



U.S. Citizenship
and Immigration
Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

ANALYZING THE PERSECUTOR BAR

TRAINING MODULE

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RAIO Directorate – Officer Training / *RAIO Combined Training Course*

ANALYZING THE PERSECUTOR BAR

Training Module

MODULE DESCRIPTION

This module addresses the legal analysis of claims where a refugee or asylum applicant may have been involved in the persecution of others as well as related interviewing considerations.

TERMINAL PERFORMANCE OBJECTIVE(S)

During an interview, you (the officer) will be able to elicit all relevant information to correctly determine when an applicant, who is otherwise a refugee, is ineligible for a grant of asylum or refugee status because he or she was involved in the persecution of others on account of a protected ground.

ENABLING PERFORMANCE OBJECTIVES

1. Summarize recent developments in U.S. law regarding the persecutor bar.
2. Explain the standard of proof applicable in the persecutor bar analysis.
3. Explain the factors to consider when determining whether or not an applicant may have ordered or incited an identifiable persecutory act on account of a protected ground.
4. Explain the factors to consider when determining whether or not an applicant may have assisted or otherwise participated in the persecution of another on account of a protected ground.
5. Describe indicators (“red flags”) that an individual may have been involved in the persecution of others.

INSTRUCTIONAL METHODS

- Interactive presentation
- Practical exercise

- Demonstration

METHOD(S) OF EVALUATION

Observed Practical Exercise and Written test

REQUIRED READING

1. *Negusie v. Holder*, 555 U.S. 511 (2009);
2. *Matter of A-H-*, 23 I&N Dec. 774 (AG 2005);
3. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 (BIA 1988);

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

1. *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011);
2. *Matter of Vides Casanova*, 26 I&N Dec. 494 (BIA 2015).

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description
ILR23	Knowledge of bars to immigration benefits (4)
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
RI1	Skill and identifying issues of a claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)
RI3	Skill and conducting research (e.g., legal, background, country conditions) (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
4/14/15	Throughout document	Minor formatting edits; fixed broken links; a few recent cases added	RAIO Trng

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

The term “refugee” in the Immigration and Nationality Act (INA) “does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹ The INA also specifically bars the Attorney General from granting asylum to such a person.² The persecutor bar may apply to government actors as well as private individuals.³

There are a number of human rights-related inadmissibility grounds that may arise for Nazi persecutors, genocidaires, torturers, and foreign government officials who have committed particularly severe violations of religious freedom and seek refugee status through overseas processing. [RAD Supplement – Grounds of Inadmissibility] While there may be instances when acts which implicate the persecutor bar also trigger a human rights-related inadmissibility ground, this module is focused exclusively on the persecutor bar. The human rights-related grounds of inadmissibility are discussed in the RAIO Training module, *Overview of Inadmissibility Grounds, Mandatory Bars, and Waivers* and in the RAD and IO division-specific courses.

¹ [INA § 101\(a\)\(42\)](#).

² [INA § 208\(b\)\(2\)\(A\)\(i\)](#). This bar also applies to: cancellation of removal, [INA § 240A\(e\)\(5\)](#); withholding of removal, [INA § 241\(b\)\(3\)\(B\)\(i\)](#); temporary protected status (TPS), [INA § 244\(c\)\(2\)\(B\)\(ii\)](#); adjustment of status of certain entrants before January 1, 1982 (legalization) (applicant must establish that he or she has “not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion), [INA § 245A\(a\)\(4\)\(C\)](#); naturalization of persons who have made extraordinary contributions to national security, [INA § 316\(f\)\(1\)](#); special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, § 203, 111 Stat. 2160 (1997), [8 C.F.R. § 240.66\(a\)](#); and withholding of removal under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), [8 C.F.R. § 208.16\(d\)\(2\)](#).

³ *Matter of McMullen*, 19 I&N Dec. 90, 96 (1984).

The statutory exclusion of persecutors from the refugee definition means that even if an applicant has been persecuted in the past, or has a well-founded fear of future persecution on account of one of the protected grounds, he or she does not meet the definition of a refugee under the INA if the persecutor bar applies.

Other statutes and provisions in the INA contain or have contained language relating to persecutors (e.g., the Displaced Persons Act [DPA]⁴ and the Holtzman amendment⁵). In this module, unless otherwise specified, reference to the “persecutor bar” refers exclusively to the language in the refugee definition in INA § 101(a)(42).

This module addresses individuals who may be barred from refugee or asylum status as “persecutors.” This term is used to describe those individuals who have ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. In other settings, references may be made to the broader category of “human rights abusers” or “human rights violators.” While persecutors may be included in that group, it is important to keep in mind that the term “persecutor” is a specific term of art in refugee and asylum adjudications, unlike general terms such as “human rights abuser” and “human rights violator.”

This module:

- Lays out the elements of the law about which you must elicit testimony during the course of your interview
- Provides an analytical framework to help you analyze the persecutor bar issue
- Provides a list of possible indicators (“red flags”) to help alert you when you must explore the persecutor bar issue
- Explains how credibility may play a part in your determinations

1.1 Burden of Proof and Duty to Elicit

The burden is on the applicant to establish eligibility.⁶ Asylum and refugee applicants are not expected to understand the complexities of U.S. asylum law and may not realize that they are subject to the persecutor bar, especially if they did not directly commit the act(s)

⁴ The Displaced Persons Act of 1948, Pub.L. No. 80-774, 62 Stat. 1009 (1948), as amended by Pub.L. No. 81-555, 64 Stat. 219 (1950).

⁵ INA § 212(a)(3)(E); *see also* INA § 237(a)(4)(D).

⁶ 8 C.F.R. § 208.13(a); *Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) (“UNHCR Handbook”), ¶ 196.

of persecution.⁷ Accordingly, although the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.⁸ If you believe that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory acts. If the applicant denies involvement, you must then determine the credibility of that denial.

For additional information regarding credibility determinations, see section below: *Credibility and the Persecutor Bar*, and RAIO Training modules, *Evidence and Credibility*, and *ASM Supplement – Burden Shifting*

1.2 Standard of Proof

An applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence. When using the preponderance of the evidence standard, it is important to focus on the quality of the evidence, not the quantity.⁹ Remember that assessing the quality of testimonial evidence means determining whether or not it is credible. See section below: *Credibility and the Persecutor Bar*.

1.3 The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the *1951 Convention relating to the Status of Refugees* that even if someone meets the definition of a refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered to be undeserving or unworthy of refugee status.¹⁰

The BIA has recognized that the exclusion from the refugee definition in INA § 101(a)(42) of those who were involved in the persecution of others is consistent with the principles of the 1951 Convention.

This exclusion from refugee status under the Act represents the view that those who have participated in the persecution of others may be unworthy or undeserving of international protection. The prohibited conduct is deemed so repugnant to civilized society and the community of nations that its justification will not be heard.¹¹

⁷ See *Jacinto v. INS*, 208 F.3d 725, 733-734 (9th Cir. 2000) (“Applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant...[adjudicators] are obligated to fully develop the record in [such] circumstances...”).

⁸ 8 C.F.R. § 208.9(b); *UNHCR Handbook*, ¶¶ 196, 205(b)(i).

⁹ For further information on the preponderance of the evidence standard, see RAIO Training Module *Evidence Assessment*.

¹⁰ *United Nations Convention Relating to the Status of Refugees*, art. 9F, July 28, 1951, 189 U.N.T.S. 150.

¹¹ *McMullen*, 19 I&N Dec. at 97.

2 ANALYTICAL FRAMEWORK

If at any time during your adjudication the persecutor bar issue arises, you will need to develop additional lines of questioning and ask follow-up questions until the record reflects that the applicant is either subject to or not subject to the bar. Often this will involve a credibility determination. You must conduct a particularized evaluation and examine all relevant facts in determining whether the persecutor bar applies.¹²

The INA does not define the terms listed in the persecutor bar: “order,” “incite,” “assist,” or “otherwise participate in.” Nor have the courts developed a uniform, bright-line test to apply when the persecutor bar is an issue. However, the following analytical framework, derived from existing case law, can assist you in analyzing whether the persecutor bar applies. This analytical framework is explored in greater detail below.

Step One: Determine if there is Evidence of the Applicant’s Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
 - the applicant’s testimony during the interview;
 - information in the applicant’s file indicating his or her involvement with an entity known for committing human rights abuses; and
 - country of origin information (COI)
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.
- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Did the harm rise to the level of persecution?
- Was there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant’s Level of Involvement

¹² *Vukmirovic v. Ashcroft*, 362 F. 3d 1247, 1252 (9th Cir. 2004); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 926-27 (9th Cir. 2006); *Hernandez v. Reno*, 258 F.3d 806, 814 (8th Cir. 2001); see *Matter of A-H-*, 23 I&N Dec. 774, 784 (AG 2005), *overruled on other grounds by Haddam v. Holder*, 547 F. App’x 306 (4th Cir. Dec. 4, 2013) (“It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies.”).

- Did the applicant order, incite, assist, or otherwise participate in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?
- Did the applicant act under duress?

Fully explore this issue for the record and follow Division-specific guidance. Following the analytical framework above will help you avoid using faulty logic that is demonstrated in the following statements:

- “Bad Place + Bad Time = Bad Person”
- “I Know It When I See It”

These statements are not legal standards and should not be the basis of analysis in any decisions relating to the persecutor bar.

2.1 Step One: Determine if there is Evidence of the Applicant’s Involvement in an Act that May Rise to the Level of Persecution

When there is an indication that the persecutor bar may be applicable, you must explore the issue thoroughly. Whether it emerges through the applicant’s testimony, evidence in the file, or country of origin information (COI), a “red flag” will indicate that you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution. A red flag does not mean that the applicant will be automatically barred from asylum or refugee status. Once you have identified a red flag, you must ask follow-up questions to determine if there is evidence of an act that may rise to the level of persecution.

As noted, evidence may include:

- the applicant’s testimony during the interview;
- information in the applicant’s file indicating that the applicant may have been involved with an entity known for committing human rights abuses;
- country of origin information

Potential Red Flags

Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.¹³ However, belonging to an organization that engaged in the

¹³ See *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814-15 (BIA 1988); *Vukmirovic v. Ashcroft*, 362 F.3d at 1252; *Hernandez v. Reno*, 258 F.3d at 814 (8th Cir. 2001); *Xu Sheng Gao v. U.S. Att’y Gen.*, 500 F.3d 93, 99 (2d

persecution of others is a “red flag,” and you must carefully question the applicant regarding his or her duties or activities within the organization to ascertain whether the applicant was involved in any specific acts that may rise to the level of persecution. The following is a non-exhaustive list of possible red flags or indicators that will alert you to explore the applicant’s actions further during your interview.

- Involvement with Agents of Persecution and Positions of Leadership in an Organization or Entity Known for Persecuting Others

Both testimony of the applicants and country of origin research may alert you to acts of persecution committed by organizations or entities known for persecuting others. When an applicant indicates that he or she worked for a government known to have committed human rights abuses, elicit details from the applicant about his position and activities within the government. Furthermore, holding a leadership position in an organization or entity known to have persecuted others during a time when such abuses have been documented is a significant red flag. Elicit testimony regarding the applicant’s role(s) and responsibilities, and explore through questioning whether the applicant had any connections with acts that may rise to the level of persecution.

Relevant Questions

- What was the applicant’s role(s) and position(s)?
- Did the applicant supervise anyone?
- To whom did the applicant report?
- What functions did the applicant’s unit(s) or division(s) perform within the organization?
- What was that unit or division’s relationship with other units or divisions who may have been involved in persecutory acts?

See also suggested questions below regarding rank, duties, and structure of government or armed forces.

- Holding an Official Position within a Government or Other Similar Entity

You may be aware of country of origin information about branches of government at the national or local level that have been responsible for human rights abuses, e.g., the Ministry of Information in Iraq under Saddam Hussein, the civil patrol in Guatemala during the civil war, or the head of a neighborhood committee in China during the Cultural Revolution. Closely examine the activities of an applicant who is associated with

Cir. 2007) (mere association “with an enterprise that engages in persecution is insufficient” on its own to trigger the persecutor bar).

a government or branch of government that is known to have committed human rights abuses.

Relevant Questions

- When did the applicant work for that branch of government?
- Why did the applicant work for the government?
- What were the applicant’s duties and responsibilities?
- What rank, if any, did the applicant hold? If so, when?
- Membership in an Ethnic or Religious Group Involved in Ethnic Fighting

Where ethnic or religious violence has erupted, in some situations both sides in a conflict may have committed abuses. When interviewing an individual who claims to be a victim of ethnic violence during a civil war, elicit information regarding the applicant’s activities during that time period, especially during times when human rights abuses committed by the applicant’s group have been documented. Examples: the Bosnian war, the Rwandan genocide, and the Syrian civil war.

- The Military, Police, and Other Security Forces

Where country conditions indicate that the military, paramilitary, police, or other security forces have committed human rights violations against civilians, or members of their own organization (e.g., a whistleblower), elicit detailed testimony about the applicant’s duties if he or she was a member of the military, police, or other security forces. Additionally, researching the structure of the military, paramilitary, police or security forces in the applicant’s country of nationality and eliciting background information from the applicant will be helpful in examining whether the persecutor bar may be at issue. Understanding the nature of the applicant’s rank and position in the armed forces will help you to develop further lines of questioning into the applicant’s activities.

Relevant Questions

- In what branch of the police, military, or security forces did the applicant serve?
- How were the branches organized?
- Were the security forces divided into military and police forces? If, so, what kinds of functions did each perform?
- Were there paramilitary units?
- Within the branch in which the applicant served, in what specific unit or company did the applicant serve?

- Where did the applicant serve and when?
 - Did the applicant serve in the field or at a desk job?
 - If it was the military branch, did the applicant serve during a time of war? If so, was the applicant in a combat unit or a support unit?
 - What was the applicant's position?
 - How long did the applicant serve in the security forces?
 - What specifically were his or her duties?
 - What types of orders were carried out by the individual/unit/entity and who issued the orders?
 - Were there ever any orders that the individual/unit/entity refused to carry out? If so, what were those orders and why were they not carried out?
- **Military Service Requirement**

Some countries require that all individuals or all males over a certain age serve in the armed forces for a set period of time. Research the service requirement of the applicant's country of nationality to alert you to the fact that the applicant may have served in the military. Explore the applicant's service or non-performance of service during the interview.

Relevant Questions

When an applicant has not listed military experience on his application, determine whether the country of the applicant's nationality had a mandatory service requirement at the time that the applicant was of service age. If there was such a requirement, ask why did the applicant not serve? Did he get an exemption? How? Did anyone assist him? How was he assisted? What kind of an exemption did he get, medical, educational, or otherwise? Did he pay a bribe? Did he have documentation that he needed to present to show an exemption? What kind of documentation? Where is that documentation?

2.2 Step Two: Analyze the Harm Inflicted on Others

2.2.1 Did the Harm Rise to the Level of Persecution?

In order to be subject to the persecutor bar, an applicant must have ordered, incited, assisted, or otherwise participated in conduct that rises to the level of persecution. Once you have identified an act, you must then determine whether the harm inflicted rises to the level of persecution.

Persecution has been defined as a threat to the life or freedom of another or the infliction of suffering or harm upon another.¹⁴ Harm can be psychological as well as physical, and can include threats and serious economic harm.¹⁵ If there is evidence of an act, but the harm did not rise to the level of persecution, the applicant is not subject to the bar. For additional guidance on what constitutes persecution, see RAIIO Training module, *Definition of Persecution and Eligibility Based on Past Persecution*.

In the majority of cases where the persecutor bar arises, the evidence will implicate an act or acts that constituted harm that the victim(s) experienced as persecution, such as killing; torture or other cruel, inhumane, or degrading treatment; slavery; and rape or other severe forms of sexual violence. However, in certain instances, you may need to independently assess whether the victim would experience the act or acts in question as serious harm.

Relevant Questions

Elicit detailed testimony about:

- the type of harm that was inflicted
- the severity of the harm
- the effect the act(s) had on the victim(s) or others
- the reason or motivation behind why individual(s) were harmed

2.2.2 Was There a Nexus to a Protected Ground?

To find that the persecutor bar may apply, the persecutory act in question must be “on account of” at least one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.¹⁶ However, it is not necessary that the applicant had a punitive or malignant intent, nor that the applicant shared the same persecutory motive as the person or entity that committed or orchestrated the persecution.¹⁷

Examples

An individual, who was forcibly recruited into the Revolutionary United Front (RUF) of Sierra Leone and who had murdered a female villager and chopped off the limbs and heads of non-combatants, argued that because he did not share the

¹⁴ *Matter of Acosta*, 19 I&N Dec. 211, 221-23 (BIA 1987).

¹⁵ *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).

¹⁶ INA § 101(a)(42); *Elias-Zacarias v. INS*, 502 U.S. 478 (1992).

¹⁷ *Matter of Fedorenko*, 19 I&N Dec. at 69 (concentration camp guard assisted persecution even if not motivated by racial or religious prejudice); *Singh v. Gonzales*, 417 F. 3d 736, 740 (7th Cir. 2005); *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003); RAIIO Training module, *Nexus and the Protected Grounds*.

RUF's intent to target political opponents, he did not engage in persecution on account of political opinion. The court found that the applicant's personal motivation was not relevant, and that the persecutor bar applied because the applicant "participated in persecution, and the persecution occurred because of an individual's political opinion."¹⁸

The head constable of a local police department participated in raids of homes of innocent Sikh families, helped arrest innocent Sikhs without cause, and transport Sikhs to the police station on orders from the police chief, where they were subsequently beaten. He testified that he was personally opposed to the persecution of innocent Sikhs, and only stayed with the police force due to his need for a steady income. The court found that even though the constable stated that he did not share the persecutory motive, he still assisted in or participated in persecution of others on account of a protected ground.¹⁹

Relevant Questions

Because the persecutor bar requires that the persecutory act or acts were committed on account of one of the five protected grounds, elicit detailed testimony to ascertain who the victims of the persecutory acts were. Why were they targeted? How were the victims identified? By whom?

For additional guidance on the requirement that there be a connection between the persecution and one of the five protected grounds, see the RAIO Training Module, *Nexus and the Five Protected Grounds*.

2.2.3 Was the Act a Legitimate Act of War or Law Enforcement?

Legitimate Acts of War

The fear of general civil strife or war, and incidental harm resulting from such violence, may not, by itself, establish eligibility for asylum or refugee status. Likewise, involvement in a civil war may not, by itself, trigger the persecutor bar. Such harm may not constitute persecution if it is not directed at the victim(s) on account of a protected ground.

For example, in open combat, acts of warfare taken in furtherance of political goals are not necessarily acts committed on account of a protected ground. The BIA has stated:

As the concept of what constitutes persecution expands, the group which is barred from seeking haven in this country also expands, so that eventually all resistance fighters would be excluded from relief. We do not believe Congress intended to

¹⁸ *Bah*, 341 F.3d at 351.

¹⁹ *Singh*, 417 F.3d at 740.

restrict asylum and withholding only to those who had taken no part in armed conflict.²⁰

Reference to international laws governing warfare may be useful in determining whether actions taken in the context of warfare constitute persecution or are “legitimate” acts of war.²¹

Examples

An individual forced to assist guerrillas fighting in El Salvador did not participate in persecution on account of a protected ground when he covered guerrillas with weapons while they burned cars and drove supplies for battles, because this was considered a legitimate act of war.²²

The rape of Bosnian Muslim women by an ethnic Serb soldier in order to bring shame to the Bosnian Muslim community during the Bosnian War is not a legitimate act of war, and is in fact a crime of war, and would have the requisite nexus to a protected characteristic to subject an applicant to the persecutor bar.²³

Likewise, true acts of self-defense do not have a nexus to a protected ground and would not subject an applicant to the persecutor bar.²⁴

Example

A Bosnian Serb fended off attacks of Croats who attacked his village. He did not participate in physical attacks against Croats other than in self-defense. The Ninth Circuit held that, given these facts, there was insufficient evidence to find that the applicant was motivated by the Croats’ ethnicity or religion and remanded the case to the Immigration Judge for further evaluation.²⁵

If you identify an act that rises to the level of persecution but there is no connection to one of the five protected grounds, the applicant is not subject to the bar.

Legitimate Acts of Law Enforcement

²⁰ *Rodriguez-Majano*, 19 I&N Dec. at 816.

²¹ *Rodriguez-Majano*, 19 I&N Dec. at 816; see RAIO Training Module *International Human Rights Law* for examples of international instruments relevant to determining what would be considered a “legitimate” act of war.

²² *Rodriguez-Majano*, 19 I&N Dec. at 815-16.

²³ See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.N.T.S. 135 (entered into force Oct. 21, 1950) (Geneva Convention III); RAIO Training Module *Nexus and the Five Protected Grounds*.

²⁴ *Vukmirovic*, 362 F. 3d at 1252-53 (“[h]olding that acts of true self-defense qualify as persecution would run afoul of the ‘on account of’ requirement in the provision.”).

²⁵ *Id.* at 1253.

Likewise, legitimate acts of law enforcement have no nexus to a protected ground and would not subject the applicant to the persecutor bar.²⁶ All countries have the right to investigate, prosecute, and punish individuals for violations of legitimate laws.²⁷ Government actors may seek to legitimately penalize individuals for violations of criminal laws of general applicability. Conversely, government actors may use the guise of prosecutions to harm applicants on account of a protected ground.²⁸ Consider all the facts in the case, along with relevant country of origin information, in determining whether the applicant was involved in a legitimate act of law enforcement. For additional guidance on the difference between prosecution and persecution, see RAIO Training module, *Nexus and the Protected Grounds*.

2.3 Step Three: Analyze the Applicant's Level of Involvement

You must evaluate all of the facts in order to determine whether the applicant is subject to the persecutor bar.²⁹ It is appropriate to look at the totality of the relevant conduct to determine whether the bar applies.³⁰ The persecutor bar applies even if the individual did not personally commit the persecutory act(s), so long as he or she “ordered, incited, assisted, or otherwise participated in the persecution.”³¹ It is not necessary for the applicant to have specific knowledge of particular acts of persecution for the bar to apply so long as the applicant is aware that his or her actions resulted in persecution.³² But while application of the persecutor bar does not require direct personal involvement in the acts of persecution,³³ mere membership in an entity or organization that commits acts of persecution is not enough to apply the bar.³⁴

2.3.1 Did the Applicant Order Others to Commit a Persecutory Act?

²⁶ See *Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1151-1154 (6th Cir. 2010).

²⁷ *Matter of A-G-*, 19 I&N Dec. 502, 506 (BIA 1987); *UNHCR Handbook*, para. 56; *Dinu v. Ashcroft*, 372 F.3d 1041 (9th Cir. 2004) (harassment resulting from an investigation does not give rise to an inference of political persecution where police are trying to find evidence of criminal activity and there is a logical reason for pursuit of the individual).

²⁸ *A-G-*, 19 I&N Dec. at 506; *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996); *UNHCR Handbook*, para. 57-59.

²⁹ *Vukmirovic*, 362 F.3d at 1252; *Miranda Alvarado*, 449 F.3d at 926-27; *Hernandez*, 258 F.3d at 814.

³⁰ *A-H-*, 23 I&N Dec. at 784.

³¹ INA § 101(a)(42)(B).

³² *Suzhen Meng v. Holder*, 770 F.3d 1071, 1075-76 (2d Cir. 2014) (noting that when “the occurrence of the persecution is undisputed, and there is such evidence of culpable knowledge that the consequences of one's actions would assist in acts of persecution... the evidence need not show that the alleged persecutor had specific actual knowledge that his actions assisted in a particular act of persecution”) (citations omitted).

³³ *A-H-*, 23 I&N Dec. at 784.

³⁴ *Rodriguez-Majano*, 19 I&N Dec. at 814-15; *Vukmirovic*, 362 F.3d at 1252; *Hernandez*, 258 F.3d at 814.

If an applicant admits to you that he or she personally ordered others to commit atrocities or harm against others, he or she may be subject to the persecutor bar. As discussed above, the harm inflicted must rise to the level of persecution and must have been on account of one of the five protected grounds.

Neither the BIA nor any federal circuit courts have applied the persecutor bar for directly “ordering” the persecution of others. However, in cases involving acts committed during the Holocaust, where the Displaced Persons Act (DPA) applied, an applicant was found to have assisted in persecution where he ordered the persecution of others.

Example

A Latvian police chief ordered his men to arrest all the inhabitants of a village suspected of being a communist stronghold and to burn down the village. The village was subsequently burned, and all the villagers were shot and killed. The Second Circuit upheld the BIA’s finding that “ordering” subordinates to arrest village inhabitants and burn the village to the ground constituted assistance in persecution.³⁵

2.3.2 Did the Applicant Incite Others to Commit a Persecutory Act?

If an applicant admits to you that he or she incited others to harm people, he or she may be subject to the bar. Remember, the harm inflicted must rise to the level of persecution and must have been on account of one of the five protected grounds.

While neither the BIA nor any federal circuit courts has directly applied the persecutor bar under the term “incite” in the INA, some courts analyzed the term “incite” under the DPA. At least two courts found that involvement in the publication of anti-Semitic propaganda during the Holocaust constituted assistance in the persecution of others.³⁶

The Attorney General has noted in discussion that “[t]o ‘incite’ means ‘to move to a course of action: stir up: spur on: urge on’ or ‘to bring into being: induce to exist or occur.’”³⁷ The term “incite,” along with the terms “assist” and “participate,” “is broad enough to encompass aid and support provided by a political leader to those who carry out the goals of his group, including statements of incitement or encouragement and actions resulting in advancing the violent activities of the group.”³⁸ Moreover, the terms

³⁵ *Maikovskis v. INS*, 773 F.2d 435, 446 (2d. Cir. 1985).

³⁶ *U.S. v. Koreh*, 59 F.3d 431, 440 (3d. Cir. 1995) (editor of an anti-Semitic publication in Hungary was found to have assisted in the persecution of Hungarian Jews under the DPA by fostering a climate of anti-Semitism); *U.S. v. Sokolov*, 814 F. 2d 864, 874 (2d Cir. 1987) (German army propagandist assisted in persecution “by creating a climate of opinion where persecution is acceptable”).

³⁷ *A-H-*, 23 I&N Dec. at 784, citing Webster’s Third New International Dictionary of the English Language Unabridged 1142 (2002). *Matter of A-H-* remains good law for the general propositions as to the meaning of the words “incite,” “assist,” and “participate”.

³⁸ *A-H-*, 23 I&N Dec. at 784.

“are to be given broad application” and “do not require direct personal involvement in the acts of persecution.”³⁹ Finally, whether the alien served in a leadership role may be “highly relevant,” and “in certain circumstances statements of encouragement alone can suffice” for a finding that an applicant incited or otherwise participated in the persecution of others.⁴⁰

Example

Statements made by an Algerian opposition political leader in various newspapers could fit within the plain meaning of the word incite when those statements resulted in the violent activities of the armed faction of his political party.⁴¹

During the 1994 genocide in Rwanda, the radio station Radio Mille Collines played a role in organizing militias, transmitted lists of people to be killed, and urged ethnic Hutus to kill ethnic Tutsis. These acts, if examined under the persecutor bar analysis, would likely be considered evidence of inciting persecution.

2.3.3 Did the Applicant Assist or Otherwise Participate in, or Actively Carry Out or Commit Persecution of Others?

Where an applicant did not order or incite the persecution of others, he or she may still be subject to the persecutor bar if he or she “assisted,” or “otherwise participated” in, or actively carried out or committed persecution of others.

Commit or Actively Carry Out

Although the persecutor bar does not expressly include the terms “commit” or “actively carry out,” if an applicant admits to you that he or she directly committed or carried out persecutory acts, that applicant has “otherwise participat[ed]” in persecution, and the persecutor bar applies.

Example

A former Iraqi intelligence officer admits to you that he used “creative” techniques when questioning individuals in his custody. When you ask what he means by “creative,” he tells you that he sometimes beat these individuals to the point of unconsciousness and used electric shock against them. While this harm seems like enough to subject him to the bar if the detainees were targeted on account of a protected ground, you must develop the record with follow-up questions, not only about what he did, but also about the severity of the harm he caused and the characteristics of the targeted individuals.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 785.

Relevant Questions

In the example above, you should elicit testimony that includes:

- what the applicant means by “beating” and using “electric shock” against detainees;
- how many times he beat the detainees;
- how often he beat them;
- how he shocked them
- what he shocked them with;
- how often he shocked them;
- who the detainees were;
- why they were detained;
- whether any particular group of detainees were treated differently from others;
- whether either the detention or any act of mistreatment was on account of the detainees’ race, religion, nationality, membership in a particular social group, or political opinion.

Assist or Otherwise Participate

The Attorney General has explained that “[t]o ‘assist’ means ‘to give support or aid: help.’ And to ‘participate’ means ‘to take part in something (as an enterprise or activity) usually in common with others.’”⁴² To date, neither the BIA nor federal circuit courts have analyzed the meaning of the term “otherwise participate” independently from the term “assist.” Accordingly, guidance from case law focuses on the term “assist.”

When you analyze the facts of the case before you, focus on whether the applicant’s particular conduct can be considered assistance in the *persecution* of others in the way the Supreme Court did in *Fedorenko*. The Supreme Court explained that:

[A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who

⁴² *A-H-*, 23 I&N Dec. at 784, citing Webster’s Third New International Dictionary of English Language Unabridged, at 132 (“assist”) and 1646 (“participate”).

admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.⁴³

Accordingly, it is appropriate to think of acts that might subject an individual to the persecutor bar along a continuum of conduct.⁴⁴ The role the individual played in the commission of the persecutory act will determine whether he or she assisted or otherwise participated in persecution.

Courts have interpreted *Fedorenko* line-drawing as assigning accountability and personal culpability. According to the Ninth Circuit, to properly analyze what it means to assist or otherwise participate in persecution, you must identify the kinds of acts the applicant engaged in.⁴⁵ You must evaluate those acts along a continuum between the two examples listed in *Fedorenko* to determine the applicant’s culpability. Also evaluate the surrounding circumstances, including whether the applicant acted in self-defense.⁴⁶ Finally, ask yourself, did the applicant’s acts *further* the persecution, or were they *tangential* to it?

To aid in this analysis, courts have suggested questions which help to place the applicant’s activities along a continuum of conduct. For example, the Second Circuit asks: was the conduct *active* and did it have *direct consequences* for the victims or was the conduct *tangential* to the acts of oppression and *passive* in nature?⁴⁷ The Seventh Circuit draws a distinction between *genuine assistance* and *inconsequential association*. This court asks whether the applicant was *simply a member* of an organization during a pertinent persecutory period or whether the applicant *actually assisted or participated in* persecution.⁴⁸ Similarly, the Ninth Circuit asks whether the acts were instrumental to the persecutory end. Did the acts further persecution or were they tangential to it?⁴⁹ These questions are organized in the following chart:

Did the Applicant Assist in the <i>Persecution</i> of Others?		
Subject to the Bar	OR	Not Subject to the Bar

⁴³ *Fedorenko*, 449 U.S. at 513 n.34 (1981).

⁴⁴ See *id.*; *Miranda-Alvarado*, 449 F.3d at 925-927.

⁴⁵ *Id.* at 926.

⁴⁶ *Id.*

⁴⁷ *Suzhen Meng*, 770 F.3d at 1075; *Weng*, 562 F.3d at 514; *Lin*, 584 F.3d at 80; *Balachova*, 547 F.3d at 385; *Gao v. U.S. Atty. Gen.*, 500 F.3d at 99; *Xie v INS*, 434 F.3d 136, 143 (2d Cir. 2006).

⁴⁸ *Singh*, 417 F.3d at 739.

⁴⁹ *Miranda Alvarado*, 449 F.3d at 928.

Did the applicant assist in the <i>persecution</i> of others?		Did the applicant merely assist in the <i>operation</i> of a location where persecution took place, where his or her duties were not related to the persecution?
Did the applicant’s acts <i>further</i> the persecution?		Were the applicant’s acts <i>tangential</i> to the persecution?
Was the conduct <i>active</i> and did it have <i>direct consequences</i> for the victims?		Was the conduct <i>tangential</i> to the acts of persecution and <i>passive</i> in nature?
Did the applicant <i>actually</i> assist or otherwise participate in persecution?		Was the applicant simply a member of an entity during a pertinent period of persecution?

Relevant Questions

Elicit detailed testimony about:

- what the applicant did;
- what actions the applicant took, committed, or performed;
- what his or her position was;
- what his or her duties were;
- the dates and locations the applicant performed these actions;
- who, if anyone, the applicant worked for or took orders from;

Case Law Examples

Most case law on the persecutor bar explores the question of whether or not the applicant “assisted” in persecution. Not coincidentally, the majority of the cases you will encounter will involve applicants who did not order or incite persecution but may have assisted or otherwise participated in it. The following case summaries are divided into fact specific categories that may help you in your analysis. These categories include intelligence gathering, coercive population control, military or security forces, rebel or opposition forces, and government officials. In each category, the courts have examined the

applicant's specific actions to determine whether or not the applicant assisted or otherwise participated in persecution.

- **Intelligence Gathering**

Examples

Did Not Assist in Persecution

Diaz-Zanatta v. Holder, 558 F.3d 450 (6th Cir. 2009) Peru (military intelligence analyst)

The applicant gathered information and passed it up the chain of command. For example, she gathered information on whether a particular professor at a university had communist tendencies. She also listened to and transcribed telephone conversations of designated individuals. When she heard that other factions of the Peruvian military were engaged in human rights violations, she reported her concerns to superiors and requested an immediate transfer. There was no evidence that information the applicant supplied actually assisted in persecution of any individuals, or that the applicant had prior or contemporaneous knowledge of the persecution.⁵⁰

Did Assist in Persecution

Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006) Philippines (intelligence operative)

For 10 years, the applicant provided the Marcos regime with intelligence about the leftist New People's Army and other anti-Marcos communist groups. The applicant testified that the information he gathered on these individuals led to their torture, imprisonment, and death. He argued that he never physically tortured or harmed any person. The Fourth Circuit concluded that while "a distinction can be made between genuine assistance in persecution and inconsequential association with persecutors," in this case there was "no dispute over [the applicant's] personal culpability."

- **Coercive Population Control**

Examples

Did Not Assist in Persecution

Weng v. Holder, 562 F.3d 510 (2d Cir. 2009) China (nurse's assistant)

⁵⁰ See section below: *Did the Applicant Know that Persecution was Occurring?*

The applicant provided post-surgical care to women who had undergone forced abortions, registered patients, assisted nurses in caring for patients, recorded vital signs, and maintained patient files. On one occasion she helped guard (unarmed) several women awaiting forced abortions for 10 minutes before helping one woman escape. The Second Circuit found that her conduct, considered in its entirety, was not sufficiently “direct, active, or integral” to the performance of forced abortions. It looked at the 10-minute unarmed guarding incident and her behavior as a whole and found that the post-surgical care she provided did not contribute to or facilitate the victims’ forced abortions.

Lin v. Holder, 584 F.3d 75 (2d Cir. 2009) China (nurse)

The applicant was a maternity nurse at a state general hospital from 2003 to 2005, where she assisted with ultrasounds and other prenatal examinations, participated in live-birth deliveries, cared for newborns, and provided recovery care to women who had undergone forced abortions. She “did not participate in the abortion procedure itself,” but the examinations she performed “were sometimes used to determine the position of the fetus so that a forced abortion could be performed without threatening the life of the mother.” The Second Circuit looked to the applicant’s behavior as a whole and found that her examinations did not contribute to or facilitate forced abortions in any direct or active way because they did not cause the abortions nor did they make it more likely they would occur. According to the Second Circuit, her actions were “tangential and not sufficiently direct, active or integral to amount to assistance in persecution.”

Did Assist in Persecution

Chen v. U.S. Att’y Gen., 513 F.3d 1255 (11th Cir. 2008) China (employee at a family planning office)

The applicant voluntarily accepted employment at a family planning office and fully understood the forced abortion policy. She was responsible for watching over detained, pregnant women locked in rooms before their scheduled forced abortions. She monitored confined women to ensure they did not escape. She was provided with a rod or baton that she never actually used. She thought that forced abortions were limited to women who were one or two months pregnant and released a woman who was eight months pregnant with her second child. The Eleventh Circuit found while she did not perform the abortions herself or use force against the women, her conduct ensuring the woman did not escape was “essential to the ultimate persecutory goal.” Her single redemptive act in releasing one woman, “while laudatory,” did “not absolve her of the consequences of her personal culpability of her previous assistance.”

Xie v. INS, 434 F.3d 136 (2d Cir. 2006) China (van driver)

The applicant occasionally transported pregnant women against their will to hospitals for forced abortions in a locked van. On each occasion the women physically resisted and wept. The court noted that the applicant's actions contributed directly to the persecution. By driving the van, the applicant ensured the women were brought to the place of their persecution: the hospitals where their forced abortions took place. The applicant claimed that his actions were not voluntary. The Second Circuit considered not just the voluntariness of the applicant's actions, but his behavior as a whole and whether his conduct was active and had direct consequences for the victims or was tangential to the acts of oppression and passive in nature. It concluded that the applicant played "an active and direct, if arguably minor, role" in the persecution. Further, the Second Circuit noted that even if voluntariness were an issue, nothing in the record indicated that the applicant did not have the ability to quit his job.

- **Military or Security Forces**

Examples

Did Not Assist in Persecution

Kumar v. Holder, 728 F.3d 993 (9th Cir. 2013) India (constable who guarded Sikh prisoners and witnessed their mistreatment)

The applicant worked as a constable in the local police department in Punjab. He served as a guard at an intelligence facility where Sikhs suspected of being part of the militant separatist movement were detained and interrogated. The applicant did not arrest, transport, or interrogate the prisoners, but he witnessed prisoners being beaten. He spoke to his superiors about the mistreatment, but nothing was done. After he was promoted to head constable, he spoke to several superior officers about mistreatment he had witnessed but was transferred after only a few weeks in the position. The Ninth Circuit held that the BIA erred in finding that the applicant was subject to the persecutor bar because his position was integral to the functioning of a facility where persecution took place; rather, it should have analyzed whether his conduct was integral to the persecution itself.

Balachova v. Mukasey, 547 F.3d 374 (2d Cir. 2008) Russia (soldier during arrest and rape of two Armenian girls)

The applicant, under orders from his captain, broke down the door of a house to search for arms. The captain ordered the applicant to take two girls found inside the house to the car. The applicant told the two girls that they had to go with him. As he reached for one of the girls, she pulled away. The captain then commanded the applicant to hit the girl. The applicant refused, and was forced to relinquish his weapon. He remained handcuffed in the car while refusing to participate in a gang rape of both girls by fellow soldiers. The Second Circuit concluded that the

applicant's actions were "tangential to the oppression and had no direct consequences for the victims."

Doe v. Gonzales, 484 F.3d 445 (7th Cir. 2007) El Salvador (Former lieutenant present during execution of Jesuits)

The applicant was a lieutenant in the Atlacatl Battalion who was present during the execution of priests at a Catholic university. He was ordered to accompany troops to kill a Jesuit priest, despite voicing his misgivings. He did not give orders, fire his gun, seize anyone, or block anyone's attempted escape. Troops killed six Jesuits, a cook, and her daughter on that mission. After the attack, the applicant assisted in destroying log books identifying soldiers who had participated. The Seventh Circuit noted that under different facts, personal presence by a military or police officer could maintain order over prisoners and discourage victims from attempting to escape, and as a result, could constitute assistance or participation in persecution. However, under the facts of this case, the applicant's mere presence did not "discourage attempts at escape, help to maintain order, or otherwise contribute to persecution." The Seventh Circuit also examined the applicant's assistance in destroying log books after the attack, and concluded that destruction of the log books did not constitute "assistance" in persecution. It reasoned that helping a murderer cover his tracks would make an individual an accessory after the fact to murder, but not a murderer. The Seventh Circuit remanded to the BIA to consider the applicant's asylum claim on other grounds.

Did Assist in Persecution

Quitaniella v. Holder, 758 F.3d 570 (4th Cir. 2014) El Salvador (Sergeant who oversaw investigation, capture, and transfer of anti-government guerrillas)

The applicant was a sergeant in the Salvadoran military for about five years, three of which he spent in the "Patrulla de Reconocimiento de Alcance Largo" (PRAL). He testified that, during his military service, he investigated and arrested about fifty guerrillas and civilians he believed to be "terrorists" aligned with anti-government guerrillas. He indicated that he never interrogated or mistreated anyone; he simply transferred the prisoners to his superiors. He denied that he was aware of human rights abuses in the Salvadoran military, but the IJ found him not credible on this point, pointing to extensive country conditions evidence detailing severe human rights abuses by the PRAL in particular. The Fourth Circuit found that the applicant's leadership role and oversight over the arrest and investigation actively "facilitated" the persecution of guerrillas and civilians and upheld the IJ's adverse credibility finding with respect to the applicant's knowledge. Thus, the applicant "assisted in the persecution of individuals because of their political views."

Miranda Alvarado v. Gonzales, 441 F.3d 750, *opinion amended and superseded on denial of reh'g*, 449 F.3d 915 (9th Cir. 2006) Peru (Interpreter during torture sessions)

The applicant was a member of the Civil Guard. His duties included protecting government officials and banks from guerrilla attacks. He was also a Quechua interpreter at interrogations during which suspects were subjected to electric shock torture and beatings. He quit after performing his duties for six years and had been present in such interrogations approximately 200 times. The Ninth Circuit explained that determining whether the applicant “assisted in persecution” requires a “particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability.” It found that because the applicant translated questions and answers interspersed with electric shock treatment, he played an integral role in facilitating persecution. As a result, he was undisputedly a regular and necessary part of the interrogation. He was not a bystander, but was present and active during the alleged persecution.

Singh v. Gonzales, 417 F.3d 736 (7th Cir. 2005) India (Supervisory constable who helped arrest fellow Sikhs)

The applicant was head constable in the local police department in Punjab during a period of considerable violence between Sikh separatist militants and the authorities. The department engaged in legitimate police activities but also systematically arrested without cause Sikhs accused of being militants. The applicant admitted that he brought suspects into the police station where they were wrongfully beaten by others, but claimed he did not share a persecutory motive. He also admitted that he went on nighttime raids that led to false charges and beatings of innocent Sikhs. The Seventh Circuit found that the applicant’s acts constituted assistance or participation in persecution.

- **Rebel or Opposition Forces**

Examples

Did Not Assist in Persecution

Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001) Guatemala (Forcibly recruited by guerrillas)

The applicant was forcibly recruited by guerrillas and given weapons training, to which he objected. He was forced to join the organization after his life was threatened; he did not know that he would be asked to participate in violent activities. On one occasion, he was forced to fire his rifle at villagers but testified that while he fired, he purposefully shot away from the civilians. He escaped from the guerillas after 20 days. The Eighth Circuit stated that the BIA erred in only considering certain facts, and that if properly analyzed under the *Fedorenko*

standard, the applicant “may be seen to have met his burden of proving that he did not assist or participate in the persecution of others.” It remanded the case to the BIA to conduct a full analysis of the record.

Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988) El Salvador (Forcibly recruited by guerrillas)

The applicant was taken from his home by guerrillas and given military training. He accompanied the guerrillas on propaganda trips, and once covered them with his weapon while they burned cars. After two months, he deserted. He was subsequently imprisoned and tortured with electric shock for having worked with guerrillas. The BIA explained that membership alone in an organization that engages in persecution is not enough to bar one from relief. The BIA also noted that a finding of persecution “requires some degree of intent on the part of the persecutor to produce the harm the applicant fears.” The BIA determined that persecution does not include harm resulting from, or directly related to, military objectives of an armed conflict, including drafting of youths as soldiers, unofficial recruiting of soldiers by force, disciplining rebel group members, prosecution of draft dodgers, attacking of garrisons, burning of cars, and destruction of other property.

Did Assist in Persecution

Parlak v. Holder, 578 F.3d 457 (6th Cir. 2009) Turkey (Kurdish PKK supporter)

The applicant smuggled weapons into Turkey and buried them. He then led Turkish authorities to the location of the hidden weapons, even though he claimed they were for his own personal use. The Sixth Circuit found that “smuggling weapons across an international border to aid the Kurdistan Workers Party (PKK) in committing violent acts against Turks and Turkish-aligned Kurds constitutes assistance in persecution.”

Matter of A-H-, 23 I&N Dec. 774 (AG 2005) Algeria (Leader of opposition political party), *overruled in part by Haddam v. Holder*, 547 F. App'x 306 (4th Cir. December 4, 2013)

The applicant, a self-proclaimed leader-in-exile of the Islamic Salvation Front of Algeria (FIS), supported and took credit for the unification of the armed factions of his party and other armed groups, which formed the Armed Islamic Group (GIA); made public statements that encouraged atrocities committed by armed groups in Algeria, and made no attempt to publicly disassociate himself from the armed faction of the party until the assassination of 2 FIS leaders. The Attorney General found that the BIA had not applied the correct legal standard when it found that the applicant was not subject to the persecutor bar. The Attorney General explained that “incite” means to move to a course of action, stir up, spur

on; “assist” means to give support or aid, or help; and “participate” means to take part in something, usually in common with others. The Attorney General explained that under the correct legal standard, someone who had created and sustained ties between the political movement and the armed group, while aware of the atrocities committed by the armed group, who used his profile and position of influence to make public statements that encouraged those atrocities, and who made statements that appeared to condone the persecution without publicly and specifically disassociating himself or the movement from the acts of persecution, could be barred as a persecutor. The Attorney General remanded to the BIA to apply the correct analysis. (On a separate ground, the Attorney General also determined that there may be reasonable grounds for regarding the applicant as a danger to national security and remanded to the BIA to make factual findings).

On petition for review from the BIA’s ultimate decision denying relief to the applicant in *A-H-*, the Fourth Circuit held, in an unpublished decision, that the Attorney General’s construction of the persecutor bar was impermissible to the extent that it could be applied to an applicant whose actions had no causal relationship to an actual instance of persecution. The Fourth Circuit explained that under the Attorney General’s test, an applicant who had created and sustained ties with a group that had previously engaged in persecution could be barred even if he did so long after the persecution took place; in such a case, no causal nexus would exist. Although it rejected the *A-H-* decision in this narrow respect, the Fourth Circuit’s logic is consistent with USCIS guidance and did not disturb other aspects of the Attorney General’s decision, which remains binding on all RAIO officers.

Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003) Sierra Leone (Forcibly recruited by RUF)

The applicant and his family were captured by the rebel group RUF. The RUF incinerated his father and raped and killed his sister. The applicant was kidnapped and forced to join the RUF. He tried to escape twice. He was ordered to murder a female prisoner and to chop off the limbs and heads of non-combatants. He stated that the RUF engaged in these practices in order to scare civilians so that they would not support the government. He argued that he did not engage in political persecution because he did not share the persecutory intent. The Fifth Circuit found that personal motivation is not relevant, that the applicant had participated in persecution, and the persecution occurred because of the victims’ political opinions.

Matter of McMullen, 19 I&N Dec. 90 (BIA 1984) Ireland (Active Provisional Irish Republican Army (PIRA) member)

The applicant was a member of the Provisional Irish Republican Army (PIRA), a clandestine, terrorist organization. When the applicant joined the PIRA, its use of

violence was escalating. The applicant was respected as an effective member of the PIRA and his duties included training other PIRA members and conducting special operations. He was also personally responsible for coordinating many illegal arms shipments from the United States to Northern Ireland, which the PIRA used to perpetrate acts of persecution and violence. The BIA found that the applicant “assisted” and “otherwise participated” in the persecution of others through his “active and effective” membership in the PIRA and through his coordination of arm shipments.

- **Government Officials**

Example

Did Not Assist in Persecution

Gao v. U.S. Att’y Gen., 500 F.3d 93 (2d Cir. 2007) China (Supervisory bookstore inspector)

The applicant was the chief officer for the Culture Management Bureau in Qingdao City. His bureau was responsible for inspecting bookstores to determine if they were selling books prohibited under the Chinese government’s cultural laws. He and his inspectors issued reports about prohibited books being sold. He confiscated prohibited books and issued citations. He reported these violations up to his superiors, who would then determine whether fines should be imposed or business licenses suspended. He was aware that a violator could receive 10 years in jail but never knew of anyone who was arrested or jailed. The mere fact that the applicant may have been associated with an “enterprise that engages in persecution” is insufficient to apply the bar. The bureau where the applicant worked did not exist solely to persecute those who illegally distributed banned materials, but also performed legitimate tasks such as enforcing copyright and pornography laws. The Second Circuit found that there was no identifiable act of persecution in which applicant assisted.

Did Assist in Persecution

Suzhen Meng v. Holder, 770 F.3d 1071 (2d Cir. 2014) China (public security official)

The applicant worked as a public security officer in China for 22 years. In this role, she reported pregnant women to China’s family planning authorities, including those in violation of the state’s coercive population control policies. She knew that women who violated the family planning policies would be punished, including by being forced to undergo sterilization or abortion. The Second Circuit upheld the BIA’s conclusion that the applicant had assisted in persecution and rejected the applicant’s argument that evidence linking her to a specific act of persecution was required in order for the bar to apply. It concluded that when “the

occurrence of persecution is undisputed, and there is such evidence of culpable knowledge that the consequences of one's actions would assist in acts of persecution," evidence of an applicant's assistance or participation in a particular act of persecution is not necessary.

2.3.4 Did the Applicant Know That the Persecution Was Occurring?

In order for an applicant to be subject to the persecutor bar, the applicant must have "sufficient" or "prior or contemporaneous" knowledge of the persecution itself or knowledge that his or her actions would contribute to or result in the persecution of others.⁵¹ Several courts have provided guidance on the knowledge requirement for the persecutor bar.

Example

(Castañeda-Castillo) Castañeda was a lieutenant in the antiterrorist unit of the Peruvian military and worked in areas where the Shining Path was active. During an operation to search for Shining Path members, Castañeda led a patrol that was assigned to block escape routes from the village while two other patrols entered and conducted a search in the village. The two search patrols committed a brutal massacre of innocent villagers. Although Castañeda was in radio contact with the two other patrols, he was unaware that the attack occurred and became a massacre. He stated he did not learn of the atrocities until three weeks after the operation. Because Castañeda did not have prior or contemporaneous knowledge, the First Circuit found that the persecutor bar did not apply.⁵² The First Circuit used a hypothetical example of a bus driver who unknowingly and unwittingly drove a killer to the site of a massacre. It said the driver should not be labeled a persecutor even if the objective effect of his actions furthered the killer's secret plan.⁵³

Whether knowledge is an issue in a case will depend on the specific facts of the case and the credibility of the applicant's claim.

Examples

(Diaz-Zanatta) On the one hand, a Peruvian intelligence officer was found not to have assisted in the persecution of others because she testified credibly that she did not know how the information she gathered was used and was not aware that

⁵¹ *Diaz-Zanatta*, 558 F.3d 450; *Lin*, 584 F.3d 75; *Weng*, 562 F.3d 510; *Balachova*, 547 F.3d 374; *Gao*, 500 F.3d 93; *Castañeda-Castillo*, 488 F.3d 17; *Quitaniña*, 758 F.3d 570; *Suzhen Meng*, 770 F.3d 1071.

⁵² *Castañeda-Castillo*, 488 F.3d at 21-22; *Castañeda-Castillo v. Holder*, 638 F.3d 354, 359 (1st Cir. 2011) (appeal after remand).

⁵³ *Castañeda-Castillo*, 488 F.3d at 20.

any person about whom she had gathered information was persecuted as a result of her actions.⁵⁴

(*Higuit*) On the other hand, the persecutor bar applied to a Filipino intelligence officer who admitted that he was aware that the information he gathered was used to torture, imprison, and kill political opponents.⁵⁵

If the applicant you are interviewing denies knowledge, the focus of your analysis will be whether the applicant's denial is credible. If you have a concern about the applicant's credibility, you must confront the applicant, informing him or her of your concern, and give him or her an opportunity to explain or elaborate. See section below: *Credibility and the Persecutor Bar*.

Relevant Questions

- Does the applicant know if what he or she did resulted in harm to others?
- Did he or she know of instances where others were persecuted as a result of the actions of individuals in similar positions?

2.3.5 Did the Applicant Act under Duress?

In many cases, an applicant may allege that he or she acted under duress when participating in persecution of others. Whether duress may negate an applicant's involvement in persecution under the refugee definition is currently an unsettled question. While the Department of Homeland Security (DHS) and the Department of Justice (DOJ) are developing regulations on this topic, under current provisions an applicant subject to the persecutor bar may not be granted asylum or refugee status even if the persecutory act(s) occurred under duress. While these regulations are pending, it is important to fully explore and document whether the applicant has a plausible claim for duress that could be adjudicated at a future date. If you find that the applicant has a plausible duress claim, follow your division specific guidance for handling such cases. See [RAD Supplement-Duress; Asylum Supplement – Headquarters Review](#).

The duress issue was litigated before the U.S. Supreme Court in *Negusie v. Holder* in 2009.⁵⁶ *Negusie* was a dual national of Ethiopia and Eritrea who was forced to join the Eritrean army. When he refused to fight against Ethiopia, he was imprisoned, beaten with sticks and placed in the hot sun. After two years he was released and forced to work as a prison guard. He carried a gun, guarded the gate to prevent escape, kept prisoners from taking showers and obtaining fresh air, and forced prisoners to stay out in the hot sun.⁵⁷

⁵⁴ *Diaz-Zanatta*, 558 F.3d 450.

⁵⁵ *Higuit*, 433 F.3d 417.

⁵⁶ *Negusie*, 555 U.S. 511 (2009).

⁵⁷ *Id.* at 514-515 (2009).

He claimed that he committed these acts involuntarily. In the lower court decisions, the BIA and the Fifth Circuit held that the persecutor bar contains no exception for coerced acts.

The Supreme Court found that the Fifth Circuit erred by applying the holding of *Fedorenko v. United States*⁵⁸ to the applicant. In *Fedorenko*, an individual who served as a guard at a concentration camp while held as a German prisoner of war was found to have assisted in the persecution of others without consideration of whether such participation was against his will.⁵⁹ While the *Fedorenko* Court found that voluntariness was not required to apply the persecutor bar, the *Negusie* Court explained that the *Fedorenko* decision interpreted the terms of the Displaced Person Act of 1948 and not the Refugee Act of 1980. Accordingly, the Court concluded that the *Fedorenko* holding does not control the BIA's interpretation of the persecutor bar under the INA. Because the BIA had not exercised its interpretive authority with regard to the INA, the Court remanded the case back to the BIA for the agency to determine, in the first instance, whether the persecutor bar in the refugee definition applies to involuntary actions or whether a duress exception may be read into the refugee definition. The BIA's review of this case is stayed while DHS and DOJ develop regulations.

Despite the holding in *Negusie*, court decisions prior to *Negusie* contain relevant guidance on lines of inquiry in assessing a voluntariness element in the context of culpability, and will assist you in fully exploring on the record whether an applicant may have a plausible claim for duress. A particularized evaluation is required to determine whether the applicant's behavior was culpable "to such a degree that he or she could be deemed to have assisted or participated in the persecution of others."⁶⁰

For example, in *Hernandez v. Reno*, a case pre-dating *Negusie*, the Eighth Circuit criticized the BIA for solely evaluating the applicant's participation in shooting civilians in reaching its determination that the applicant was a persecutor.⁶¹ The Eighth Circuit explained that the BIA should have also considered the fact that the applicant had been forcibly recruited into the guerrilla organization, that he shared no persecutory motives with the guerrillas, and that he participated in the shooting only while the commander stood behind him during the shooting and checked the magazine of his rifle afterwards. Furthermore, the BIA should have also taken into account the applicant's disagreement with his commander about the shootings immediately following the incident, and that at the first available opportunity, the applicant risked his life to escape the guerrillas.⁶²

⁵⁸ *Fedorenko*, 449 U.S. 490 (1981).

⁵⁹ *Id.* at 512 (interpreting the "voluntariness" aspect of the persecutor bar under the Displaced Persons Act).

⁶⁰ *Vukmirovic*, 362 F.3d at 1252.

⁶¹ *Hernandez*, 258 F.3d at 814.

⁶² *Id.*

As discussed above, in all cases involving the persecution of others, even those where the applicant alleges that his or her acts were committed under duress, you must carefully weigh all relevant facts to determine whether the applicant's actions furthered the persecution of others on account of a protected ground. Consider these facts even in cases where the acts were committed involuntarily.⁶³

Example

(*Miranda-Alvarado v. Gonzales*) Upon considering the applicant's interpretation of interrogation questions during torture, his involvement in interrogations for six or seven years two to three times per month, his continued interpretation despite that he would not have suffered dire consequences if he stopped interpreting, and that he made little effort to avoid being involved in the interrogations, other than to ask for the torture to be lessened when it was so extreme that that the victim had difficulty speaking, the Ninth Circuit found that the applicant assisted in the persecution of others.⁶⁴

Relevant Questions

- What led the applicant to commit, assist/participate in the act?
- Did the applicant believe that he or she had a choice?
- Could the applicant have reasonably avoided committing, assisting/participating in the act?
- Did the applicant take steps to avoid committing the act?
- What was the severity and type of harm inflicted and/or threatened by those coercing the applicant to engage in the act?
- To whom was/were those threats and/or harm directed? (e.g., the applicant, his or her family)?
- Was the person threatening the applicant with immediate harm or future harm?
- What was the perceived likelihood that the threatened harm would actually be inflicted? (e.g., past harm to the applicant, his or her family)?
- Any other relevant factors?

3 CREDIBILITY AND THE PERSECUTOR BAR

⁶³ See, e.g., *Miranda Alvarado*, 449 F.3d at 927.

⁶⁴ *Id.*

As explained in greater detail in the RAIO Training modules *Interviewing - Eliciting Testimony* and *Evidence*, while the burden of proof is on the applicant to establish eligibility, your duty to elicit all relevant testimony is equally important. As discussed above, if a “red flag” emerges, because of the non-adversarial nature of the interview, you must utilize interviewing techniques that best allow you to elicit detailed testimony from an applicant, and diligently conduct relevant country of origin (COI) research.

In addition to the applicant’s testimony, general country of origin information may be the only other type of evidence available to you when you make your decision in a case involving the persecutor bar.⁶⁵ It is important to remember that reliable information may sometimes be difficult to obtain. The absence of such information should not lead you to presume that an applicant assisted or participated in persecutory acts by being a member of or associated with a group that committed persecutory acts.

If an applicant was in a particular place at a time when you know from COI that human rights abuses were being committed but denies any involvement or knowledge, the applicant should be questioned about his or her activities and awareness that abuses were taking place. The credibility of the applicant’s responses should be examined in the same way that you would examine any statements that are material or relevant to the claim: the statements are credible if they are detailed, consistent and plausible. If the applicant testifies credibly that he or she did not order, incite, assist, or otherwise participate in the persecution of others on account of a protected ground then he or she is not subject to the persecutor bar. A negative credibility determination must contain well-articulated examples of flaws in the applicant’s testimony.⁶⁶ Your notes must reflect that you explained your credibility concerns to the applicant, and in turn, gave the applicant an opportunity to address your concerns.

It is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the corroborating evidence some asylum seekers can reasonably obtain.

Relevant Questions

- Is the applicant aware that his or her unit committed human rights abuses ?
- Did the applicant hear or see other members of his or her unit commit human rights abuses?
- How was the applicant able to remain in a unit that committed human rights abuses without learning about them or being involved?

⁶⁵ It is well-established that a fact-finder consider both direct and circumstantial evidence in the persecutor bar context. *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011).

⁶⁶ See RAIO Training Module, *Credibility*.

4 DECISION-MAKING AND WRITING

4.1 Mandatory Nature of the Persecutor Bar

If you determine that the applicant is subject to the persecutor bar, you cannot approve the case.

In asylum cases, you have no discretion to approve the case, even though the applicant may otherwise qualify for asylum or derivative status. If the asylum applicant is subject to the persecutor bar, you do not weigh that adverse factor against the risk of future persecution in an exercise of discretion. You will either deny the applicant, or if the person is not in status, refer the applicant for an immigration court hearing. See [ASM Supplement – Discretion](#).

In the refugee context, there is no waiver available to an applicant who has been denied based on the persecutor bar. Denial in such cases is mandatory in the overseas context.

4.2 Applicability to Dependents

When a principal applicant is granted asylum or refugee status, his or her spouse and/or children, as defined in the Act, may also be granted status if accompanying or following to join. If the principal applicant is subject to the persecutor bar, neither the spouse nor the child is eligible for asylum or refugee status as a dependent. Conversely, if the principal applicant is not subject to the persecutor bar, but his spouse or his child is subject to the persecutor bar, the principal may be approved and the dependent will be denied or referred.⁶⁷

4.3 Relationship to Terrorism-Related Inadmissibility Grounds (TRIG)

When analyzing the facts before you, it is also important to keep the persecutor bar distinct from the terrorist-related inadmissibility grounds, particularly the bar against material support. Some cases that you review will implicate the applicability of both bars. Under the TRIG analysis, the amount of support need not be large or significant, whereas in the persecutor bar analysis, an applicant must be found to have “ordered, incited, assisted, or otherwise participated” in the persecution.

Another distinction between these grounds arises regarding application of a duress exception. While the Executive Branch may provide exemptions by policy for applicants who provided material support under duress to designated or undesignated terrorist organizations, as noted above, the Executive Branch is still considering whether a duress exception should be read into the persecutor bar analysis, and what the limits of that exception would be. Although the relevant facts may occasionally overlap, it is important to keep TRIG and persecutor bar concepts distinct when analyzing the facts of the case before you.

⁶⁷ INA § 101(a)(42)(B); INA § 207(c)(2); 8 C.F.R. § 208.21(a).

Example

On a few occasions, when the applicant was a medical doctor in Syria, he provided medical care to patients whom he knew were members of several armed groups opposed to the Syrian Government. On one occasion, after a violent protest, the applicant was taken by the police and government agents to a locked area and told to revive a man who had fainted. The applicant provided medical care to the patient until he regained consciousness and was able to faintly speak. The police then made the applicant leave. The applicant saw signs of beating on the patient and feared the patient was beaten again after he left.

In such a situation, depending on the facts, testimony and any other relevant evidence, the applicant's treatment of members of armed groups opposing the Syrian regime could render him inadmissible for engaging in terrorist activity by providing material support to a terrorist organization, although he could be eligible for a TRIG exemption for the voluntary medical care. However, depending on the facts, testimony and other evidence, the applicant might also be subject to the persecutor bar for his medical care to the patient he feared was beaten by the police. The applicant would have to be questioned regarding, for example, his contemporaneous knowledge of the harm, why the patient was harmed, if he knew his medical care assisted in any later harm and if he acted under duress.

4.4 Addressing the Bar in your Decision

See [ASM Supplement – Decision Writing](#).

See [ASM Supplement – Note Taking](#).

See [ASM Supplement – Identity Checks](#).

See [ASM Supplement – One Year Filing Deadline](#).

See [RAD Supplement – Decision Making and Recording](#).

5 CONCLUSION

Adjudicating claims that may involve the persecutor bar present certain challenges. You must carefully consider all relevant evidence in reaching your decision. As always, the law and the facts, rather than your emotions or intuition, must be your guide.

6 SUMMARY

The Rationale behind the Bar

The rationale for the persecutor bar is derived from the general principle in the *1951 Convention relating to the Status of Refugees* that even if someone meets the definition of refugee, i.e., has a well-founded fear of persecution on account of a protected ground, he or she may nonetheless be considered undeserving or unworthy of refugee status.

Analytical Framework

Step One: Determine if there is Evidence of the Applicant's Involvement in an Act that May Rise to the Level of Persecution

- Look for red flags in the evidence to alert you that the persecutor bar may be at issue.
- Evidence may include:
 - the applicant's testimony during the interview;
 - information in the applicant's file indicating his or her involvement in an entity known for committing human rights abuses; and
 - country of origin information (COI).
- If a red flag is present, examine whether there is further evidence of a specific act or acts that may rise to the level of persecution.
- Mere membership in an entity that committed persecutory acts is not enough to subject an applicant to the bar.

Step Two: Analyze the Harm Inflicted on Others

- Does the harm inflicted rise to the level of persecution?
- Is there a nexus to a protected ground?
- Was the act a legitimate act of war or law enforcement?

Step Three: Analyze the Applicant's Level of Involvement

- Did the applicant *order, incite, assist, or otherwise participate* in the persecutory act(s)?
- Did the applicant know that the persecution was occurring?
 - Prior or contemporaneous knowledge is required.
- Did the applicant act under duress?
 - Fully explore this issue for the record and follow Division specific guidance.

Do Not Confuse Persecutor Bar with TRIG

It is important not to confuse the persecutor bar with terrorist-related inadmissibility grounds and the security-related mandatory bars to asylum. While some cases may implicate the applicability of both bars, each issue should be analyzed separately.

PRACTICAL EXERCISES

Practical Exercise # 1

- **Title:**
- **Student Materials:**

OTHER MATERIALS - STEP-BY-STEP PERSECUTOR BAR CHECKLIST

- 1. Is there evidence of the applicant's involvement in an act that may rise to the level of persecution?** Yes No

If no, stop –applicant is not subject to the bar. If yes, proceed to next step.

- 2. Analyze the harm inflicted on others.**

- a) Did the harm rise to the level of persecution?** Yes No

If no, stop –applicant is not subject to the bar. If yes, proceed to next step.

- b) Was there a nexus to a protected ground? If yes, what was the targeted characteristic?**

Race Religion Nationality Membership in a PSG Political Opinion

If no boxes are checked, stop –applicant is not subject to the bar. If yes, proceed to next step.

- c) Was the act a legitimate act of war or law enforcement?**

Yes No

If yes, stop - applicant is not subject to the bar. If no, proceed to next step.

- 3. Analyze the Applicant's level of Involvement.**

- a) Did the applicant order, incite, assist, otherwise participate in, or actively carry out or commit persecution of others?**

Yes No

If no, stop –applicant is not subject to the bar. If yes, proceed to Step 3b.

- b) Did the applicant know that the persecution was occurring?**

Yes No

If no, stop –applicant is not subject to the bar. If yes, proceed to Step 3c.

- c) Did the applicant act under duress?** Yes No

If applicant did not act under duress, the persecutor bar applies and he or she is ineligible for refugee or asylum status. If you find he or she has a plausible claim of duress, see division-specific guidance.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

RAD Supplement – Related Grounds of Inadmissibility

In addition to analyzing the possible applicability of the persecutor bar to refugee eligibility, when an applicant engages in activity that may have assisted in, or furthered, the harm or suffering of other individuals, the officer must also consider whether related grounds of inadmissibility may apply to the applicant. The related inadmissibility grounds are directed at preventing individuals from entering the United States if they have:

1. Ordered, incited, assisted or otherwise participated in Nazi Persecutions (INA Section 212(a)(3)(E)(i));
2. Ordered, incited, assisted or otherwise participated in genocide (INA Section 212(a)(3)(E)(ii));
3. Committed, ordered, incited, assisted or otherwise participated in torture or extrajudicial killing under the color of law (INA Section 212(a)(3)(E)(iii));
4. Recruited or used child soldiers in violation of section 2442 of title 18, U.S. Code; or

5. As a foreign government official, committed particularly severe violations of religious freedom (INA Section 212(a)(2)(G)).

In the first three inadmissibility grounds, the same analysis of the persecutor bar to refugee status is applicable to the determination of whether an applicant ordered, incited, assisted, or otherwise participated in the relevant activity. Further discussion of these provisions can be found in the Inadmissibility module.

RAD Supplement – Decision Making and Recording

Please see Refugee Application Assessment Standard Operating Procedure (SOP): “D. Section IV – BARS AND INADMISSIBILITIES.”

<http://connect.uscis.dhs.gov/org/RAIO/RAD/Documents/SOP%20-%20Assessment%20SOP,%2001-11-12.pdf>

RAD Supplement – Duress

Pursuant to the following guidance, all cases involving persecution committed under duress must be placed on hold for review at RAD Headquarters to ensure the hold is appropriate. When a persecutor hold is appropriate, the applicant may be informed by the RSC regarding his or her options, which may include remaining on long-term hold with RAD, requesting a denial or withdrawing from the USRAP in hope of resettlement in another country. Given the grave consequences for applicants, it is vital that refugee officers elicit all relevant testimony to ensure that the persecutor bar does, in fact, apply. Testimony must be elicited regarding issues such as the applicant’s level of involvement in persecution and his or her prior or contemporaneous knowledge of the persecution.

Response to Query

Date: June 30, 2009

Subject: Persecution Committed Under Duress

Keywords: Duress, Persecution, Bars, *Negusie*

Query: In light of the recent *Negusie* ruling, what should officers do with cases in which applicants are found to have ordered, incited, assisted or otherwise participated in the persecution of others if such actions were taken under duress?

Response: Effective immediately, officers must place on hold any case in which a

refugee applicant is found to have ordered, incited, assisted or otherwise participated in the persecution of others *if such actions were taken under duress*. Supervisors are requested to keep track of all cases (including case numbers) placed on hold pursuant to this instruction in their standard trip report. Where IO staff serve as a team leader or otherwise oversee adjudication of refugee processing (either through nomad circuit rides or as part of the regular IO workload), IO staff should send to RAD Headquarters, through the Overseas District chain of command, a list of the cases on hold, including A-numbers, and note the reason for placement on hold as an applicant found to have ordered, incited, assisted or otherwise participated in the persecution of others while under duress.

While no duress exception to the persecutor bar currently exists, the requirement to place such cases on hold has been made at the request of the Department of Homeland Security's Office of the General Counsel in light of the March 3, 2009, Supreme Court decision in *NEGUSIE v. HOLDER*.

The issue presented by the case is whether the provision of the Immigration and Nationality Act that prohibits the finding that an individual is a refugee if he/she has engaged in the persecution of others applies to those who were compelled to do so under duress (for example, coercion through physical harm or threats of death or torture.) The petitioner in the case, Negusie, at age 18, was forcibly conscripted by Eritrean military forces in the longstanding war with Ethiopia. On account of his Ethiopian heritage, however, Negusie refused to fight against those he deemed his "brothers." He served roughly two years in prison on account of his refusal. Following his term of imprisonment, Negusie was directed to serve as a guard at the same prison where he had been held. Torture reportedly is common at the prison. Based on his work as a prisoner, the Fifth Circuit denied Negusie relief, finding the forcible service as a prison guard is irrelevant to deciding applicability of the bar.

The Court asserted that, "...the BIA and the Court of Appeals misapplied *Fedorenko*. We reverse and remand for the agency to interpret the statute, free from the error, in the first instance." The Court held that simply because the INA is silent on a duress exception doesn't mean that one should or should not exist and held that the BIA should use its interpretive authority to decide the matter.

DHS is assessing the issue at this time to formulate a department position. As such, all USCIS Divisions have been instructed to hold any cases that raise a plausible duress claim. Cases put on hold must contain a *plausible* claim of duress as to any persecutory act *and be otherwise eligible* for the benefit. If there is no plausible duress claim and/or the individual is not otherwise eligible, the case may be denied.

Refugee Officers are accustomed to analyzing duress in the context of TRIG exemptions. The same factors may be considered when determining whether duress was a factor in the applicant's actions. At a minimum, the persecutory act must have been committed as a response to a *reasonably-perceived threat of serious*

harm. Lines of inquiry/considerations to assess whether the action was taken under duress include but are not limited to:

- What led the applicant to commit the act
- Whether the act was voluntary or if the applicant felt pressure to commit the act
- Whether the applicant believed he/she had a choice
- Whether the applicant reasonably could have avoided, or took steps to avoid committing a persecutory act
- The severity and type of harm inflicted or threatened
- To whom the threat of harm was directed (e.g., the applicant, the applicant's family, the applicant's community, etc.)
- The perceived imminence of the harm threatened
- The perceived likelihood that the threatened harm would be inflicted (e.g., based on instances of past harm to the applicant, to the applicant's family, to the applicant's community, and the manner in which harm was threatened, etc.)
- Whether the applicant was aware of other threats or instances of harm inflicted by this group on his community
- Any other relevant factor regarding the circumstances under which the applicant felt compelled to act

SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

ASM Supplement - Burden Shifting

The asylum regulations regarding the “mandatory bars” to asylum state that “if the evidence indicates that” an applicant ordered, incited, assisted, or otherwise participated in the persecution of any person on account of one of the five protected grounds, “he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act.”⁶⁸

As discussed earlier in this module, the burden is on the applicant to establish eligibility.⁶⁹ Credible testimony alone may be enough to meet the applicant’s burden. While the applicant has the burden of proving eligibility, you have an equal duty in a non-adversarial interview to elicit detailed testimony from the applicant.⁷⁰ If the applicant’s testimony, documents in the record, country of origin information, or other evidence indicates that the persecutor bar may apply, you must question the applicant about his or her possible involvement in persecutory acts. If the applicant denies involvement, you must then determine the credibility of

⁶⁸ 8 C.F.R. § 208.13(c).

⁶⁹ 8 C.F.R. § 208.13(a); *UNHCR Handbook, para 196*.

⁷⁰ 8 C.F.R. § 208.9(b); *UNHCR Handbook, para 196*, and 205(b)(i).

that denial. For additional information regarding credibility determinations and evaluation of evidence, see RAIO Training modules, *Credibility* and *Evidence Assessment*. Just as you must identify inconsistencies and offer the applicant an opportunity to explain, in the instance where it appears the persecutor bar might apply, you must identify the issues of concern and elicit detailed information on which to base the determination. The applicant must establish that he or she is not subject to the persecutor bar by a preponderance of the evidence.

ASM Supplement - Note-Taking

Asylum Division procedures require that officers take notes in a sworn statement format when the applicant admits, or there are serious reasons to believe, he or she ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five enumerated grounds.

This is crucial because an applicant's admission may be used as a basis to institute deportation or removal proceedings against him or her, or as a basis for DHS to detain the applicant.

For further explanation and requirements, see RAIO Module, *Interviewing - Note-Taking*, including the Asylum Supplement, and see the Affirmative Asylum Procedures Manual (AAPM).

ASM Supplement - Discretion

There may be some cases in which facts fall short of a mandatory bar to asylum but nonetheless warrant the denial or referral of the asylum application as a matter of discretion, even if the applicant has established refugee status.

Examples:

Although mere membership in an organization that is or has been involved in the persecution of others is insufficient to statutorily bar an applicant from a grant of asylum, it may be considered as an adverse factor when weighing the totality of the circumstances to exercise discretion to grant asylum.

An applicant testifies to serving in his country's police force for several years. Country conditions information reports that many individuals held in police custody are abused by police officers. The applicant admits that he had used extreme force in a number of situations in dealing with prisoners. There is insufficient evidence to support a finding that the applicant's actions amounted to

persecution on account of one of the five grounds. In such a situation, the asylum officer may be able to support a determination that asylum should not be granted as a matter of discretion.

Asylum officers must bear in mind that the sound exercise of discretion requires a balancing of the fact that the applicant qualifies as a refugee, along with any other positive factors, against any negative factors presented in the case. This should be reflected in the assessment.

The likelihood of future persecution is an important factor in the exercise of discretion. A reasonable possibility of future persecution weighs heavily in favor of exercising discretion to grant asylum. The BIA has held that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”⁷¹

NOTE: Denials and referrals of applicants who meet the definition of a refugee and are otherwise eligible for asylum, but are denied or referred because of acts that are not a bar to asylum must be reviewed by Headquarters Quality Assurance.

ASM Supplement – Headquarters Review

Cases involving the persecutor bar require headquarters review. Specifically, Headquarters Quality Assurance will review the following cases involving the persecutor bar:

- **Grants** of cases where evidence indicates that the applicant may have ordered, incited, assisted, or otherwise participated in persecution of others on account of any of the five grounds, and the applicant is found to have met his or her burden of proof to establish that he or she should not be barred a persecutor.
- **All Notices of Intent to Deny (NOID) and referrals to the immigration judge** when an applicant is found to be credible and found to be barred as a persecutor.
- **All NOIDs and referrals of credible applicants with cases that involve having committed persecution of others under duress.** Pending finalization of guidance relating to the issue of voluntariness and the persecutor bar, HQ Quality Assurance will put on hold cases where there is evidence of duress and intent.

⁷¹ *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

ASM Supplement – Decision Writing

If the evidence indicates that the persecutor bar may apply, the assessment must contain an analysis of that evidence. The analysis must include a summary of the material facts, an explanation of how those facts and other evidence support a finding that the bar may apply, and a conclusion as to whether or not the applicant is subject to the bar.

Where it appears that the persecutor bar may apply to the applicant, your analysis must give a detailed explanation as to whether the applicant ordered, incited, assisted or otherwise participated in the persecution of others on account of one of the five protected grounds. The analytical framework described in this module must be followed in order to accurately describe the relevant issues. Because it is an open area of law, the analysis must also address the issues of duress and intent, including the age and/or mental capacity of the applicant at the time he or she may have engaged in the acts of persecution.

Unlike applicants barred from receiving asylum or refugee status on other grounds, an applicant found to be a persecutor CANNOT also be said to be a refugee because this bar is included in the definition of a refugee.

If the case contains evidence indicating that the persecutor bar may apply, but the applicant establishes by a preponderance of evidence that the bar does not apply, the assessment must include an analysis setting forth why the evidence raised the possibility that the bar applies, and that clearly articulates the facts and reasoning by which the bar was found not to apply.

If the facts indicate that a discretionary denial/referral may be warranted, then you must discuss the positive and negative factors considered in reaching that determination, and explain the reason for exercising discretion to grant, deny, or refer the case.

When writing a decision involving an applicant barred as a persecutor, you must analyze all elements of the refugee definition and consider any other bars that may apply. The assessment must not include a statement that “the applicant met the definition of a refugee,” even when the applicant established that he or she suffered past persecution or has a well-founded fear of persecution on account of a protected ground. You must follow current Asylum Division decision writing guidance as to appropriate language to use to address the persecutor bar. A possible example would be: “However, the preponderance of evidence indicates that the applicant is subject to the persecutor bar because the applicant assisted in the persecution of others on account of [state the protected ground].” An analysis of why the applicant was found to be a persecutor must follow.

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

There is no IO Supplement.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

IO Supplement – 1
There is no IO Supplement.