)(2)(A)(v);

5. has committed a serious nonpolitical crime;

6. is a dual or multiple national who can avail himself or herself of the protection of a third state; and,

This bar and the firm resettlement bar are not bars to withholding or deferral of removal. *See* INA § 241(b)(3).

7. was firmly resettled in another country prior to arriving in the United States.

C. Flagging Potential Bars

The officer must keep in mind that the applicability of these bars requires further evaluation that will take place in the full hearing before an immigration judge if the applicant otherwise has a credible fear of persecution or torture. In such cases, the officer should consult a supervisory officer, follow procedures on "flagging" such information for the hearing, and prepare the appropriate paperwork for a positive credible fear finding. Officers may be asked to prepare a memorandum to file outlining the potential bar that may be triggered. Although positive credible fear determinations that involve a possible mandatory bar no longer require HQ review, supervisory officers

Procedures Manual, Credible Fear Process (Draft, Nov., 2003); Joseph E. Langlois. Asylum Division, Refugee, Asylum and International Operations Directorate. *Revised Credible Fear Quality Assurance Review Categories and Procedures*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 December 2008).

may use their discretion to forward the case to HQ for review.

X. OTHER ISSUES

A. Treatment of Dependents

8 C.F.R. § 208.30(b)

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination, if the spouse or child: arrived in the United States concurrently with the principal alien; and desires to be included in the principal alien's determination. USCIS maintains discretion under this regulation not to allow a spouse or child to be included in the principal's credible fear request.

Any alien also has the right to have his or her credible fear evaluation and determination made separately, and it is important for asylum pre-screening officers to question each member of the family to be sure that, if any member of the family has a credible fear, his or her right to apply for asylum or protection under CAT is preserved. When questioning family members, special attention should be paid to the privacy of each family member and to the possibility that victims of domestic abuse, rape and other forms of persecution might not be comfortable speaking in front of other family members.

The regulatory provision that allows a dependent to be included in a principal's determination does not change the statutory rule that any alien subject to expedited removal who has a credible fear has the right to be referred to an immigration judge.

B. Attorneys and Consultants

8 C.F.R. § 208.30(d)(4)

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. Asylum officers should determine whether or not an applicant wishes to have a consultant present at the credible fear interview. Although an alien is permitted by regulation to have a consultant present at a credible fear interview, the availability of a consultant cannot unreasonably delay the process. A consultant may be a relative, friend, clergy person, attorney, or representative. If the consultant is an attorney or representative, he or she is not required to submit a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, but may submit one if he or she desires.

8 C.F.R. § 208.30(d)(4); Procedures Manual, Credible Fear Process (Draft, Nov., 2003).

C. Factual Summary

8 C.F.R. § 208.30(d)(6)

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant. At the conclusion of the interview, the asylum officer must review the summary with the applicant and provide the applicant with an opportunity to correct any errors therein. The factual summary and its review should be contemporaneously recorded at the end of the asylum officer's interview notes.

XIII. SUMMARY

A. Expedited Removal

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by the Department of Homeland Security, unless they indicate an intention to apply for asylum or express a fear of persecution or torture or a fear of return to their home country. Aliens subject to expedited removal are not entitled to an immigration hearing or further review unless they are able to establish a credible fear of persecution or torture.

B. Function of Credible Fear Screening

The purpose of the credible fear screening process is to identify persons subject to expedited removal who might ultimately be eligible for asylum under section 208 of the INA or withholding of removal or deferral of removal under the Convention Against Torture.

C. Credible Fear Standard of Proof: Significant Possibility

In order to establish a credible fear of persecution or torture, the applicant must show a "significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or deferral of removal.

The "significant possibility" standard of proof required to establish a credible fear of persecution or torture must be applied in conjunction with the standard of proof required for the ultimate determination on eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.

When there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination. The questions at issue can be

addressed in a full hearing before an immigration judge. Similarly, the asylum officer shall consider whether the applicant's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; or the claim otherwise raises an unresolved issue of law; and, there is no DHS or Asylum Division policy or guidance on the issue, then generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.

D. Credibility

To meet the credible fear standard, an applicant must establish that there is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing.

E. Establishing a Credible Fear of Persecution

In general, a finding that there is a significant possibility that the applicant experienced past persecution on account of a protected characteristic is sufficient to satisfy the credible fear standard. However, if there is evidence so substantial that there is no significant possibility of future persecution or other serious harm or that there are no reasons to grant asylum based on the severity of the past persecution, a negative credible fear determination may be appropriate.

When an applicant does not claim to have suffered any past harm or where the evidence is insufficient to establish a significant possibility of past persecution under section 208 of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under section 208 of the Act.

F. Establishing a Credible Fear of Torture

In order to be eligible for withholding or deferral of removal under CAT, an applicant must establish that it is *more likely than not* that he or she would be tortured in the country of removal. Therefore, a significant possibility of establishing eligibility for withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of

eligibility for asylum. .

After establishing that the applicant's claim would be found credible, the applicant satisfies the credible fear of torture standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that: (a) the torturer specifically intends to inflict severe physical or mental pain or suffering; (b) the harm constitutes severe pain or suffering; (c) the torturer is a public official or other person acting in an official capacity, or someone acting at the instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and (d) the applicant is in the torturer's custody or physical control. Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. However, sanctions that defeat the object and purpose of the Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

Credible evidence of past torture is strong evidence in support of a claim for protection based on fear of future torture. For that reason, an applicant who establishes that he or she suffered past torture will establish a credible fear of torture, unless changes in circumstances are so substantial that the applicant has no significant possibility of future torture as a result of the change.

Under the Convention Against Torture, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of internal relocation.

G. Other Issues

While the mandatory bars to asylum and withholding of removal do not apply to credible fear determinations, asylum officers must elicit and make note of all information relevant to whether or not a bar to asylum or withholding applies.

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination, if the spouse or child: arrived in the United States concurrently with the principal alien; and desires to be included in the principal alien's determination.

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. A consultant

may be a relative, friend, clergy person, attorney, or representative.

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant and review the summary with the applicant.