Asylum, Withholding and CAT

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I. ASYLUM

A. Jurisdiction

The Department of Homeland Security has initial jurisdiction over an asylum application filed by an alien who is physically present in the United States or seeking admission at a port of entry. *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 (BIA 2017); 8 C.F.R. §§ 208.2(a), 1208(2). The DHS has prosecutorial discretion in deciding whether to commence removal proceedings. *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 170 (BIA 2017) (holding that the IJ did not have the authority to terminate section 240 proceedings to give an arriving alien the opportunity to present an asylum claim to the DHS in the first instance). An IJ may not question the DHS's decision to forgo expedited removal or to initiate removal proceedings in a particular case. *Id.* Once the DHS files a notice to appear with the immigration court and commences removal proceedings, the IJ has exclusive jurisdiction over the asylum claim and has a duty to adjudicate the matter. *Id.*; 8 C.F.R. §§ 208.2(b), 1208.2(b), 1240.11(c)(3).

B. Entitlement of Hearing and Consideration of Evidence

An applicant for asylum cannot meet his or her burden of proof unless he or she testifies under oath regarding the application. *Matter of Fefe,* 20 I&N Dec. 116, 118 (BIA 1989). At a minimum, the regulations require that an applicant for asylum or withholding be questioned under oath to determine whether the information in the written application is complete and correct. *Matter of Fefe,* 20 I&N Dec. 116, 118 (BIA 1989); INA § 240(b)(4)(B), (c)(4)(B). Examination may cease at this point only if the parties stipulate that the applicant's testimony would be entirely consistent with the written materials and that the oral statement would be

believably presented. *Matter of Fefe,* 20 I&N Dec. 116, 118 (BIA 1989). Otherwise, "[t]he full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself." *Id.*

During the removal hearing, "the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf." 8 C.F.R. § 1240.11(c)(3)(iii). While the regulations clearly give the IJ "the authority . . . to properly control the scope of any evidentiary hearing," 8 C.F.R. § 1240.11(c)(3)(ii), this authority is premised at a minimum on including an opportunity for the respondent to present evidence and witnesses on his or her own behalf. *See Matter of Fefe,* 20 I&N Dec. 116, 118 (BIA 1989); 8 C.F.R. § 1240.11(c)(3). The opportunity to testify also recognizes that the facts underlying the application for relief may continue to develop up to the time of the final individual hearing on the merits, potentially long after the original application was submitted. Even where an IJ is inclined to conclude that a mandatory bar to relief applies, the statutory and regulatory provisions require the IJ to conduct a full evidentiary hearing on any disputed factual issues related to that question. 8 C.F.R. § 1240.11(c)(3).

Along these lines, the court must "meaningfully consider the evidence and arguments ... presented [by the respondent]." *Fei Yan Zhu v. Att'y Gen.*, 744 F.3d 268, 272 (3d Cir. 2014) (reversing BIA denial of motion to reopen on forced abortion claim where the court could not determine if the BIA ignored, rejected or discounted the documentary evidence); *see also Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 349-51 (3d Cir. 2008) (stating that BIA should rely on USDOS and Amnesty International reports to determine whether Colombian government would be "willfully blind" to petitioner's risk of torture by FARC); *Ghebrehiwot v. Att'y Gen.*, 467 F.3d 344, 353-55 (3d Cir. 2006) (remanding where IJ failed to consider USDOS reports and other documents submitted by Eritrean Pentecostal Christian); *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 93 (3d Cir. 2004) (stating that USDOS reports on Georgia considered by IJ as "objective evidence" to find no past persecution). The court "must provide an indication that it considered such evidence, and if the evidence is rejected, an explanation as to why it was rejected." *Fei Yan Zhu v. Att'y Gen.*, 744 F.3d 268, 272 (3d Cir. 2014). "This does not mean that [the court] is required to expressly parse each point or discuss each piece of evidence presented . . . but 'it may not ignore evidence favorable to the alien.'" *Id.* (citing *Huang v. Att'y Gen.*, 620 F.3d 372, 388 (3d Cir. 2010)).

C. Procedural Due Process in Removal Hearings

1. Impermissible Conduct by an IJ May Constitute a Due Process Violation

Where a respondent's due process challenge is based on the conduct of an Immigration Judge during his or her removal hearing, there is a spectrum of troubling conduct that is fact-specific and must be evaluated on a case-by-case basis to determine (1) if the petitioner "was prevented from reasonably presenting his case[,] and (2) . . . substantial prejudice resulted." *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017) (finding that the IJ's conduct fell on the impermissible end of the spectrum because it consisted of "a hostile and demeaning tone, a focus on issues irrelevant to the merits, brow beating, and continual interruptions."); *see also Wang v. Att'y Gen.*, 423 F.3d 260, 263-65 (3d Cir. 2005) (holding that the petitioner did not

receive due process where the IJ employed a disparaging and sarcastic tone throughout the petitioner's removal hearing and expressed great disapproval of aspects of the petitioner's personal life that were irrelevant to his claims); *Cham v. Att'y Gen.*, 445 F.3d 683, 691-93 (3d Cir. 2006) (holding that due process was violated by an IJ who "continually abused an increasingly distraught petitioner, . . . wholesale nitpick[ed] . . . with an eye towards finding inconsistencies and contradictions," and denied that petitioner the opportunity to present testimony from critical witnesses who were only available on dates after the hearing); *but see Abdulrahman v. Ashcroft*, 330 F.3d 587, 597 (3d Cir. 2003) (holding that an IJ's palpable "lack of courtesy" towards the petitioner did not, without more, violate the petitioner's due process rights, where "the language used by the IJ during the hearing and in her opinion [did] reflect an annoyance and dissatisfaction with [the petitioner's] testimony that [was] far from commendable.").

D. Credibility

In all applications for asylum, the court must make a threshold determination of the applicant's credibility. *See* INA §§ 208(b)(1)(B)(iii); 240(c)(4)(B); *Chukwu v. Att'y Gen.*, 484 F.3d 185, 189 (3d Cir. 2007); *Matter of S-H-,* 23 I&N Dec. 462, 463 (BIA 2002) (remanding the case where the IJ did not make any specific findings of fact, did not include any specific credibility determinations, and did not meaningfully discuss the documents that had been offered into evidence); *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). A credibility finding is independent of an analysis of the sufficiency of an applicant's evidence. *Chen v. Gonzales*, 434 F.3d 212, 221 (3d Cir. 2005). An IJ must allow the applicant to create a record before making an adverse credibility finding. *Muhanna v. Gonzales*, 399 F.3d 582, 589-90 (3d Cir. 2005) (holding that the IJ's premature decision to halt the proceedings based on a flawed frivolousness finding prevented the development of a record upon which an adverse credibility determination could be made).

The court's credibility determination will be upheld by the reviewing body absent a finding that the credibility determination was "clearly erroneous," meaning that the reviewing body on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Alimbaev v. Atty Gen.*, 872 F.3d 188, 195 (3d Cir. 2017) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *Matter of A-B-*, 27 I&N Dec. 316, 341 (A.G. 2018) (noting that where credibility determinations are at issue even greater deference must be afforded to the immigration judge's factual findings). The BIA may find an immigration judge's factual findings to be clearly erroneous only if they are "illogical or implausible," or without "support in inferences that may be drawn from the facts in the record." *Matter of A-B-*, 27 I&N Dec. 316, 341 (A.G. 2018) (internal quotations omitted).

1. Pre-REAL ID Act[1] Credibility

Applications for relief filed before May 11, 2005 are not subject to the REAL ID Act. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 306 (2005); *Kaita v. Att'y*

[1] REAL ID Act of 2005, 8 U.S.C. § 1229a.

Gen., 522 F.3d 288, 296 (3d Cir. 2008); *Chukwu v. Att'y Gen.*, 484 F.3d 185, 189 (3d Cir. 2007); *Gabuniya v. Att'y Gen.*, 463 F.3d 316, 322 n.7 (3d Cir. 2006); *Matter of S-B-*, 24 I&N Dec. 42, 42 (BIA 2006). Thus, the amendments made by the REAL ID Act to INA § 208(b)(1)(B) do not apply.

An applicant's testimony is sufficient to meet his burden of proof for his asylum claim without corroboration if the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989); *see also* 8 C.F.R. § 1208.13(a). Importantly, inconsistencies must go to the heart of an applicant's asylum claim in order to support an adverse credibility finding. *See Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002). An applicant may be given the "benefit of the doubt" if there is some ambiguity regarding an aspect of his asylum claim. *Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998). In some cases, an applicant may be found to be credible even if he has trouble remembering specific facts. *See, e.g.*, *Matter of B-*, 21 I&N Dec. 66, 70-71 (BIA 1995) (finding that an applicant who fled persecution may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception).

Moreover, minor inconsistencies and minor admissions that "reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding." *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (quoting *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir. 1988)); *see also Xin Jie Xie v. Ashcroft*, 359 F.3d 239, 243 (3d Cir. 2004) (stating that "'minor inconsistencies' do not provide an adequate basis for an adverse credibility finding."); *Gui Cun Liu v. Ashcroft*, 372 F.3d 529, 533-34 (3d Cir. 2004) (finding that the IJ's purported inconsistencies in the alien's testimony, concerning gender of aborted child, date of alien's baptism, and length of pregnancy before abortion, were insufficient to support an adverse credibility finding because the inconsistencies were ill-founded, trivial, or nonexistent); *Gabuniya v. Att'y Gen.*, 463 F.3d 316, 323-24 (3d Cir. 2006) (discussing inconsistencies in dates regarding death of alien's wife, alien's self-correction of misstatement in date of his third arrest, and differences in translation of Georgian word "arm" into English and finding these minor and insufficient to support an adverse credibility finding). Rather, discrepancies must go to the "heart of the asylum claim." *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (quoting *Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990)); *Berishaj v. Ashcroft*, 378 F.3d 314, 323 (3d Cir. 2004) (citation omitted).

Conversely, an applicant's omission of key events coupled with numerous inconsistencies may lead to a finding that the applicant is not credible. *Matter of A-S-*, 21 I&N Dec. 1106, 1109-10 (BIA 1998). Testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable. *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997); *Matter of A-S-*, 21 I&N Dec. 1106, 1109-10 (BIA 1998).

Adverse credibility findings cannot be based on speculation or conjecture. *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002); *Gabuniya v. Att'y Gen.*, 463 F.3d 316, 323 (3d Cir. 2006). When making a finding that an applicant is not credible, the IJ must provide "'specific, cogent reason[s]'" why that is so. *Gabuniya v. Att'y Gen.*, 463 F.3d 316, 321-2 (3d Cir. 2006).; *see also Jishiashvili v. Att'y Gen.*, 402 F.3d 386, 393-94 (3d Cir. 2005) (stating that IJ's

conclusions about "implausibility" of petitioner's testimony about police interrogations in Georgia had to be "properly grounded in the record and, to that extent, informed by the conditions in the petitioner's country."); *Gui Cun Liu v. Ashcroft*, 372 F.3d 529, 534 (3d Cir. 2004) (remanding because "[a]bsent the one glaring inconsistency," evidence was insufficient to support adverse credibility determination).

The Third Circuit has cautioned against basing an adverse credibility finding solely on the fact that details regarding incidents of persecution were omitted from the asylum application. *Xin Jie Xie v. Ashcroft*, 359 F.3d 239, 243 (3d Cir. 2004) (stating that an examination of the record must also reveal that "the alien has not supplied a convincing explanation for . . . discrepancies and omissions" [to justify an adverse credibility determination]); *see also Abulashvili v. Att'y Gen.*, 663 F.3d 197, 206-07 (3d Cir. 2011) (finding that substantial evidence did not support an adverse credibility determination when some of the purported contradictions that the IJ relied on resulted from misreading the alien's application, reading only part of it, or ignoring it).

i. Discrepancies over Dates

In some circumstances, discrepancies over dates do not to go to the heart of an alien's asylum claim. *See Kaita v. Att'y Gen.*, 522 F.3d 288, 297 (3d Cir. 2008) (finding that the petitioner's inability to remember the exact date of her husband's disappearance and the date of her hospitalization do not go to the heart of her claim, which was based on her capture, detention, and mistreatment by the rebels).

2. Post-REAL ID Act Credibility

The REAL ID Act of 2005 ("REAL ID Act") amended various sections of the INA relating to the adjudication of asylum applications filed on or after May 11, 2005.[2] 8 U.S.C. § 1229a (2005); *Matter of S-B*, 24 I&N Dec. 42, 45 (BIA 2006). Specifically, it amended INA § 208 and placed the burden of proof on the respondent to establish that he or she satisfies the applicable eligibility requirements and that he or she merits a favorable exercise of discretion for relief. INA § 240(c)(4)(A).

Credibility determinations are made "considering the totality of the circumstances and all relevant factors." INA § 240(c)(4)(C). A trier of fact may base a credibility determination on:

> demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral

[2] Where an applicant has filed an asylum application before May 11, 2005, the effective date of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 302, and, on or after that date, submitted a subsequent application that is properly viewed as a new application, the later filing date controls for purposes of determining the applicability of section 208(b)(1)(B)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(iii) (2012), to credibility determinations. *Matter of M-A-F-*, 26 I&N Dec. 651, 651 (BIA 2015).

> statements,[3] the internal consistency of each such statement, the consistency of such statements with other evidence of record, and any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim*, or any other relevant factor. There is no presumption of credibility, however, if no adverse-credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

INA § 208(b)(1)(B)(iii) (emphasis added); *see generally Lin v. Att'y Gen.*, 543 F.3d 114, 126-27 (3d Cir. 2008) (affirming the IJ's adverse credibility determination based on discrepancies between respondent's testimony and affidavit). This standard also applies to applications for withholding of removal and relief under the Convention Against Torture. *See* INA § 240(c)(4)(C).

i. Inconsistent Statements

The trier of fact may make a credibility determination on a number of factors "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim." INA § 208(b)(1)(B)(iii); *see also Lin v. Att'y Gen.*, 543 F.3d 114, 127 (3d Cir. 2008) (finding that a discrepancy between the petitioner's testimony and affidavit concerning whether the police gave him a reason for his arrest, an inconsistency concerning whether he practiced his religion secretly or in public, and his "unpersuasive demeanor" were substantial inconsistencies that supported an adverse credibility finding); *Obale v. Att'y Gen.,* 453 F.3d 151, 163-64 (3d Cir. 2006) (finding that a sibling's failure to reference the applicant's past persecution was a proper basis to deny asylum). Multiple inconsistencies between the testimony solicited on direct and cross-examination may be a strong indication that the respondent's testimony is not credible. *See* INA § 208(b)(1)(B)(iii); *Gabuniya v. Att'y Gen.*, 463 F.3d 316, 321 (3d Cir. 2006).

ii. Airport Statements and Other Interviews

An Immigration Judge may rely on a border or airport interview in making a credibility determination if the interview is accurate and reliable. *Matter of J-C-H-F-*, 27 I&N Dec. 211, 213 (BIA 2018); *see Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 158 (3d Cir. 2005) (noting that "[an airport] interview is likely to be hurried; language difficulties arise; the results may be inaccurately recorded, and an arriving alien who has suffered abuse in his home country may be reluctant to reveal full information in his or her first meeting with the government"). In assessing its accuracy and reliability, the IJ should examine on the totality of the circumstances, rather than relying on any one factor among a list or mandated set of inquiries. *Matter of J-C-H-F-*, 27 I&N Dec. 211, 213 (BIA 2018) (finding that the applicant's border interview was accurate and reliable because it was conducted in his native language, was specific and detailed, and the applicant did not present any other circumstances that affected the interview's reliability).

[3] The consistency between written and oral statements can be considered regardless of when the statements were made and whether or not they were made under oath, although an IJ should consider the circumstances under which the statements were made. INA § 208(b)(1)(B)(iii).

Factors to be considered include: the language in which the interview was conducted, whether an interpreter was provided if requested, the level of detail in the questions, whether further inquiries were made of the alien to get a more accurate version of the claim, whether the questions contained ambiguous or broad language, and whether an individual has specific circumstances that may affect the reliability of the answers. *J-C-H-F-,* 27 I&N Dec. at 216*; see also Balasubramanrim v. INS*, 143 F.3d 157, 162-64 (3d Cir. 1998) (reversing an adverse credibility finding where there were some inconsistencies between the airport interview and applicant's testimony before immigration judge; the accuracy and completeness of the only record of interview was questionable; the interview was not based on an application for asylum and the questions posed were not designed to elicit pertinent details; and the Board's assessment of applicant's English skills lacked basis)); *Yan Lan Wu v. Ashcroft*, 393 F.3d 418, 424-25 (3d Cir. 2005) (remanding where the IJ failed to explain why he relied on an airport interview to contradict an asylum claim after finding the respondent's testimony credible). An airport interview may not be adequate for adverse credibility purposes where:

> [The court] do[es] not know how the interview was conducted or how the document was prepared. [The court] do[es] not know whether the questions and answers were recorded verbatim, summarized, or paraphrased. [The court] cannot tell from the document the extent to which [the alien] had difficulty comprehending the questions, whether questions had to be repeated, or when and how sign language was used. Does the document reveal whether [the alien's] responses actually correspond to those recorded or whether the examiner recorded some distilled or summary version based on his best estimation of the response?

See Dia v. Ashcroft, 353 F.3d 228, 257 (3d Cir. 2003) (en banc) (quoting *Balasubramanrim v. INS*, 143 F.3d 157, 164 (3d Cir. 1998). Furthermore, the IJ should address any arguments raised regarding the accuracy and reliability of the interview and explain why such arguments are or are not persuasive. *Matter of J-C-H-F-*, 27 I&N Dec. 211, 213 (BIA 2018) (finding that the IJ did not err in making an adverse credibility finding when the applicant's explanation for the inconsistencies were unpersuasive); *see Yan Lan Wu v. Ashcroft*, 393 F.3d 418, 424-25 (3d Cir. 2005) (remanding where the IJ failed to explain why he relied on an airport interview to contradict asylum claim after finding respondent's testimony credible).

An interview with an asylum officer may have the same or similar contextual or content flaws as an airport statement and thus may not support an adverse credibility finding. *Korytnyk v. Ashcroft*, 396 F.3d 272, 289 (3d Cir. 2005) (finding that it was unreasonable for the IJ to rely on an inconsistent statement made to an asylum officer where the asylum interview that was not in the record, including the asylum officer's "assessment referral memo."); *see also Matter of S-S-,* 21 I&N Dec. 121, 124 (BIA 1995) (stating that "[a]t a minimum, the record must contain a meaningful, clear, and reliable summary of the statements made by the applicant at the interview.").

iii. Mistranslations and Inconsistent Applications

The court should not make an adverse credibility finding solely on inconsistencies that are reasonably attributable to faulty translation. *Abulashvili v. Att'y Gen.*, 663 F.3d 197, 206 (3d Cir. 2011) (stating that "the linguistic and cultural difficulties endemic in immigration hearings

may frequently result in statements that appear to be inconsistent, but in realty arise from a lack of proficiency in English or cultural differences rather than attempts to deceive."); *see also Issiaka v. Att'y Gen.*, 569 F.3d 135, 141-43 (3d Cir. 2009) (remanding and directing the government to obtain a new translator where the poor quality of translation undermined the evidence that the adverse credibility was based upon); *Gabuniya v. Att'y Gen.*, 463 F.3d 316, 323-24 (3d Cir. 2006) (stating that minor or irrelevant inconsistencies, plus a minor misunderstanding regarding the translation of testimony, do not support an adverse credibility finding).

iv. Inconsistencies Caused by Incompetent Counsel

An IJ's adverse credibility finding based, in part, on inconsistent testimony, will not be supported where the record establishes that the evidentiary inconsistencies would have been avoided by competent counsel. *See Fadiga v. Att'y Gen.*, 488 F.3d 142, 162-63 (3d Cir. 2007).

v. Conjecture, Speculation, and Plausibility

The REAL ID Act of 2005 provides that adjudicators may consider the "inherent" plausibility of the applicant's account. 8 U.S.C. § 1158(b)(1)(B)(iii). An IJ may make reasonable inferences from direct and circumstantial evidence in the record as a whole. *Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (finding that the IJ made a reasonable inference from the totality of the record to conclude that respondent assisted in the extrajudicial killings even when there was no evidence that he ordered any extrajudicial killing). "[An] inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist." *Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011).

"An IJ is not required to accept a respondent's assertions, even if plausible, where there are other permissible views of the evidence based on the record." *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011). "Where an IJ bases an adverse credibility finding in part on 'implausibility,' such a conclusion will be properly grounded in the record only if it is made against the background of the general country conditions." *Sukwanputra v. Gonzales*, 434 F.3d 627, 636 (3d Cir. 2006); *Matter of M-B-C-*, 27 I&N Dec. 31, 35 (BIA 2017) (holding that a respondent's professed ignorance of human rights abuses committed by Army of the Republic of Srpska ("VRS") during the Bosnian War was implausible).

Adverse credibility findings cannot be based on speculation or conjecture. *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (stating that "[a]dverse credibility findings based on speculation or conjecture, rather than on evidence in the record, are reversible."); s*ee also Sukwanputra v. Gonzales*, 434 F.3d 627, 636-37 (3d Cir. 2006) (finding that an adverse credibility determination was based on speculation and conjecture, rather than on any evidence in the record where the IJ found it "implausible" that respondent was present at three central events even though there were quite far apart in distance where the record contained no evidence regarding the distance between the events recounted); *Issiaka v. Att'y Gen.*, 569 F.3d 135, 138–41 (3d Cir. 2009) (finding no basis for claim that applicant failed to describe his head wound with sufficient detail where IJ's effort was more consistent with undermining credibility than assessing it); *Dia v. Ashcroft*, 353 F.3d 228, 247-60 (3d Cir. 2003) (en banc) (finding that the

credibility determinations rested on conjecture and were "more puzzling than plausible, more curious than commonsense.").

vi. Omissions

A deliberate omission of a material fact from a refugee application that could have affected or influenced the government's decision whether to grant refugee status constitutes a willful misrepresentation of a material fact. *See Matter of D-R-*, 25 I&N Dec. 445, 450 (BIA 2011) (finding that a respondent's deliberate omission from his refugee application that he was a special police officer during a war conflict constituted a willful representation of a material fact because it could have influenced the government's decision whether to grant him refugee status).

The omission of "significant events of persecution" from statements made and affidavits filed prior to testimony may lead an adjudicator to question the credibility of an applicant. *See Xie v. Ashcroft*, 359 F.3d 239, 243 (3d Cir. 2004) (finding omission of wife's forced sterilization from asylum application supported an adverse credibility determination where the alien had put down on his application the birth control official's request for him to be forcibly sterilized thus showing that alien was aware of importance of the relevance of such information). However, the Third Circuit has cautioned against basing an adverse credibility finding solely on the fact that details regarding incidents of persecution were omitted from the asylum application. *Xie v. Ashcroft*, 359 F.3d 239, 246 (3d Cir. 2004) (stating that "an examination of the record must also reveal that 'the alien has not supplied a convincing explanation for . . . discrepancies and omissions'" [to justify an adverse credibility finding]). "Asylum applicants are not required to list every incident of persecution on their I–589 statement." *Abulashvili v. Att'y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011) (quoting *Pavlova v. INS*, 441 F.3d 82, 90 (2d Cir. 2006)).

Omissions must be discernible in the record, and must not be the result of a translation or interpretation error or mischaracterization of the record. *Issiaka v. Att'y Gen.*, 569 F.3d 135, 142–43 (3d Cir. 2009) (remanding where, *inter alia*, because of translation and transcription problems, "the written record is too muddled to allow intelligent review.").

vii. Lack of Specific and Detailed Testimony

The REAL ID Act of 2005 provides that an asylum applicant may establish his or her claim by offering credible, persuasive testimony that "refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. § 1158(b)(1)(B)(ii); *see also Matter of E-P-*, 21 I&N Dec. 860, 862 (BIA 1997) (noting that a finding of credible testimony by an asylum applicant is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony, and any other relevant evidence in the record, is also considered); *Issiaka v. Att'y Gen.*, 569 F.3d 135, 140 (3d Cir. 2009) (finding that adverse credibility determination was not appropriate where the IJ found it questionable that the respondent could not describe in detail the extent of his head wounds, but did explain how he was injured, how many cuts he suffered, and described the cuts as "serious," "deep," and "open."); *Butt v. Gonzales*, 429 F.3d 430, 436-37 (3d Cir. 2005) (finding that the IJ's claim that respondent's testimony was "thin" or "extremely vague" and documents were "equally flimsy" is not enough to support an adverse credibility determination).

viii. Demeanor

The REAL ID Act of 2005 provides that "demeanor" is one of the factors that adjudicators may consider in making credibility determinations. 8 U.S.C. § 1158(b)(1)(B)(iii). An IJ is "uniquely qualified to decide whether an alien's testimony has about it the ring of truth." *Lin v. Att'y Gen.*, 543 F.3d 114, 128 (3d Cir. 2008) (citing *Abdulrahman,* 330 F.3d 587, 597 (3d Cir. 2003), the court noted that "[a]n IJ alone is in a position to observe an alien's tone and demeanor" . . . [and] [an IJ] is "uniquely qualified to decide whether an alien's testimony has about it the ring of truth."); *see also Matter of A-H-*, I&N Dec. 774, 787 (AG 2005) (finding that the BIA failed to give the IJ's credibility findings the proper deference, where "[m]uch of the IJ's assessment of respondent's credibility related to his demeanor and sincerity as a witness, [and that such] assessments of testimonial credibility are uniquely within the ken of the IJ"); *Matter of J-Y-C-*, 24 I&N Dec. 260, 264-65 (BIA 2007) (finding that the record supported an adverse credibility determination where the IJ considered, among other factors, the "respondent's 'agitated' demeanor" and his "rapid manner" of testimony which suggested that his explanation of an inconsistency was fabricated).

Adverse credibility based on boilerplate demeanor determinations or stereotyping are reversible. *Yusupov v. Att'y Gen*., 650 F.3d 968, 992 (3d Cir. 2011) (finding that the IJ never explained why demeanor, candor and responsiveness demonstrated that testimony was not credible).

ix. Post-Traumatic Stress Disorder and Credibility

When assessing an applicant's credibility, an Immigration Judge must recognize the effects of Post-Traumatic Stress Disorder ("PTSD") on his or her testimony. *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 159 (3d Cir. 2005) (reversing adverse credibility finding where inconsistencies arose during the testimony of a woman who suffered from PTSD as a result of being repeatedly emotionally and sexually abused by her father less than one month before the credible fear interview). Thus, an applicant's previous mental trauma may serve to mitigate discrepancies or omissions that would otherwise be cause for an adverse credibility finding. *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 159 (3d Cir. 2005).

x. Embellishments

An IJ may make an adverse credibility finding based upon a determination that an alien's exaggerated, embellished asylum claim is not believable if such finding is supported by the record. *See Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 278-79 (3d Cir. 2004).

xi. False Travel Documents and Credibility

The use of fraud to obtain documents to escape the "immediate danger [of] an alien's country of origin" is not considered a particularly significant factor in assessing an applicant's credibility. *See Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998) (finding that "[t]he use of false documents to facilitate travel or gain entry does not serve to impute a lack of credibility to the petitioner"). Indeed, the "circumvention of orderly refugee procedures," to the extent that it is a significant factor in asylum proceedings, "is only one of a number of factors which should be

balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case." *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987).

xii. Credibility Assessments in Mental Competency Cases

In evaluating whether a respondent has established a genuine subjective fear of persecution "where a mental health concern may be affecting the reliability of the applicant's testimony, the [IJ] should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim." *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015) (remanding to the IJ to assess the respondent's competency where the respondent "had difficulty meaningfully answering basic questions," and the IJ did not evaluate his mental competency); *see also Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). This safeguard is intended to reduce the risk of a claim being "denied solely on testimony that is unreliable on account of the applicant's competency issues, rather than any deliberate fabrication." *Matter of J-R-R-A-*, 26 I&N Dec. 612 (BIA 2015). Courts should then proceed to determine whether the applicant has met his or her burden of proof based on the objective evidence of the record. *Matter of J-R-R-A-*, 26 I&N Dec. 612 (BIA 2015).

xiii. Inter-Proceedings Similarities

Significantly similar statements made in other proceedings by different individuals may be considered in assessing an applicant's credibility. *Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015) (upholding an IJ's adverse credibility determination when a respondent's brother had made identical statements and claims in his prior asylum application). An IJ should follow a three-part framework when relying on inter-proceedings similarities in making an adverse credibility determination. *Matter of R-K-K-*, 26 I&N Dec. 661 (BIA 2015)

First, an IJ should give an applicant "meaningful notice" of the similarities by clearly identifying the seemingly significant similarities between the proceedings, providing the individual with copies of the relevant documents and by explaining how the similarities potentially undermine his or her credibility. *Id.*

Second, an IJ should provide the applicant a "reasonable opportunity" to explain the similarities, and it may be appropriate to grant the applicant an adjournment to procure evidence to support his or her explanation.[4] *Matter of R-K-K-*, 26 I&N Dec. 658, 661-62 (BIA 2015). In so doing, the IJ should consider the following factors: whether there is a "meaningful likelihood" that the similarities were a product of mere coincidence, whether the information may be truthful but inserted into a standardized template or conveyed to a scrivener who used an identical style, whether valid accounts had been converted into dubiously similar narratives, and whether there is a likelihood the individual was an innocent "plagiaree." *Matter of R-K-K-*, 26 I&N Dec. 658, 662 (BIA 2015). (quoting *Mei Chai Ye v. U.S. Dep't of Justice*, 489 F.3d 517, 526-27 (2d Cir. 2007)).

[4] The BIA expressly declined to address what procedural protections would sufficiently provide an adequate opportunity to explain similarities between asylum applications in the absence of a confidentiality waiver from the other applicant(s). *R-K-K-*, 26 I&N Dec. at 663, n.4.

Third, an IJ should assess the reliability of all of the evidence and determine whether, under the totality of the circumstances, it sufficiently explains the inter-proceedings similarities. *Matter of R-K-K-*, 26 I&N Dec. 658, 661-62 (BIA 2015).

E. Corroboration

1. Pre- and Post-REAL ID Act Corroboration

An applicant bears the evidentiary burden of proof and persuasion in connection with any application under INA § 208. INA § 208(b)(1)(B); 8 C.F.R. § 1208.13(a); *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985), *modified on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987). An applicant's own testimony may be sufficient to sustain the burden of proof for asylum without corroboration if the testimony is credible, persuasive, and "refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA § 208(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a); *Sandie v. Att'y Gen.*, 562 F.3d 246, 252 n.2 (3d Cir. 2009); *Matter of J-Y-C-*, 24 I&N Dec. 260, 263 (BIA 2007). The BIA has recognized the difficulties an asylum applicant may face obtaining documentary or other corroborative evidence to support his claim of persecution. *Matter of Dass*, 20 I&N Dec. 124 (BIA 1989). As such, "[u]nreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor)." *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997).

However, the weaker an applicant's testimony, the greater the need for corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998) (citing *Matter of E-P-*, 21 I&N Dec. 860 (BIA 1997)) (determining that a finding of credible testimony by an asylum applicant is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony and any other relevant evidence should be considered). Thus, the credibility determination is independent of an analysis from the sufficiency of the applicant's evidence. *Chen v. Gonzales*, 434 F.3d 212, 221 (3d Cir. 2005); INA § 208(b)(1)(B)(ii). The withholding of removal provision in INA § 241 refers to the corroboration provision contained in INA § 208, indicating that withholding applicants must also comply with the corroboration requirement of asylum applicants.

The BIA has held that, even assuming an applicant's testimony was credible, it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of the claim. *Matter of Dass*, 20 I&N Dec. 120, 120 (BIA 1989); *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997); *Toure v._Att'y Gen.*, 443 F.3d 310, 323 (3d Cir. 2006); *Chukwu v. Att'y Gen.*, 484 F.3d 185, 191 (3d Cir. 2007). An IJ can reasonably expect corroboration "where the facts are central to the applicant's claim and easily subject to verification." *Chukwu v. Att'y Gen.*, 484 F.3d 185, 191 (3d Cir. 2007) (citing *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001)); *Sandie v. Att'y Gen.*, 562 F.3d 246, 252 (3d Cir. 2009). Where the court determines that the applicant should "provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." INA § 208(b)(1)(B)(ii); *Sandie v. Att'y Gen.*, 562 F.3d 246, 252 n.2 (3d Cir. 2009).

In cases initiated both before and after the passage of the REAL ID Act of 2005, the IJ must conduct a three-part inquiry—otherwise known as the *Abdulai* inquiry—before concluding that an applicant has failed to corroborate his or her claim. *See Chukwu v. Att'y Gen.*, 484 F.3d 185, 191 (3d Cir. 2007) (citing *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001)); *see also Sandie v. Att'y Gen.*, 562 F.3d 246, 252-53 (3d Cir. 2009). The IJ must 1) identify the testimony for which it is reasonable to expect the applicant to produce corroboration; 2) examine whether the applicant corroborated that testimony; and 3) analyze whether the applicant has adequately explained any failure to provide corroboration. *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001); *see also Sandie v. Att'y Gen.*, 562 F.3d 246, 252-53 (3d Cir. 2009)).

In addition, the IJ must give the applicant notice of what corroborating evidence will be expected and the opportunity to provide such evidence or present an explanation if the applicant cannot produce such corroboration. *Saravia v. Att'y Gen.,* No. 17-2234,---F.3d.---, 2018 WL 4688710 p. 20. (finding that it was not fair to require the petitioner to provide further corroboration without telling him so and giving him the opportunity either to supply that evidence or to explain why it was not available (citing *Chukwu v. Att'y Gen.*, 484 F.3d 185, 192 (3d Cir. 2007)); *Toure v. Att'y Gen.*, 443 F.3d 323 (3d Cir. 2006); *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997). The IJ should ask if the applicant *could* submit corroborating evidence, as opposed to asking why the applicant *did not* submit corroborating evidence. *Saravia v. Att'y Gen.,* No. 17-2234,---F.3d.---, 2018 WL 4688710 p. 20-21. The absence of such corroboration may lead to a finding that an applicant failed to meet his or her burden of proof. *Matter of S-M-J-*, 21 I&N Dec. 722, 726 (BIA 1997).

i. State Department Reports

Country reports from the U.S. Department of State ("USDOS") are the "most appropriate" and "perhaps best resource[s]" for determining the current political situation in a particular country. *Kayembe v. Ashcroft*, 334 F.3d 231, 235 (3d Cir. 2003) (quoting *Lal v. INS*, 255 F.3d 998, 1028 (9th Cir. 2001)); *Xie v. Ashcroft*, 359 F.3d 239, 243-44 (3d Cir. 2004); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010) (USDOS reports on country conditions "are highly probative evidence and are usually the best source of information on conditions in foreign nations"), *abrogated on other grounds by Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *Mendoza-Ordonez v. Att'y Gen.*, 869 F.3d 164 (3d Cir. 2017) (relying on country reports submitted by the alien showing widespread human rights abuses, unchecked politically motivated violence, and a poorly functioning justice system, vulnerable to corruption, that failed to reign in the violence to reverse the IJ's denial of the alien's petition for withholding of removal).

If the most recent country report was not submitted by either party, the court may take administrative notice of its contents. *Sheriff v. Att'y Gen.*, 587 F.3d 584, 591-92 (3d Cir. 2009) (reversing the BIA in a Liberian case but noting it may use latest country reports, even if not in the record, as long as a respondent may rebut). Along these lines, the Third Circuit has warned that the refusal of reviewing courts to take judicial notice of updated country conditions that are not in the record may be a myopic approach. *See Nbaye v. Att'y Gen.*, 665 F.3d 57, 60 (3d Cir. 2011).

Notwithstanding the above, the Third Circuit has cautioned against the "wholesale reliance" on USDOS country reports, particularly when the data they contain is old or when there is very little information about the relevant topic at hand. *See Zhang v. Gonzales*, 405 F.3d 150, 157 (3d Cir. 2005) (quoting *Chen v. Ashcroft*, 376 F.3d 215, 225-26 (3d Cir. 2004)). Additionally, generalized information contained in the country reports should not be used to rebut a specific claim made by the respondent. *See Sheriff v. Att'y Gen.*, 587 F.3d 584, 590-92 (3d Cir. 2009) (remanding a case where the BIA relied on a recent USDOS country report indicating improved country conditions but did not address the respondent's specific basis for her fear of future persecution); *see also Berishaj v. Ashcroft*, 378 F.3d 314, 326-28 (3d Cir. 2004) (holding that use of generalized information to rebut claim was not permissible where no explanation was given as to how or why the USDOS country report rebutted the claim).

F. Statutory Bars to Asylum

Where "the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien has the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d); *Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006); *Matter of R-S-H-*, 23 I&N Dec. 629, 640 (BIA 2003); *Matter of M-B-C-*, 27 I&N Dec. 31 (BIA 2017).

1. One-Year Filing Deadline

As a threshold matter, an applicant must prove by clear and convincing evidence that the application was filed[5] within one year of the date of his or her last arrival into the United States or April 1, 1997, whichever is later.[6] INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2)(ii). The BIA has interpreted the term "last arrival" to mean an alien's most recent arrival in the United States from a trip abroad, regardless of whether the trip was temporary. *Matter of F-R-P-*, 24 I&N Dec. 681, 684-85 (BIA 2008).[7]

A subsequent asylum application is properly viewed as a new application if it presents a previously unraised basis for relief or is predicated on a new or substantially different factual basis. *See Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015) (stating that where the last filed asylum claim is based upon a different factual predicate or different legal ground, it is considered to be a new application). Where such a subsequent application is deemed to be new, the filing date of the later application controls for purposes of determining whether the one-year statutory time bar applies under section 208(a)(2)(B) of the Act. *Matter of M-A-F-*, 26 I&N Dec. 655-7 (BIA 2015).

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[5] The application is considered filed upon receipt by United States Citizenship and Immigration Services ("USCIS") or Immigration Court. If USCIS has not received the application within one year of the applicant's arrival, the mailing date may be considered the filing date if the applicant has "clear and convincing evidence of mailing the application within the one-year period." 8 C.F.R. §§ 208.4(a)(2)(ii), 1208.4(a)(2)(ii).

[6] The one-year filing deadline does not apply to applications filed before April 1, 1997. 8 C.F.R. §§ 1208.4(a)(2)(B)(ii), 1208.13(c). Time limits on filing asylum and the safe third country bar are inapplicable to unaccompanied children, as defined under 6 U.S.C. § 279(g)(2). INA § 208(a)(2)(E).

[7] The Third Circuit has deferred to this interpretation by the BIA in several unpublished decisions.

If the asylum application is filed after the one-year deadline, the applicant must show *to the satisfaction of the Court* that he or she qualifies for an exception to the filing deadline. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(2). To qualify for an exception to the filing deadline, the applicant must demonstrate the existence of either (1) changed circumstances that materially affect his eligibility for asylum, or (2) extraordinary circumstances relating to the delay in filing an application within the filing period. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)-(5). In either instance, the applicant must apply for asylum within a reasonable period given the changed or extraordinary circumstances. 8 C.F.R. § 1208.4(a)(4)-(5). A "reasonable period" of time is not clearly defined, though generally if the application is made within six months it will be "reasonable"; only rarely will a full year delay be "reasonable." *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010) (finding that it was error for IJ to give a one-year extension beyond changed circumstances without evaluating the reason). A respondent's lack of knowledge of the possibility of applying for asylum does not constitute a changed or extraordinary circumstance. *See Matter of Marin*, 13 I&N Dec. 497, 501 (BIA 1970) (stating that "ignorance of the law does not excuse the failure to apply for relief.").

"Changed circumstances" include, but are not limited to: (1) changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence; (2) changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable United States law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or (3) the termination of a relationship that qualified an applicant as a dependent on another's pending asylum application, including attainment of age twenty-one by the dependent. 8 C.F.R. § 1208.4(a)(4)(A)-(C).

"Extraordinary circumstances" include, but are not limited to: (1) serious illness or mental or physical disability, including effects of persecution or violent harm suffered in the past, during the 1-year period after arrival; (2) legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival; (3) ineffective assistance of counsel;[8] (4) the applicant maintained Temporary Protected Status, lawful immigrant or non-immigrant status, or was given parole, until a reasonable period before the filing of the application; (5) the applicant filed an asylum application before the one-year deadline, but that application was rejected as not properly filed, was returned to applicant for corrections, and was re-filed within a reasonable period thereafter; or (6) the death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family. 8 C.F.R. § 1208.4(a)(5). The burden of proof is on the applicant to establish to the satisfaction of the court that the circumstances were not intentionally created by him or her through his or her own action or inaction, that those circumstances were directly related to his or her failure to file the application within the one-year period, and that the delay was reasonable

[8] 8 C.F.R. § 1208.4(a)(5)(iii) sets out in detail the procedural requirements for an ineffective assistance of counsel claim with regard to the extraordinary circumstances exception to the one-year bar. Additionally, an applicant claiming ineffective assistance of counsel must show that prior counsel's deficient performance prevented them from reasonably presenting their case and caused them substantial prejudice. *Contreras v. Att'y Gen.*, 665 F.3d 578, 584 (3d Cir. 2012); *see also Mahmood v. Gonzales*, 427 F.3d 248, 251, n. 7 (3d Cir. 2005) (recognizing that fraudulent conduct or ineffective assistance of counsel can serve as a basis for equitable tolling, i.e., can prevent the alien from filing in a timely manner such that equity warrants tolling the limitations period).

under the circumstances. 8 C.F.R. § 1208.4(a)(5); *see also Matter of Y-C-*, 23 I&N Dec. 286, 287-88 (BIA 2002) (finding that extraordinary circumstances existed where a minor was in INS custody for more than one year after his arrival to the United States and sought to file an application five and a half months subsequent to his release). An IJ should not employ a "benefit of the doubt" standard in determining whether an applicant qualifies for an exception to the one-year statutory filing deadline. *Sukwanputra v. Gonzales*, 434 F.3d 627, 634-35 (3d Cir. 2006).

2. Particularly Serious Crime

An applicant is statutorily barred from asylum if he or she, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." INA § 208(b)(2)(A)(ii); 8 C.F.R. § 1208.13(c)(1). The IJ need not separately determine whether the applicant is a danger to the community because a person who has been convicted of a particularly serious crime shall be considered a danger to the community. *See* INA § 208(b)(2)(A)(ii); *see also Matter of N-A-M-,* 24 I&N Dec. 336, 342 (BIA 2007) (holding said proposition in the context of a withholding of removal analysis); *Matter of Q-T-M-T-*, 21 I&N Dec. 639, 655-56 (BIA 1996) (holding said proposition in the context of a withholding of deportation analysis).

In the context of asylum, all aggravated felonies are *per se* particularly serious crimes. INA § 208(b)(2)(B)(i).[9] Additionally, an offense need not be an aggravated felony to constitute a particularly serious crime for either asylum or withholding of removal.[10] *Matter of N-A-M-,* 24 I&N Dec. 336, 341 (BIA 2007); *Matter of M-H-*, 26 I&N Dec. 46, 51 (BIA 2012). Rather, "the proper focus for determining whether a crime is particularly serious is on the nature of the crime and not the likelihood of future serious misconduct."[11] *Matter of N-A-M-,* 24 I&N Dec. 336, 342 (BIA 2007); *see also Matter of R-A-M-*, 25 I&N Dec. 657, 661-62 (BIA 2012) (finding possession of child pornography under Cal Penal Code § 311.11(a) is not *per se* a particularly serious crime but downloading "numerous images and videos" of it was enough to make it so); *Kaplun v. Att'y Gen.*, 602 F.3d 260, 267-68 (3d Cir. 2010) (finding that securities fraud with losses of nearly $900,000 was a particularly serious crime); *Denis v. Att'y Gen.*, 633 F.3d 201, 213-17 (3d Cir. 2011) (finding that where petitioner tampered with physical evidence by violently dismembering and concealing his victim constituted an aggravated felony and a particularly serious crime).

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[9] INA § 208(b)(2)(B)(i) provides that "[f]or purposes of [determining eligibility for asylum], an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." Additionally, INA § 208(b)(2)(B)(ii) states that "[t]he Attorney General may designate by regulation offenses that will be considered" particularly serious crimes.

[10] In *Matter of M-H-*, the BIA rejected the Third Circuit's decision in *Alaka v. Att'y Gen.*, 456 F.3d 88, 104-05 (3d Cir. 2006) (finding that only aggravated felonies can be particularly serious crimes), and held that *Matter of N-A-M-,* 24 I&N Dec. 336 (BIA 2007), should apply in the Third Circuit. *Matter of M-H-,* 26 I&N Dec. 46, 48-50 (BIA 2012).

[11] The BIA has determined that once it finds that the crime by its nature brings it within the "range" of particularly serious, either party may bring in any otherwise reliable evidence to determine whether it should be treated as such. *N-A-M-*, 24 I&N Dec. at 342 (BIA would not limit its inquiry to the record of conviction or sentencing information and considered the Statement in Support of Warrantless Arrest).

In limited circumstances, the court may look at information outside the record of conviction when analyzing whether an offense falls within the ambit of particularly serious crimes. Specifically:

> [i]f the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal. On the other hand, once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.

Denis v. Att'y Gen., 633 F.3d 201, 215 (3d Cir. 2011)(quoting *Matter of N-A-M-,* 24 I&N Dec. 336, 342 (BIA 2007)).

An alien's mental health as a factor in a criminal act falls within the province of the criminal courts and is not considered in assessing whether the alien was convicted of a "particularly serious crime" for immigration purposes. *Matter of G-G-S-*, 26 I&N Dec. 339, 345 (BIA 2014).

3. Serious Non-Political Crime

An applicant is statutorily ineligible for asylum if there are reasonable grounds to believe that he or she committed a serious nonpolitical crime outside of the United States prior to his or her arrival in the United States. INA § 208(b)(2)(A)(iii).[12] In *Matter of E-A-,* the BIA provided a three-part test to assess the political nature of the crime: (1) the act or acts were directed at a governmental entity or political organization, as opposed to a private or civilian entity; (2) they were directed toward modification of the political organization of the State; and (3) there is a close and direct causal link between the crime and its political purpose. 26 I&N Dec. 1, 3 (BIA 2012). Once the crime is determined to be political, if it is not "atrocious" in nature, "an IJ should balance the seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the acts outweighs their political character." *Matter of E-A-,* 26 I&N Dec. 1, 3 (BIA 2012).

Determining whether an offense is "nonpolitical" involves consideration of whether "the political aspect of the offense outweigh[s] its common-law character." *See Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012) (holding that an applicant who burned passenger buses and cars, threw stones, and disrupted economic activity while pretending to be from the opposition party reached the level of serious criminal conduct that, when weighed against its political nature, constituted a serious nonpolitical crime). "This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 429 (1999) (quoting *Matter of McMullen*, 19 I&N Dec. 90, 97-98 (BIA 1984)).

[12] Note that the aggravated felony bar was not explicitly made applicable to this section by statute.

The IJ is not required to balance the "criminal acts against the risk of persecution [the applicant] would face if returned." *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425-28 (1999). Additionally, where it has been determined that the acts were not political based on the lack of proportion with the objectives, the IJ need not engage in a detailed analysis of the "political necessity and success" of the applicant's methods. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 431-33 (1999).

The IJ also need not determine whether the applicant actually committed a serious nonpolitical crime. Rather, it is "enough to find that there are serious reasons for considering that [the applicant] has committed such a crime."[13] *Matter of Ballester-Garcia*, 17 I&N Dec. 592, 595 (BIA 1980) (internal quotation marks omitted). When there is no doubt a crime has been committed, the court must "look to the facts, as [the court finds] them to be accurate, to determine whether there are serious reasons to consider that the crime committed was a 'serious' one." *Matter of Ballester-Garcia*, 17 I&N Dec. 592, 595 (BIA 1980)n (finding a serious nonpolitical crime when the petitioner had broken into a building, taken a large sum of money, and was sentenced to fifteen years' imprisonment). The BIA interprets "'serious reasons for believing' to be equivalent to probable cause," and an applicant's credible testimony can be sufficient to establish the requisite probable cause of involvement in a serious nonpolitical crime. *Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012) (quoting INA § 208(b)(2)(A)(iii)). In close cases, the court can consider "the alien's description of the crime, the turpitudinous nature of the crime according to our precedents, the value of any property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offenses in the United States." *Matter of Ballester-Garcia*, 17 I&N Dec. 592, 595 (BIA 1980) (finding a serious nonpolitical crime where the petitioner broke into a building, took a large sum of money, and was sentenced to fifteen years' imprisonment).

Robbery and embezzlement are serious nonpolitical crimes. *Matter of Ballester-Garcia*, 17 I&N Dec. 592, 595 (BIA 1980) (robbery); *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1302 (2003) (Kennedy, Circuit Justice) (citing *Matter of Castellon*, 17 I&N Dec. 616 (BIA 1981)) (embezzlement). In *Matter of E-A-*, the BIA held that the applicant, who was politically active in the Ivory Coast, had committed a serious nonpolitical crime because he was a "member of a group that burned passenger buses and cars, threw stones, and disrupted the economic activity of merchants in the market while pretending to be from the opposition party." 26 I&N Dec. 1, 1 (BIA 2012). Although recognizing the political nature of his conduct, the BIA held that his actions "reached the level of serious criminal conduct that . . . constituted a serious nonpolitical crime." *Matter of E-A-,* 26 I&N Dec. 1, 1 (BIA 2012).

4. Danger to U.S. Security

[13] Former INA § 243(h) prohibited an otherwise eligible applicant for withholding of deportation from receiving such relief if there were "serious reasons for considering that [the applicant] committed a serious nonpolitical crime." *Ballester-Garcia*, 17 I&N Dec. at 595. The statute has since been amended to require "serious reasons for believing" that such a crime had been committed, but with little change to the analysis applied in determining whether such a crime has been committed. INA § 208(b)(2)(A)(iii); *see also E-A-*, 26 I&N Dec. 1, 3 (BIA 2012).

An applicant is statutorily barred from asylum if the Attorney General determines that there are reasonable grounds for regarding him or her as a danger to the security of the United States. INA § 208(b)(2)(A)(iv); 8 C.F.R. § 1208.13(c)(1). The phrase "danger to the security of the United States" means "a risk to the Nation's defense, foreign relations, or economic interests." *Matter of A-H-*, 23 I&N Dec. 774, 788 (AG 2005). According to the Attorney General, this statutory bar is applicable when "under the circumstances, information about an alien supports a reasonable belief that the alien poses a danger—that is, any nontrivial degree of risk—to the national security." *Matter of A-H-*, 23 I&N Dec. 774, 788 (AG 2005).

Whether there are reasonable grounds to believe an applicant is a danger to the security of the United States is akin to a probable cause determination that requires a finding that an applicant "is" an actual and present danger. *See Yusupov v. Att'y Gen.*, 518 F.3d 185, 200-01 (3d Cir. 2008) (holding said proposition in the context of withholding of removal). The mere existence of extradition proceedings, an Interpol alert, or guilt by association cannot be the basis of denying withholding on the grounds that a person is a danger to the security of the United States. *See Yusupov v. Att'y Gen.*, 550 F.3d 968, 982-84 (3d Cir. 2011) (rejecting BIA's assertion that the petitioners were a danger to the United States and ineligible for withholding because of extradition requests and Interpol warrants issued by the Uzbek government or claims of guilt by association).

5. Persecutors

i. Generally

An applicant who "ordered, incited, assisted, or otherwise participated in the persecution of an individual on account of the individual's race, religion, nationality, membership in a particular social group, or political opinion" is ineligible for asylum. *See* INA § 208(b)(2)(A)(i); INA § 101(a)(42) (defining the term "refugee" as excluding persecutors of others). DHS bears the initial burden of establishing that "the evidence indicates" that the persecutor bar to asylum may apply. 8 C.F.R. § 1240.8(d). If DHS meets this burden, the applicant then bears the burden of proving by a preponderance of the evidence that the bar does not apply. 8 C.F.R. § 1240.8(d); *Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006); *Matter of R-S-H-*, 23 I&N Dec. 629, 640-41 (BIA 2003).

In determining whether the persecutor bar applies, the alien's personal motivation for assisting or participating in the persecution is irrelevant. *Matter of J.M. Alvarado*, 27 I&N Dec. 27 (BIA 2017) (finding that the respondent was not required to have a persecutory motive when he assisted in the persecution of a detainee); *see also Matter of M-B-C-*, 27 I&N Dec. 31 (BIA 2017). Rather, the proper focus is on the intent of the perpetrator of the underlying persecution. *Matter of J.M. Alvarado*, 27 I&N Dec. 29 (BIA 2017). If the perpetrator's motivation is based on one of the protected grounds for asylum, then the alien's assistance invokes the persecutor bar, without regard to the personal motivation of the alien who assisted or otherwise participated in the persecution. *Matter of J.M. Alvarado*, 27 I&N Dec. 29-30 (BIA 2017) (citing *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003)).

In *Matter of A-H-*, the BIA held that the "plain meaning of ['incite,' '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 that result in advancing the violent activities of the group." 23 I&N Dec. 774, 783 (AG 2005). Further, the BIA concluded that the foregoing terms (1) are to be given "broad application"; (2) do not require "direct personal involvement in the acts of persecution"; (3) indicate that it is "highly relevant whether the alien served in a leadership role in the particular organization"; and (4) evince that in certain circumstances, statements of encouragement alone are sufficient. *Matter of A-H-*, 23 I&N Dec. 774, 785-7 (AG 2005). In short, it is appropriate to assess the totality of the relevant conduct in determining whether the persecutor bar applies. *Matter of A-H-*, 23 I&N Dec. 774, 785 (AG 2005).

ii. Duress Exception

An asylum or withholding of removal applicant who is subject to the persecutor bar may claim a duress offense, which is limited in nature. *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018). Once the DHS has met its initial burden of proving that the alien assisted or otherwise participated in persecution, the burden shifts to the alien to demonstrate by a preponderance of the evidence that that he: (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonable should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater that the threatened harm to himself of others. *Matter of Negusie*, 27 I&N Dec. 347, 363 (BIA 2018).

iii. Case Law From Other Circuits[14]

Although the Third Circuit has not specifically addressed the persecutor bar in any precedential decision, other circuit courts have determined that there must also be a nexus between the alleged persecutor's actions and the persecution of another. The Sixth Circuit Court of Appeals, held that there must be some nexus between the petitioner's actions and the persecution of others to the extent that he or she "can fairly be characterized as having actually assisted or otherwise participated in that persecution." *Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009). It further held that a court must determine whether a petitioner acted with scienter, or "some level of prior or contemporaneous knowledge that the persecution was being conducted." *Id.* The Eleventh Circuit Court of Appeals adopted a similar inquiry in *Chen v. Att'y Gen.*, 513 F.3d 1255, 1259 (11th Cir. 2008) (asking whether "the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral.").

In *Higuit v. Gonzales*, the Fourth Circuit Court of Appeals held that the language of the "persecutor bar" was broad enough to cover actions other than physical harm. 433 F.3d 417, 421 (4th Cir. 2006) (finding that the respondent's ten years of service as an intelligence officer in the

repressive Ferdinand Marcos government in the Philippines, where he admitted that his information-gathering and infiltration led to the torture, imprisonment, and death of many individuals, was sufficient to show that he assisted or otherwise participated in the persecution of others).

In *Xie v. INS*, the Second Circuit Court of Appeals held that "in assessing the character of an individual's conduct, we look[ ] not to the voluntariness of the person's actions, but to his behavior as a whole." 434 F.3d 136 (2d Cir. 2006) (finding that the petitioner, who drove female captives to certain hospitals against their will to undergo forced abortions, participated in "active and direct" persecution); *See also Suzhen Meng v. Holder*, 770 F.3d 1071, 1074-75 (2d Cir. 2014) (finding that a public security officer who was registering and reporting unauthorized pregnancies was assisting in persecution where women were subject to forced abortions or sterilization).

Additionally, in *Castañeda-Castillo v. Gonzales*, the First Circuit Court of Appeals held that for the persecutor bar to apply, the applicant must have had prior or contemporaneous knowledge about the persecution. 488 F.3d 17, 22 (1st Cir. 2007).

In *Kumar v. Holder*, 728 F.3d 993, 998-1000 (9th Cir. 2013), the Ninth Circuit Court of Appeals found that a prison guard at an interrogation center in India who did not take part of nor was present during interrogations was not barred.

6. Engaged in Terrorist Activities

An alien is statutorily barred from asylum if the alien is one described in INA § 212(a)(3)(B) (related to "engag[ing] in a terrorist activity" and membership in a "terrorist organization."). INA § 208(b)(2)(A)(v).[15] Terrorist activity is defined as any activity that (1) is unlawful in the country where it was committed, or would be unlawful if committed in the United States and (2) involves any of the following: "hijacking or sabotage of any conveyance"; "the seizing or detaining, and threatening to kill, injure, or continue to detain another individual in order to compel a third person . . . to do or abstain from doing any act"; "[a] violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title, 18 United States Code)"; "an assassination"; the use of biological, chemical or nuclear devices; the use of explosives, firearms, or other weapons and/or dangerous devices with the intent to endanger the safety of one or more individuals or to cause substantial damage to property; "conspiracy to do any of the foregoing." INA § 212(a)(3)(B)(iii)(I)-(VI).

To be statutorily barred, it is not necessary that the applicant be convicted of a terrorist act; rather, it suffices that the Attorney General knows, or has reasonable grounds to believe, that the individual "has engaged," "is engaged," or "is likely to engage" in terrorist activity. INA § 212(a)(3)(B)(i)(I)-(II). An alien can "engage" in a terrorist activity by (1) committing or inciting another to commit a terrorist activity under circumstances indicating an intention to cause death or serious bodily injury; (2) preparing or planning a terrorist activity; (3) gathering information

[15] Section 208(b)(2)(A)(v) refers to certain subsections of INA § 212(a)(3)(B); however, it also refers to INA § 237(a)(4)(B), which refers to all of INA § 212(a)(3)(B). Therefore, any alien described in INA § 212(a)(3)(B) is statutorily ineligible for asylum.

on potential targets for a terrorist activity; (4) soliciting things of value for (a) a terrorist activity or (b) a terrorist organization; (5) soliciting any individual to engage in (a) activities described in this section or (b) for membership in a terrorist organization; (6) committing an act that the actor knows, or reasonably should know, affords material support. INA § 212(a)(3)(B)(iv)(I)-(VI).

i. Material Support – INA § 212(a)(3)(B)(iv)(VI)

An alien "engages in a terrorist activity" by committing "an act the actor knows, or reasonably should know, affords material support" (1) for the commission of a terrorist activity, (2) to an individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity, or (3) to a terrorist organization. INA § 212(a)(3)(B)(iv)(VI)(dd).[16]

The INA contains three definitions for the term "terrorist organization." INA § 212(a)(3)(B)(vi). A Tier I terrorist organization can be formally designated by the Secretary of State pursuant to INA § 219. INA § 212(a)(3)(B)(vi)(I). A Tier II terrorist organization can be designated upon publication in the Federal Register. INA § 212(a)(3)(B)(vi)(II). Finally, a Tier III terrorist organization can refer to "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in the activities described in subclauses (I) through (VI) of clause (iv)." INA § 212(a)(3)(B)(vi)(III). The Third Circuit has held that "unless the agency finds that party leaders authorized terrorist activity committed by its members, an entity…cannot be deemed a Tier III terrorist organization." *Uddin v. Att'y Gen.*, 870 F.3d 282, 284 (3d Cir. 2017). In making this determination, the IJ should consider the following:

> Evidence of authorization may be direct or circumstantial, and authorization may be reasonably inferred from, among other things, the fact that most of an organization's members commit terrorist activity or from a failure of a group's leadership to condemn or curtail its members' terrorist acts . . . [w]hether words, acts, or silences amount to authorization must depend on context, including, but not limited to, the structure of the organization, the relationship between the organization and its members, and the information each has about the other.

Uddin v. Att'y Gen., 870 F.3d 282, 292 (3d Cir. 2017).

Moreover, the INA does not define the term "material support." In *Matter of S-K-*, the BIA recognized that the term "material support" was not clear, finding that "while the list of examples following the term [material support] provides some clarification regarding its scope, its meaning remains somewhat ambiguous." 23 I&N Dec. 936, 943 (BIA 2006). Nevertheless, the BIA took the following into consideration in its determination of what is "material": (1) the size of petitioner's donation relative to her income and (2) whether "the donation had some effect on the ability of the [organization] to accomplish its goals." *Id.* at 945-46. The material support bar may still apply regardless of whether there is a link between the provision of material support to a terrorist organization and the intended use by that recipient organization to further a

[16] INA § 212(a)(3)(B)(iv)(VI) provides a list of examples of material support: "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . ., explosives, or training."

terrorist activity. *Id.* at 944. In *Matter of A-C-M-*, the BIA further clarified that "material support" is a term of art that relates to the type of aid provided rather than whether it is a substantial or considerable amount. *Matter of A-C-M-*, 27 I&N Dec. 303, 307 (BIA 2018) (finding there is no quantitative requirement for the term "material"). An alien provides "material support" to a terrorist organization if the act has a "logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a *de minimis* degree." *Matter of A-C-M-,* 27 I&N Dec. 303, 308 (BIA 2018).

There is no duress exception to the material support bar. *Sesay v. Att'y Gen.*, 787 F.3d 215, 224 (3d Cir. 2015) (holding that "the material support bar does not distinguish between voluntary and involuntary support"); *Matter of M-H-Z-*, 26 I&N Dec. 757, 757 (BIA 2016) (holding that the "material support bar" does not include an implied exception for an alien who has provided material support to a terrorist organization under duress); *see also Matter of A-C-M-*, 27 I&N Dec. 303, 306 (BIA 2018); *Matter of S-K-*, 23 I&N Dec. 936, 943 (BIA 2006) (noting that "[n]or do we understand the decision in *Singh-Kaur v. Ashcroft*, *supra*, to require a showing of an intent on the part of a provider of material support to further a particular admission-barring or asylum-barring goal of a terrorist organization.").. The BIA has established that "[i]f Congress intended to make involuntariness or duress an exception for aliens who provided material support to a terrorist organization, it would reasonably be expected to have enacted a provision similar to that in section 212(a)(3)(D)(ii) of the Act," which provides for an exception for aliens who were involuntarily members of affiliated with the Communist or other totalitarian parties. *Matter of M-H-Z-*, 26 I&N Dec. 757, 761 (BIA 2016);[17] *cf. Fedorenko v U.S.*, 449 U.S. 490, 512 (1981) (concluding that "under traditional principles of statutory construction," Congress expressed its intent to deliberately exclude the word "voluntary" from one provision by including the same word in another provision). In concluding that the "material support bar" does not include an implied exception for material support to a terrorist organization under duress, the BIA cited the Third, Ninth, Eleventh and Fourth Circuit Courts of Appeals, which have all made similar holdings. Thus, the BIA concluded that a duress defense should not be read into the "material support bar." *Matter of M-H-Z-*, 26 I&N Dec. 757, 761 (BIA 2016); *see also Matter of A-C-M-*, 27 I&N Dec. 303, 308-09 (BIA 2018) (holding that the existence of a waiver under INA § 212(d)(3)(B) indicates that Congress did not intend to include quantitative or duress exception in the material support bar).

A discretionary waiver based on voluntariness or duress exists for aliens who may be subject to the material support bar. INA § 212(d)(3)(B). The waiver can also be used for aliens who provide "insignificant material support" to an undesignated terrorist organization, a member of such an organization, or an individual the applicant knew, or reasonably should have known, had committed or planned to commit a terrorist activity. *Matter of A-C-M-*, 27 I&N Dec. 303, 308 (BIA 2018). However, Immigration Courts do not have jurisdiction to determine such waivers; such jurisdiction is given to the Secretary of State. INA § 212(d)(3)(B).

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[17] In *M-H-Z-*, the BIA distinguished the holding in the Supreme Court case *Negusie v. Holder*, 555 U.S. 511, 517-18 (2009) by finding that, in that case, the Supreme Court was analyzing whether there is an implied duress exception to the persecutor bar in sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the INA and, in this case, the BIA was addressing a "distinct" issue: the duress exception to the "material support bar" in section 212(a)(3)(B)(iv)(VI) of the INA. 26 I&N Dec. at 760, n.2.

ii. Solicitation of Funds – INA § 212(a)(3)(B)(iv)(IV)

An alien "engages in terrorist activity" if he or she solicits "funds or other things of value" for a "terrorist activity" or for a "terrorist organization." INA § 212(a)(3)(B)(iv)(IV)(aa)-(bb). However, an alien does not "engage in terrorist activity" if the alien solicits for a Tier III Organization and "can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was terrorist organization." INA § 212(a)(3)(B)(iv)(IV)(cc).

iii. Solicitation of an Individual – INA § 212(a)(3)(B)(iv)(V)

An alien "engages in terrorist activity" if he or she solicits "any individual [1] to engage in [terrorist activity]; [2] for membership in a [Tier I or Tier II Organization]; [3] for membership in a [Tier III Organization]." INA § 212(a)(3)(B)(iv)(V)(aa)-(cc). However, an alien does not "engage in terrorist activity" if the alien solicits an individual for membership in a Tier III Organization; the alien must "demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization." INA § 212(a)(3)(B)(iv)(V)(cc).[18]

7. Firm Resettlement

An applicant is ineligible for asylum if he or she was "firmly resettled in another country prior to arriving in the United States." INA § 208(b)(2)(A)(vi); 8 C.F.R. § 208.13(c)(1). The regulations provide that an applicant will be deemed firmly resettled if, prior to arriving in the United States, he or she entered another country with, or while in that country received, *an offer of permanent resident status*, citizenship or some other type of permanent resettlement, unless he or she establishes the following:

a) his or her entry into that nation was a necessary consequence of his or her flight from persecution, that he or she remained in that nation only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that nation; or

b) the conditions of his or her residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the Asylum Officer or Immigration Judge shall consider the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation including a right of entry or

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[18] The Sixth Circuit has held that, in determining whether an alien knew or reasonably should have known that the organization was a terrorist organization, the following factors are relevant: the alien's disassociation from the group, his young age, the political turmoil occurring in his country at the time of his membership, and the tight control on the country's media. *See Daneshvar v. Ashcroft*, 355 F.3d 615, 628 (6th Cir. 2004).

> reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

8 C.F.R. § 208.15 (emphasis added).

The government has the initial burden of producing evidence that indicates that the firm resettlement bar applies. *See Abdille v. Ashcroft*, 242 F.3d 477, 491 (3d Cir. 2001) (applying 8 C.F.R. § 208.13(c)(2)(ii) burden allocation scheme to applications filed after April 1, 1997). A *prima facie* case of firm resettlement is established once the evidence shows that the applicant received an offer of permanent resident status, citizenship or some other type of permanent resettlement in a third country.[19] *Abdille v. Ashcroft*, 242 F.3d 477, 486 (3d Cir. 2001); *see also Matter of A-G-G-*, 25 I&N Dec. 486, 501-02, 502 (BIA 2011) (holding that the government should secure "direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely" as part of a four-step analysis). Should the government satisfy this threshold burden of production, the burden then shifts to the respondent to demonstrate by a preponderance of the evidence that he or she had not firmly resettled in another country. *Matter of A-G-G-*, 25 I&N Dec. 486, 501-02, 502 (BIA 2011).

The Third Circuit rejected a "totality of the circumstances approach" in determining firm resettlement. *Abdille v. Ashcroft*, 242 F.3d 477, 479 (3d Cir. 2001) (reversing firm resettlement finding where person was granted asylum for two years in South Africa). The court reasoned that non-offer based factors, such as availability of housing to the alien, extent and types of employment accessible to the alien, and the ability of the alien to hold property should be considered only in determining whether one of the two exceptions to firm resettlement is satisfied. *Abdille v. Ashcroft*, 242 F.3d 477, 486 (3d Cir. 2001). However, if the government is unable to secure direct evidence of a formal government offer and is thus unable to make a *prima facie* showing that an applicant has been firmly resettled, non-offer-based elements can serve as a surrogate for direct evidence. *Abdille v. Ashcroft*, 242 F.3d 477, 486-87 (3d Cir. 2001).

8. Frivolous Applications

An applicant who "has knowingly made a frivolous application for asylum . . . shall be permanently ineligible for any benefits under this Act," including asylum. INA § 208(d)(6). Such an applicant is not, however, ineligible for withholding of removal. 8 C.F.R. § 1208.20; *Luciana v. Att'y Gen.*, 502 F.3d 273, 278 n.3 (3d Cir. 2007) (citing *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005)).

There is no statute of limitations on making a frivolous determination and IJs are not limited to considering the frivolousness of only currently pending asylum applications. *Matter of X-M-C-*, 25 I&N Dec. 322, 325 n.3 (BIA 2010). Once a finding of frivolousness has been made, it may not be waived under any circumstances. *Muhanna v. Gonzales*, 399 F.3d 582, 588 (3d Cir. 2005). Either the IJ or DHS may raise the issue of frivolousness, but the IJ need not evaluate an application for frivolousness if DHS does not raise the issue *Matter of X-M-C-*, 25 I&N Dec.

[19] In *Matter of D-X- & Y-Z-*, the BIA held that a facially valid permit allowing an asylum applicant to reside in a third country constitutes *prima facie* evidence of firm resettlement offer, even if the permit was obtained fraudulently. 25 I&N Dec. 664, 665-66 (BIA 2012).

322, 324 n.1 (BIA 2010). DHS bears the burden to demonstrate frivolousness. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010).

An asylum application is frivolous "if any of its material elements is deliberately fabricated." 8 C.F.R. § 1208.20. The materiality of a fabricated element of an asylum application is determined at the time the application is filed. *See Matter of X-M-C-,* 25 I&N Dec. 322, 324 (BIA 2010). An analysis of whether a material element was deliberately fabricated centers on whether the fabrication had a natural tendency or capability of influencing the decision of an asylum officer, an immigration judge, or the BIA. *Luciana v. Att'y Gen.*, 502 F.3d 273, 280 (3d Cir. 2007).

An untimely application for asylum may be found to be frivolous where there is a deliberate misrepresentation regarding the applicant's date of entry that is material to the threshold question of the applicant's eligibility to seek asylum. *Matter of M-S-B-*, 26 I&N Dec. 872, 877 (BIA 2016).[20]

A finding of frivolousness does not flow automatically from an adverse credibility determination. 8 C.F.R. § 208.20; *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005). Inconsistencies between testimony and an asylum application, while certainly relevant to a credibility determination that may result in the denial of an applicant's asylum claim, do not equate to a frivolousness finding under INA § 208(d)(6), which carries with it much greater consequences. *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3d Cir. 2005) (finding that frivolousness determination violated due process where it was based solely on a credibility determination and not on the application as a whole and where respondent was not permitted to present testimony on his claim).

The BIA has devised four requirements for a frivolousness finding: (1) notice to the alien of the consequences of filing a frivolous asylum application when the alien files the asylum application[21]; (2) a specific finding by the IJ or BIA that the alien knowingly filed a frivolous asylum application; (3) sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and (4) an indication that the alien has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim. *Luciana v. Att'y Gen.*, 502 F.3d 273, 281 (3d Cir. 2007) (citing *Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007)).

[20] In *M-S-B-*, the BIA distinguished the holding in the Third Circuit's case *Luciana v. Att'y Gen.*, 502 F.3d 273, 280 (3d Cir. 2007), by finding that the respondent in *Luciana* "made a misrepresentation that went solely to the merits of her asylum claim – namely, the facts underlying her claim of past persecution," and, in this case, the respondent's "misrepresentation of his date of entry concern[ed] a threshold question regarding his eligibility to seek asylum." 26 I&N Dec. at 876.

[21] Once the frivolousness warnings have been given prior to the start of the merits hearing, the IJ is not required to afford additional warnings or seek further explanation with regard to inconsistencies that have become obvious to the applicant in the course of the hearing. *Matter of B-Y-*, 25 I&N Dec. 236, 242 (BIA 2010). Specific warnings regarding frivolous applications *must* be given before inquiry into frivolousness can commence; this is a mandatory prerequisite. INA § 208(d)(4); 8 C.F.R. § 1208.3.

With regard to the third requirement, certain factors that may be relevant to credibility determinations are, in and of themselves, insufficient to establish "materiality and deliberate fabrication." *Matter of B-Y-*, 25 I&N Dec. 236, 243 (BIA 2010). For example, an applicant's omission of facts, or an admission or finding that the applicant fabricated statements at the airport interview, are insufficient to support a frivolous determination because the omitted or fabricated facts may or may not relate to the factual basis for the asylum application. *Matter of B-Y-*, 25 I&N Dec. 236, 243 (BIA 2010). Similarly, minor inconsistencies that are not material to the claim will be insufficient. *Id.* at 244 (holding that where applicant was inconsistent regarding whether he had gone home first or gone straight to the family planning office was found immaterial to his claim and insufficient by itself to make a frivolousness determination). Finally, as aforementioned, an adverse credibility finding does not necessarily warrant a determination of frivolousness. *See Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007).

With regard to the fourth requirement, whether the applicant has had a full and fair opportunity to address inconsistencies is determined by the totality of the circumstances and includes such factors as whether the applicant had counsel at the merits hearing, the nature and extent of the inconsistencies, and the manner in which the asylum application was prepared. *Matter of B-Y-*, 25 I&N Dec. 236, 243 (BIA 2010).

The IJ must address the question of frivolousness separately from the credibility analysis and "include specific findings that the respondent deliberately fabricated material elements of his asylum claim." *Matter of Y-L-*, 24 I&N Dec. 151, 157 (BIA 2007). However, an IJ need not separate and repeat those aspects of a credibility determination that overlap with a frivolous determination. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010). Although an IJ may incorporate an adverse credibility finding and analysis by reference, a frivolousness determination should separately address the applicant's explanations in the context of how they bear on the materiality and deliberateness requirements unique to such a finding. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010). Ideally, a frivolousness determination will be addressed under a separate section from credibility. *Id.* The IJ must "make specific findings based on cogent reasoning that material aspects of the claim were deliberately fabricated," and "[t]hese findings should not simply be left to be inferred or extrapolated from the strength of the overall adverse credibility determination." *Matter of B-Y-*, 25 I&N Dec. 236, at 240 (BIA 2010).

After a frivolousness determination has been made, a separate evaluation of the merits of the application is not necessary because the only requirements are that the application be "made" or "filed." *Matter of X-M-C-*, 25 I&N Dec. 322, 324-25 (BIA 2010).[22] Additionally, once a frivolous asylum application has been made and the required warnings have been given, withdrawal of the application by the applicant does not negate such a finding. ." *Matter of X-M-C-*, 25 I&N Dec. 322, 325 (BIA 2010) (holding that a frivolousness determination still stands

[22] In *M-S-B-*, the BIA recognized that the Third Circuit's decision in *Luciana v. Att'y Gen.*, 502 F.3d 273, 280 (3d Cir. 2007), is inconsistent with its own prior decision in *X-M-C-*, 25 I&N Dec. at 324-25 to the extent that *Luciana* holds that any deliberate fabrication relating to the merits in a time-barred asylum application is immaterial for purposes of the frivolousness bar under INA § 208(d)(6). 26 I&N Dec. at 877. The BIA declined to follow the Third Circuit's contrary holding in *Luciana* outside of that circuit. *Id.* at 878-79 (finding "that neither the materiality requirement under 8 C.F.R. § 1208.20 nor the time-bar provision under section 208(a)(2)(B) of the Act precludes an [IJ] from making a frivolousness finding in cases involving time-barred applications for asylum, including cases in which the fabrications relate to the merits.").

when the applicant could have withdrawn her asylum application before being given the warnings or after being asked whether she wished to proceed but choosing neither until she had a viable adjustment claim).

G. Statutory Eligibility for Asylum

Asylum is a discretionary form of relief that allows aliens to remain in the United States and apply for residency after one year, if they are fleeing persecution in their country of nationality or last habitual residence on account of their race, religion, nationality, membership in a particular social group, or political opinion. INA § 208; 8 C.F.R. § 1208.1.

An asylum applicant bears the burden of demonstrating that he or she is a refugee within the meaning of INA § 101(a)(42)(A). *See* INA § 208(b)(1). An asylum applicant may demonstrate that he or she is a "refugee" in either of two ways. First, an asylum applicant may demonstrate that he or she suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). Second, an asylum applicant may demonstrate a well-founded fear of future persecution on account of one of the aforementioned protected grounds by demonstrating that he or she subjectively fears persecution and that his or her fear is objectively reasonable. INA § 101(a)(42)(A).

In order to establish past or future persecution, an applicant must demonstrate that he or she suffered past persecution or will face future persecution on account of one of the statutorily-protected grounds, and that such persecution is inflicted by the government or by forces that the government is unable or unwilling to control. *See Garcia v. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011) (finding that a government's decision to relocate applicant to another country is evidence that they are unable to protect the applicant); *Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 288-89 (3d Cir. 2007) (finding that the applicant is not required to demonstrate that the police refused to protect him from persecution by gang members, but only that the government was unable or unwilling to protect him); *Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997) (finding that the respondent had not demonstrated the government was unable or unwilling to protect his family when the evidence suggested that his family "was afforded extraordinary governmental assistance" when officials engaged in "massive rescue effort[s]" when his brother and sister were kidnapped).

If an asylum application is fatally flawed in one respect, an immigration judge or the Board need not examine the remaining elements of the asylum claim. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (providing an example where an adjudicator need not examine the remaining elements of an asylum claim upon finding that the petitioner failed to show membership in a particular social group).

1. Nationality and Statelessness

A person's nationality or, if stateless, a person's country of last habitual residence, must initially be addressed when a person applies for asylum. It is the respondent's burden to prove his or her nationality or citizenship or, if he or she contends that he or she is stateless, why that is the case. *See* INA § 240(c)(4); 8 C.F.R. § 1208.13(a); *see also Wangchuck v. DHS*, 448 F.3d 524,

528 (2d Cir. 2006) (noting that "a petitioner's nationality, or lack of nationality, is a threshold question in determining his eligibility for asylum . . . ") (quoting *Dhoumo v. BIA*, 416 F.3d 172, 174 (2d Cir. 2005)).

An alien who is a citizen or national of more than one country but has no fear of persecution in one of those countries might not be a "refugee" as contemplated by the INA. *Matter of B-R-*, 26 I&N Dec. 119 (BIA 2013). Once nationality is established, it is the alien's burden to demonstrate that his or her alternative country of nationality will not offer him protection. *Matter of B-R-*, 26 I&N Dec. 122 (BIA 2013).

For stateless persons, the court must determine the applicant's "last habitual residence." *Paripovic v. Gonzales*, 418 F.3d 240, 243-45 (3d Cir. 2005) (finding that an applicant's two and a half year stay in Serbia established that he habitually resided there). Although statelessness alone would not necessarily constitute persecution, where statelessness is due to a protected ground, it may constitute persecution. *See Ahmed v. Ashcroft*, 341 F.3d 214 (3d Cir. 2003) (finding that discrimination against stateless Palestinian in Saudi Arabia did not amount to persecution and that statelessness alone does not warrant asylum).

2. Persecution

There is no universally accepted definition of "persecution." *See Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, ¶ 51 (Geneva, January 1992) ("Handbook"). While "persecution" has generally been interpreted to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom, courts have also recognized that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985) (noting that persecution may include mental suffering or even severe economic deprivation); *Matter of T-Z-*, 24 I&N Dec. 163, 173-75 (BIA 2007) (holding that nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution).

Generally harsh conditions shared by many other persons have not been found to amount to persecution. *See Konan v. Att'y Gen.,* 432 F.3d 497, 506 (3d Cir. 2005) (finding that general conditions of civil unrest or chronic violence and lawlessness did not amount to persecution); *see also Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018) (holding that the mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim); *Al-Fara v. Gonzales*, 404 F.3d 733, 740 (3d Cir. 2005) (finding that an individual must do more than rely on a general threat of danger arising from a state of civil strife despite residing in a country where the lives and freedoms of a significant number of persons of a protected group are targeted for persecution); *Matter of Sanchez & Escobar*, 19 I&N Dec. 276 (BIA 1985) (finding that harm resulting from country-wide civil strife is not persecution on account of one of the five enumerated grounds).

The Attorney General has found "persecution" to involve an "intent to target a belief or characteristic." *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (noting that private criminals are motivated more often by greed or vendettas than by an intent to "overcome [the protected] characteristic of the victim") (quoting *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)). However, an asylum applicant is not required to prove that the persecutor engaged in persecution with malignant or punitive intent to harm. *Matter of Kasinga*, 21 I&N Dec. 357, 365-67 (BIA 1996) (finding persecution where FGM is practiced to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM, even if done with a "subjective benign intent.").

Persecution should be treated cumulatively. The severity of each incident should not be addressed in isolation without considering the cumulative effect of events. *Fei Mei Cheng v. Att'y Gen.*, 623 F.3d 175, 190-98 (3d Cir. 2010) (finding that the applicant who had a painful IUD procedure, was threatened with the loss of her child and jailing of her boyfriend, and whose family farm was confiscated due to her refusal to have an abortion cumulatively suffered persecution arising from her "other resistance" to China's population control policies).

i. Physical Harm

An isolated incident involving a physical attack that does not result in serious injury does not rise to the level of persecution. *See Voci v. Gonzales*, 409 F.3d 607, 615 (3d Cir. 2005); *Kibinda v. Att'y Gen.*, 477 F.3d 113, 119-20 (3d Cir. 2007) (holding that single detention and beating requiring stitches and leaving a scar was not "severe enough to constitute persecution under our stringent standard."); *Chen v. Ashcroft*, 381 F.3d 221, 235 (3d Cir. 2004) (rejecting the petitioner's claim that he suffered past persecution because even though he was subjected to physical abuse by local officials, he did not allege that he received medical treatment for his injuries); *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005) (holding that isolated acts of robbery of the applicant's house and workplace by unknown assailants which only resulted in theft of some personal property and a minor injury did not constitute persecution).

Notwithstanding the above, evidence that the applicant was physically harmed by his or her persecutors and that the harm was severe and required medical attention, along with other harassment, may rise to the level of persecution. *See Voci v. Gonzales*, 409 F.3d 607, 615 (3d Cir. 2005) (finding past persecution where the petitioner was found to have been beaten by police numerous times, which on one occasion, necessitated the petitioner's extended hospitalization for a broken knee).

Persecution does not require that an applicant establish permanent or serious injuries. *Matter of O-Z- & I-Z-,* 22 I&N Dec. 23, 25-26 (BIA 1998) (holding that persecution "encompasses a variety of forms of adverse treatment, including non-life threatening violence and physical abuse or non-physical forms of harm."); *Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 341-45 (3d Cir. 2008) (finding that an eight-day abduction and confinement by FARC amounted to persecution because of the duration of confinement, the deprivation of movement and sight, the invasion of privacy, the implicit and overt threats, the ominous warnings upon release, and the expectation that petitioner was obliged to return to serve their cause).

ii. Physical Harm to the Respondent's Family

An applicant cannot rely solely on the persecution of his or her family members to qualify for asylum, but such evidence can be relevant. *See Cham v. Att'y Gen.*, 445 F.3d 683, 693 (3d Cir. 2006) (finding that persecution of the applicant's family members relevant where there was a high degree of factual similarity between the applicant's claim and those of his family members, and where his claim of political persecution rested on that very familial relationship); *see also Sioe Tjen Wong v. Att'y Gen*., 539 F.3d 225 (3d Cir. 2008) (citing *Surya v. Gonzales*, 454 F.3d 874, 878 (8th Cir. 2006)) (holding that "attacks on family members, absent a pattern of persecution tied to the applicant, do not establish a well-founded fear of persecution). However, the Third Circuit has recognized that when incidents of persecution of applicant's relatives are motivated by a desire to punish or otherwise harm the applicant, such acts may constitute persecution of the applicant. *Toure v. Att'y Gen.*, 443 F.3d 310, 314-19 (3d Cir. 2006) (determining that the kidnapping, beating and interrogation of the applicant's wife in connection with the applicant's political opinion supported a finding of past persecution); *see also Al-Fara v. Gonzales*, 404 F.3d 733, 741 (3d Cir. 2005) (citing *Baballah v. Ashcroft*, 335 F.3d 981, 988 (9th Cir. 2003)) (finding that "violence against a family member may support . . . a claim of persecution.").

Notably, however, the Third Circuit found persecution where an applicant witnessed the forcible seizure and removal of a parent to unknown whereabouts by a group that the petitioner definitively identified as having directly and unambiguously threatened her with harm. *Camara v. Att'y Gen.*, 580 F.3d 196, 204 (3d Cir. 2009).

iii. Threats

Unfulfilled threats are not substantial enough to be characterized as tantamount to past persecution. *See Li v. Att'y Gen.*, 400 F.3d 157 (3d Cir. 2005) (holding that unfulfilled threats must be highly imminent and menacing in nature to constitute persecution). Only where threats are "so menacing as to cause significant actual suffering or harm" may they constitute persecution. *Chavarria v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006) (citing *Li v. Att'y Gen.*, 400 F.3d 157 (3d Cir. 2005)).

In *Chavarria v. Gonzalez,* the Third Circuit found past persecution where armed men threatened the respondent that "if [they] ever catch [him] again, [he] won't live to talk about it," in addition to being stalked, forced into the back of a car with a gun pointed at his head and another at his stomach, and robbed. 446 F.3d 508, 518 (3d Cir. 2006). In *Camara v. Att'y Gen.*, the Third Circuit held that a threat that the respondent and her family would "disappear," which occurred during an ambush by a group of men dressed in black armed with rifles, who kidnapped the respondent's father and accused him of supporting rebel forces, constituted persecution. 580 F.3d 196, 204-05 (3d Cir. 2009).

iv. Economic Harm

Deliberate imposition of severe economic disadvantage which threatens a petitioner's life or freedom may constitute persecution. *See Li v. Att'y Gen.*, 400 F.3d 157, 169 (3d Cir. 2005)

(holding that the "deliberate impos[ition]" of a fine, confiscation of personal belongings, loss of health benefit, school tuition, and food rations, and being blacklisted from all government positions is severe economic disadvantage that constitutes persecution (quoting *Eduard v. Ashcroft*, 379 F.3d at 187 (5th Cir. 2004)). Such disadvantage may, for instance, involve "the deprivation of liberty, food, housing, employment, and other essentials of life." *Li v. Att'y Gen.*, 400 F.3d 158 (3d Cir. 2005); *see also Fei Mei Cheng v. Att'y Gen.*, 623 F.3d 175, 194 (3d Cir. 2010) (finding that an applicant whose family farm was confiscated due to her refusal to have an abortion suffered persecution because "severe economic sanctions constitute persecution."). *But see Matter of T-Z-*, 24 I&N Dec. 163, 173-74 (BIA 2007) (reversing persecution finding and remanding to determine whether, for example, the applicant's spouse who was forced to abort due to claimed economic persecution, had other sources of income if she lost her job).

v. Enforcement of Laws of Military Conscription

Punishment for desertion or evasion of military conscription does not constitute persecution for purposes of an asylum claim unless it targets the individual on the basis of a protected category. *See Lukwago v. Ashcroft*, 329 F.3d 157, 168 (3d Cir. 2003) (holding that "[i]t is generally accepted 'that a sovereign nation enjoys the right to enforce its laws of conscription, and that penalties for evasion are not considered persecution.'") (citation omitted). *But see Ilchuk v. Att'y Gen.*, 434 F.3d 618, 626 (3d Cir. 2006) (reversing BIA denial for Pentecostal who refused service in Ukraine military because of possible religious persecution); *Matter of A-G-*, 19 I&N Dec. 502, 506 (BIA 1987) (noting that persecution for failure to serve in the military may be established in those rare cases where a disproportionately severe punishment would result on account of one of the five grounds enumerated in INA § 101(a)(42)(A)); *Matter of Canas*, 19 I&N Dec. 697, 709 (BIA 1988) (suggesting that overt discrimination in the enforcement of conscription laws may reflect a government's intent to persecute members of a given religion).

Relief is available, however, where the applicant can show that he or she "would be associated with a military whose acts are condemned by the international community as contrary to the basic rules of human conduct." *Kibinda v. Att'y Gen.*, 477 F.3d 113, 121-22 (3d Cir. 2007). These exceptions are relevant to both past and future persecution. *Id*.

vi. Criminal Acts

Ordinary, isolated criminal acts do not constitute persecution. *Gonzalez-Posadas v. Att'y Gen.*, 781 F.3d 677, 685 (3d Cir. 2015) (citing *Shehu v. Att'y Gen.*, 482 F.3d 652, 657 (3d Cir. 2007)) (finding that the applicant had not demonstrated past persecution when the gang had targeted him for economic gain, rather than on account of his familial or political affiliations); *Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001) (finding that the past mistreatment at issue could have been "motivated not by animosity against a particular ethnic group, but rather by arbitrary hostility or by a desire to reap financial rewards" and thus did not rise to the level of persecution).

vii. Conflicts of a Personal Nature

Conflicts of a personal nature do not constitute persecution on account of one of the enumerated grounds. *Gonzalez-Posadas v. Att'y Gen.*, 781 F.3d 677, 685 (3d Cir. 2015) (citing *Amanfi v. Ashcroft*, 328 F.3d 719, 727 (3d Cir. 2003)) (finding no persecution where the past conflict was driven by an interpersonal conflict rather than religious persecution); *Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987) (stating that "aliens fearing retribution over purely personal matters . . . would not qualify for asylum.").

viii. Other Forms of Alleged Persecution

Persecution may "include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993). For example, "wearing the chador or complying with any of the other restrictions" of fundamentalist Islamic laws may be "so deeply abhorrent" to an individual that "it would be tantamount to persecution." *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). Violations of the right to equal treatment of women and the right to hold feminists beliefs can also constitute persecution when accompanied by a failure of state protection. *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993).

Except in extraordinary circumstances, persecution does not include discrimination.. *See Ahmed v. Ashcroft*, 341 F.3d 214 (3d Cir. 2003) (holding that discrimination against stateless Palestinian in Saudi Arabia did not constitute persecution); *Matter of V-F-D-,* 23 I&N Dec. 859, 863-64 (BIA 2006) (holding that discrimination in school, neighborhood, and employment against non-Muslims in Egypt is not persecution). *But see Matter of Salama*, 11 I&N Dec. 536 (BIA 1996) (holding that Jewish professionals denied licenses to practice in their field due to government campaign of discrimination were subject to persecution).

Fear of prosecution for violations of fairly administered laws does not itself qualify one as a refugee. *Chang v. INS*, 119 F.3d 1055, 1060 (3d Cir. 1997); *see also Long Hao Li v. Att'y Gen.*, 633 F.3d 136 (3d Cir. 2011) (finding that the petitioner, an ethnic Korean, did not qualify as a refugee for violating Chinese laws forbidding citizens from providing assistance to illegal immigrants from North Korea).

Generally, a country's restriction on traveling abroad is not persecution. *Lin v. Ashcroft*, 113 Fed. Appx. 496, 498 (3d Cir. Nov. 23, 2004) (unpublished) (citing *Li v. INS,* 92 F.3d 985, 988 (9th Cir. 1996)). Likewise, the possibility of future prosecution for violating travel laws is not persecution. *Janusiak v. INS,* 947 F.2d 46, 49 (3d Cir. 1991).

3. Nexus[23]

[23] Note: In *Serrano-Alberto v. Attorney General*, the Third Circuit noted that "[i]n a number of recent cases, the BIA has assumed a cognizable social group or imputed political opinion and disposed of the appeal by finding no nexus." *Serrano-Alberto*, 859 F.3d at 219 n.5. (3d Cir. 2017). The Third Circuit found this practice troubling for two reasons. First, in cases "where the very definition of the social group is at issue, for denying relief based on the absence of a nexus begs the questions: nexus to what?" Second, "the BIA's practice of assuming a social group and resolving cases on nexus grounds often inhibits the proper and orderly development of the law in this area by leaving the contours of protected status undefined, precluding further appellate review under the *Chenery* doctrine, and ultimately generating additional needless litigation because of the uncertainty in this area." *Id.* In so doing, the

An applicant for asylum must also demonstrate that the persecution he or she fears would be "on account of" his or her race, nationality, religion, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

In determining whether the alleged persecution is "on account of" one of the protected grounds, the court must examine the persecutor's views of the applicant's actions or lack of action. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (finding that "the mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment [of the respondent] is inadequate to establish . . . the proposition that he fears persecution on account of political opinion."). In certain cases, "the factual circumstances alone may constitute sufficient circumstantial evidence of a persecutor's . . . motives." *Espinosa-Cortez v. Att'y Gen.*, 607 F.3d 101, 108 (3d Cir. 2010) (quoting *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744 (9th Cir. 2006)) (further explaining that "circumstantial evidence of motive may include, inter alia, the timing of the persecution and signs or emblems left at the site of persecution.") (internal quotations omitted). Moreover, the court may rely on the applicant's credible testimony to assess the motive and perspective of the persecutor. *Chavarria v. Att'y Gen.*, 446 F.3d 508, 521 (3d Cir. 2006).

For pre-REAL ID Act cases, an applicant need not conclusively show the motive for the persecution or that the persecutor would be motivated solely by a protected ground, but must produce evidence from which it is reasonable to conclude that the harm would be motivated, at least in part, by an actual or imputed ground. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000); *Matter of S-P-*, 21 I&N Dec. 486, 489-90 (BIA 1996). Mixed-motive cases often involve situations where persecution is, in part, on account of "imputed" grounds. The BIA has held that such persecution can satisfy the "refugee" definition. *Matter of A-G-*, 19 I&N Dec. 502, 507 (BIA 1987).

In post-REAL ID Act cases, the applicant must demonstrate that the protected ground would be "at least one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Ndayshimiye v. Att'y Gen.*, 557 F.3d 124, 129 (3d Cir. 2009); *Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 339-40 (3d Cir. 2008); *see also Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007). In order for a protected characteristic to constitute "one central reason," it must play more than "an incidental, tangential, or superficial role in persecution"; rather, it must be an essential or principal reason for the persecution. *Gonzalez-Posadas v. Att'y Gen.*, 781 F.3d 677, 685 (3d Cir. 2015) (finding the applicant had not demonstrated past persecution or a well-founded fear of future persecution where the record suggested that the gangs targeted him because of his financial situation and recruitment potential, rather than on account of his sexual orientation) (citing *Ndayshimiye v. Att'y Gen.*, 557 F.3d 124, 130 (3d Cir. 2009)). However, the BIA observed that the mixed-motive standards have "not been radically altered by the [REAL ID Act] amendments." *Matter of J-B-N- & S-M-*, 24 I&N Dec. 214 (BIA 2007).

Third Circuit "strongly encourage[d] IJs and the BIA to define the social group in question and to adjudicate the existence and cognizability of that social group." *Id.*

An alien seeking asylum bears the burden of establishing a nexus between the alleged persecution and one of the five statutory grounds. *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018). In particular, the Attorney General noted that for victims of private crime who seek asylum, establishing the required nexus between past persecution and membership in a particular social group is a critical step. *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018). When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be "one central reason" for the abuse. *Matter of A-B-*, 27 I&N Dec. 316, 338-339 (A.G. 2018) (citing *Matter of R-A-*, 22 I&N 908, 919, 921 (BIA 1999).

i. Religion

Although instructive, rather than binding, the Second Circuit Court of Appeals has commented on what must be assessed when analyzing a claim for asylum based on religious persecution. "The critical showing that an applicant must make to demonstrate eligibility for asylum on religious persecution grounds is that he has suffered past persecution, or fears future persecution, on the basis of religion." *Rizal v. Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006). The applicant must establish that he or she identifies with a particular religion or that others perceive the applicant as an adherent to that religion, but the applicant need not demonstrate detailed knowledge of the religion's doctrinal tenets. *Rizal v. Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006).

Religious persecution inflicted by a member of the applicant's family may be sufficient to constitute past persecution on account of religion. *See Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (holding that a woman with liberal Muslim beliefs suffered past persecution and has a well-founded fear of future persecution at the hands of her father on account of her religious beliefs, which differ from her father's orthodox Muslim views concerning the proper role of women in Moroccan society).

ii. Political Opinion/Imputed Political Opinion

In order to prevail on an asylum claim based on political opinion, "an alien must (1) specify the political opinion on which he or she relies, (2) show that he or she holds that opinion, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that opinion." *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). In determining whether persecution existed on account of political opinion, the court focuses on whether the persecutor has attributed a political view to the victim and acted on that attribution. *Singh v. Gonzales*, 406 F.3d 191, 196 (3d Cir. 2005) (holding that the petitioner was persecuted on account of imputed political opinion where the police mentioned his father's political activities in India while they were beating him in custody) (quoting *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir.1997)). Specifically, persecution on account of a political opinion

> presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant... The relative importance or tenacity of the applicant's opinions—in so

far as this can be established from all the circumstances of the case—will also be relevant.

Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, ¶ 80 (Geneva, January 1992).

The Third Circuit has recognized imputed political opinion as a category for refugee qualification. *See, e.g., Lukwago v. Ashcroft*, 329 F.3d 157, 181 (3d Cir. 2003) (finding that "persecution may be on account of a political opinion the applicant actually holds or on account of one the [persecutor] has imputed to him."); *Chavarria v. Gonzales*, 446 F.3d 508, 518 (3d Cir. 2006) (holding that petitioner, who was apolitical but had assisted members of human rights organization opposed to the Guatemalan government and was later threatened and harassed by a paramilitary group, had demonstrated a well-founded fear of future persecution based on his imputed political opinion). The applicant may provide either direct or circumstantial evidence to show that the motive for persecution is the applicant's own political beliefs, real or imputed. *See Espinosa-Cortez v. Att'y Gen.*, 607 F.3d 101, 110 n.7 (3d Cir. 2010).

Prosecution for violating a generally applicable law may establish refugee qualification on account of imputed political opinion if (1) the law's objective is to silence or punish political dissent and (2) the punishment is sufficiently extreme to constitute persecution. *Compare, e.g., Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997) (finding that the petitioner had a well-founded fear of persecution for violating China's security law because the law's objective "appears to be to frighten dissidents into halting their activities" and the punishment for such violation was up to one year of imprisonment, which the court found sufficiently severe to constitute persecution) *with Long Hao Li v. Att'y Gen.*, 633 F.3d 136 (3d Cir. 2011) (finding that the petitioner failed to establish through sufficient evidence that his arrest for violating a generally applicable law forbidding Chinese citizens from providing assistance to illegal aliens from North Korea had a political objective).

a. Neutrality

The BIA has expressly rejected the notion that neutrality constitutes a political opinion. *Matter of Acosta* 19 I&N Dec. 211 (BIA 1985) (finding that a member of a taxi co-op who was threatened by guerillas for not participating in a work stoppage was neutral and did not have a political opinion); *see also Matter of Maldonado-Cruz*, 19 I&N Dec. 509, 516-17 (BIA 1988) (holding that the respondent who was kidnapped by guerillas for remaining neutral did not show persecution "on account of" his political opinion). In addition, testimony that the applicant wishes to remain neutral in the midst of civil conflict in his or her country is insufficient to establish a well-founded fear of persecution on account of a political opinion. *Matter of Vigil*, 19 I&N Dec. 572, 576-77 (BIA 1988).

b. Failure to report to authorities

Failing to report persons to Chinese authorities may constitute a political opinion. *See Chang v. INS*, 119 F.3d 1055, 1062 n.4 (3d Cir. 1997) (finding that the petitioner had a well-founded fear of persecution for violating China's security law because the law's objective "appears to be to frighten dissidents into halting their activities" and the punishment for such

violation was up to one year of imprisonment, which the court found sufficiently severe to constitute persecution).

c. Refusal of gang recruitment

Refusing to join a gang, or harm resulting from that, without more, is not a political opinion. *Matter of E-A-G-*, 24 I&N Dec. 591, 596-97 (BIA 2008) (finding the respondent's refusal to join the MS-13 in Honduras and the harm that occurred as a result was not persecution on account of political opinion); *see also Valdiviezo-Galdamez v. Att'y Gen*., 663 F.3d 582, 609 (3d Cir. 2011) (finding that there was no evidence that the petitioner's refusal to join the Mara Salvatrucha was taken by the gang as an expression of a political opinion).

d. Anti-gang opinion

To establish persecution based on anti-gang political opinion, the applicant must provide adequate evidence that he or she was targeted by the gangs because of this opinion. *See Matter of N-C-M-*, 25 I&N Dec. 535, 536 n.1 (BIA 2011) (finding there was no proof in record that El Salvador applicant was targeted by criminal gangs because of his express or imputed anti-gang political opinion). The BIA has suggested in *dicta* that petitioners might establish that their resistance to a gang is a political opinion by providing relevant evidence that they were "political active" or expressed "anti-gang political statements." *Matter of S-E-G-,* 24 I&N Dec. 579, 589 (BIA 2008); *see also Matter of N-M-,* 25 I&N Dec. 526, 528 (BIA 2011) (stating that campaigning against state corruption through "classic political activities such as founding or being active in a political party that opposes state corruption, attending or speaking in political rallies . . . or writing or distributing political materials . . . would likely constitute expression of political opinion.").

e. Coercive Population Control

A person who has been forced to undergo an abortion, involuntary sterilization, or who has suffered some other form of persecution for failure or refusal to undergo other coercive birth control measures, shall be deemed to have been persecuted on account of political opinion. *See* INA § 101(a)(42)(B); *Matter of Y-T-L-*, 23 I&N Dec. 601, 607 (BIA 2003) (finding that coerced abortion and sterilization constitute permanent and continuous acts of persecution and necessarily demonstrate a well-founded fear of persecution); *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996); *Matter of M-F-W-& L-G-*, 24 I&N Dec. 633 (BIA 2008). However, spouses and family members of individuals who have been subjected to coercive population control policies, such as forced abortions and involuntary sterilizations, are not *per se* deemed to have been persecuted on account of political opinion. *See Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 157 (3d Cir. 2009); *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008), *overruling Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006). Such individuals must show that they themselves have been persecuted for "other resistance" to coercive population control policies, or that they themselves have a well-founded fear that they will be subject to persecution for such resistance in order to be eligible for relief. *See Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 157 (3d Cir. 2009); INA § 101(a)(42).

An act that thwarts the goals of China's family planning policy, such as removing an intrauterine device ("IUD") or failing to attend a mandatory gynecological appointment, may constitute "other resistance" to the policy. *Matter of M-F-W-& L-G-*, 24 I&N Dec. 633, 638 (BIA 2008). "Other resistance" can also cover a range of circumstances, including but not limited to expressions of opposition, attempts to interfere with enforcement of government policy, and other "overt" forms of resistance to the requirements of China's family planning laws. *See Matter of S-L-L-*, 24 I&N Dec. 1, 10-11 (BIA 2006) *overruled on other grounds by Lin-Zheng*, *supra*. However, the resistance does not have to be active or forceful opposition; it can simply be an action that thwarts the goals of the family planning policy. *Matter of S-L-L-*, 24 I&N Dec. 1, 10-11 (BIA 2006).

The mere insertion of an IUD, absent some aggravating circumstances, does not rise to the level of harm necessary to constitute persecution. *Matter of M-F-W-& L-G-*, 24 I&N Dec. 633, 642 (BIA 2008); s*ee also Fei Mei Cheng v. Att'y Gen.*, 623 F.3d 175, 185 (3d Cir. 2010) (finding the argument that IUD insertion is tantamount to sterilization, and therefore per se persecution, unavailing). If the insertion or reinsertion of an IUD is carried out as part of a routine medical procedure, an applicant will not be able to establish the required nexus between the procedure and her resistance to China's family planning policy. *Matter of M-F-W-& L-G-*, 24 I&N Dec. 633, 643 (BIA 2008).

f. Whistle Blowing

Opposition to state corruption or "whistle-blowing" can constitute a political opinion or serve as a reason for a persecutor to impute a political opinion. *Matter of N-M-*, 25 I&N Dec. 526, 528 (BIA 2011). The court should consider: (1) whether and to what extent the alien engaged in activities that could be perceived as expressions of anticorruption beliefs; (2) any direct or circumstantial evidence that the persecutor was motivated by the alien's actual or perceived anticorruption beliefs; and (3) any evidence regarding the pervasiveness of corruption within the governing regime. *Matter of N-M-*, 25 I&N Dec. 526, 532-33 (BIA 2011). "Campaigning against state corruption" through activities like political party membership, attending political rallies, or writing or distributing political materials, may constitute expression of a political opinion. *Matter of N-M-*, 25 I&N Dec. 526, 528 (BIA 2011). Similarly, "exposing or threatening to expose government corruption to higher governmental authorities, the media, or nongovernmental watchdog organizations could constitute the expression of a political opinion." *Matter of N-M-*, 25 I&N Dec. 526, 528 (BIA 2011).

iii. Particular Social Group

An applicant for asylum or withholding should clearly indicate on the record before the Immigration Judge the enumerated ground(s) he or she is relying upon in making a claim, including the exact delineation of any particular social group to which the applicant claims to belong. *Matter of A-B-*, 27 I&N Dec. 316, 344 (A.G. 2018); *Matter of W-Y-C-& H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018); *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009); *Matter of A-M-E- & J-G-U-,* 24 I&N Dec. 69, 73 (BIA 2007) (establishing that "respondents must initially identify the 'group' on which the claim is based and demonstrate that such a group is a 'particular social group' as that term is used in the 'refugee' definition.").

To show persecution on account of membership in a particular social group, an applicant must establish three elements: (1) a group that constitutes a "particular social group" within the interpretation discussed in *Fatin*, (2) membership in that group, and (3) persecution based on that membership. *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993). With regards to the first element, an applicant must further establish that the group is: (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 535 (3d Cir. 2018) (holding that *Matter of M-E-V-G-* is entitled to *Chevron* deference); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *see also Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (reiterating and clarifying the standards set forth in *Matter of M-E-V-G-* and *Matter of W-G-R-*).

In order for a particular social group to be cognizable, it must "exist independently" of the harm asserted. *Matter of A-B-*, 27 I&N Dec. 316, 334 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 236 n.11, 243 (BIA 2014)). A particular social group "cannot be defined exclusively by the fact that its members have been subjected to harm." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 242 (BIA 2014) (internal quotations omitted). "[T]he individuals in the group must share a narrowing characteristic other than their risk of being persecuted." *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018) (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)).

A "common immutable characteristic" is a shared characteristic that might be an innate one such as sex, color, or kinship ties, or in some circumstances might be a shared past experience such as former military leadership or land ownership. *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)). A "common, immutable characteristic" is one that cannot be changed or should not be required to be changed because it is fundamental to an individual's identity or conscience. *See Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (adopting the standard set forth in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *see also Lukwago v. Ashcroft*, 329 F.3d 157, 170-73 (3d Cir. 2003).

Both the "particularity" and "social distinction"[24] requirements are analyzed in the specific context of the society at issue in each case. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 214-15, 217 (BIA 2014).

The BIA held that the "'particularity' requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put 'outer limits' on the definition of a 'particular social group.'" *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238 (BIA 2014); . *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 535 (3d Cir. 2018). Particular social groups must be defined by concrete characteristics that provide a "clear benchmark for determining who falls within the group," and who does not. *Id.* at 239. "It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238 (BIA 2014). Particularity ensures that the group be "discrete," with "definable boundaries," such that it is not "amorphous, overbroad, diffuse, or subjective." *Matter of M-E-V-*

[24] In *Matter of M-E-V-G-*, the BIA renamed "social visibility" as "social distinction" in order to clarify that the element does not require, and never has required, literal or "ocular" visibility, and it is defined by the perception of society, not the perception of the alleged persecutor(s). 26 I&N Dec. 227 (BIA 2014).

G-, 26 I&N Dec. 227, 238 (BIA 2014); *see also Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018) (noting that social groups defined by their vulnerability to private criminal activity likely lack particularity , given that broad swaths of society may be susceptible to victimization).

The BIA held that "social distinction" does not require, and has never required, literal or "ocular" visibility. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 234 (BIA 2014). Importantly, whether a social group is "socially distinct" is based on the perception of society, not the persecutor. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 242 (BIA 2014) (internal quotations omitted) *see also Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014). The BIA elaborated:

> the 'social distinction' requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.

Matter of M-E-V-G-, 26 I&N Dec. 227, 238 (BIA 2014); *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 535 (3d Cir. 2018).

The key thread running through the particular social group framework is that social groups must be classes recognizable by society at large. *Matter of A-B-*, 27 I&N Dec. 316, 336 (A.G. 2018). Membership in a particular tribe or clan is an instructive example: those distinctions often constitute a "particular social group" because that is a "highly recognizable, immutable characteristic" that makes members recognized in a society as a group. *Matter of A-B-*, 27 I&N Dec. 316, 336 (A.G. 2018) (noting that there is significant room for doubt that Guatemalan society views "married women in Guatemala who are unable to leave their relationship" as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances).

a. Membership Based on Family Ties/Clan

The BIA has long recognized that family ties may meet the requirements of a particular social group depending on the facts and circumstances in the case. *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985); *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017); *see also Singh v. Gonzales*, 406 F.3d 191, 196 n. 5 (3d Cir. 2005) (stating that membership in a particular social group may be established through kinship ties); *Matter of A-B-*, 27 I&N Dec. 316, 336 (A.G. 2018) (nothing that membership in a particular tribe or clan often constitute a "particular social group" because they involve "highly recognizable, immutable characteristics" that makes members recognized in society as a group). However, whether a particular social group based on family membership is cognizable "depend[s] on the nature and degree of the relationships involved and how those relationships are regarded by the society in question." *Matter of L-E-A-*, 27 I&N Dec. 40, 43 (BIA 2017). Furthermore, to establish eligibility for asylum on this basis, an applicant must not only demonstrate that he or she is a member of the family but also that the

family relationship is at least one central reason for the claimed harm. *Matter of L-E-A-*, 27 I&N Dec. 40, 44 (BIA 2017). In determining the persecutor's motive for harming the applicant or his or her family, the court should consider "the reasons that generate the dispute." *Matter of L-E-A-*, 27 I&N Dec. 40, 45 (BIA 2017). The fact that a persecutor has threatened an applicant and members of his [or her] family does not necessarily mean that the threats were motivated by family ties. *Matter of L-E-A-*, 27 I&N Dec. 40, 45 (BIA 2017) (citing *Marin-Portillo v. Lynch*, 834 F.3d 99, 102 (1st Cir. 2016). If the persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established a claim on this ground. *Matter of L-E-A-*, 27 I&N Dec. 40, 44 (BIA 2017).

The BIA has also deemed clan membership to be a "particular social group" as it is an immutable characteristic based on several factors, including family ties and linguistic commonalities. *Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996). While the BIA has not ruled "*categorically* that membership in any clan would suffice, the BIA has held unambiguously that membership in a nuclear family *may* substantiate a social-group basis of persecution. *See Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006) (emphasis added).

b. Membership Based on Sexual Orientation

Sexual and/or gender orientation as an immutable characteristic such that it could accord an applicant status as a member of a particular social group if the applicant is deemed credible. *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990); *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003) (remanding the matter to the BIA to consider whether the evidence supported the alien's claim that he was subjected to persecution in Ghana on account of a *perception* that he could be a homosexual).

c. Membership Based on Domestic Violence

In *Matter of A-B-*, the Attorney General held that social groups defined by their vulnerability to private criminal activity, such as individuals fleeing domestic violence, likely lack the particularity required under *Matter of M-E-V-G-,* 26 I&N Dec. 227, 241-42 (BIA 2014), given that broad swaths of society may be susceptible to victimization. *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018) (overruling *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014)). In addition, there is significant room for doubt that society at large would view women fleeing domestic violence, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances. *Matter of A-B-*, 27 I&N Dec. 316, 336 (A.G. 2018).

When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be "one central reason" for the abuse. *Matter of A-B-*, 27 I&N Dec. 316, 338-339 (A.G. 2018). For example, the Attorney General noted that nexus cannot be established in domestic violence cases where there is no evidence that the abuser is aware of, and hostile to, a victim's membership in a particular social group, and instead, attacked the victim because of a preexisting personal relationship. *Matter of A-B-*, 27 I&N Dec. 316, 338-339 (A.G. 2018); *see also Matter of R-A-*, 22 I&N Dec. 906, 921 (BIA 1999) (stating that "the record does not reflect that [the respondent's] husband bore any particular

animosity toward women who were intimate with abusive partners, women who had previously suffered abuse, or women who happened to have been born in, or were actually living in, Guatemala.”).

Moreover, the Attorney General noted that victims of private criminal conduct, such as domestic violence, must establish that the harm was inflicted by persons or organizations that the government was unable or unwilling to control. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (citing *Matter of Acosta*, 19 I&N Dec. 221, 222 (BIA 1985). An applicant seeking to establish persecution based on violent conduct of a private actor must show more than difficulty controlling private behavior. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (internal quotations omitted). The applicant must show that the government condoned the private actions “or at least demonstrated a complete helplessness to protect the victims.” *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (internal quotations omitted). Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it. *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018).

d. Membership Based on Resistance to Gang Recruitment

The BIA, in a pair of 2008 opinions, held that male Salvadorans/Hondurans who resist gang recruitment is not a cognizable particular social group because the group does not meet the required elements of particularity and social visibility. *See Matter of S-E–G–*, 24 I&N Dec. 579 (BIA 2008) (rejecting the particular social group of “Salvadoran youth who were subjected to recruitment efforts by the Mara Salvatrucha, and who resisted gang membership based on their own personal, moral and religious opposition to the gang's values and activities.”); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) (rejecting the particular social group of “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs.”). In 2018, the Attorney General issued a precedential decision, noting that groups comprising of persons who are “resistant to gang violence” and susceptible to violence from gang members on that basis “are too diffuse to be recognized as a particular social group” because victims of gang violence often come from all segments of society and possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group. *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018).

The Attorney General noted that establishing the required nexus between past persecution and membership in a particular social group is a critical step for victims of private crime who seek asylum. *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018). When private actors inflict violence based on a personal relationship with a victim, then the victim’s membership in a larger group may well not be “one central reason” for the abuse. *Matter of A-B-*, 27 I&N Dec. 316, 338-339 (A.G. 2018). A criminal gang may target people because they have money or property within the area where the gang operates, or simply because the gang inflicts violence on those who are nearby and that does not make the gang’s victims persons who have been targeted “on account of” their membership in any social group. *Matter of A-B-*, 27 I&N Dec. 316, 339 (A.G. 2018).

e. Membership Based on Being a Former Gang Member

In *Matter of W-G-R-*, the BIA rejected the putative group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" as diffusive, too broad, and subjective. 26 I&N Dec. 208 (BIA 2014).[25] Specifically, the BIA found that the purported social group could potentially include persons of any age, sex, or background and was not limited to those who had a meaningful involvement with the gang. *Matter of W-G-R-,* 26 I&N Dec. 208, 221 (BIA 2014). Importantly, the BIA extensively discussed the contours of a social group based on former gang membership, and concluded that such a group would have to be delineated with more particularity and specificity, as well as supported by evidence that such a group is perceived as socially distinct in the country at issue. *Matter of W-G-R-,* 26 I&N Dec. 208, 222 (BIA 2014). The BIA further noted that the respondent failed to establish that any harm would be motivated by his status as a former gang member, "rather than by the gang members' desire to enforce their code of conduct and punish infidelity to the gang." *Matter of W-G-R-,* 26 I&N Dec. 208, 224 (BIA 2014).

The BIA has also noted that granting asylum protection to persons who were willingly involved in violent antisocial behavior more akin to persecutors and criminals is inconsistent with principles underlying the bars to asylum and withholding of removal based on criminal behavior. *Matter of W-G-R-,* 26 I&N Dec. 208, 215 (BIA 2014).; *see also Matter of E-A-G-,* 24 I&N Dec. 591, 595 (BIA 2008).

[*See supra* for further discussion of requirement of social distinction]

f. Membership Based on Being a Gang Informant/ Court Witness

Informants who assist law enforcement against gang members may constitute a particular social group. In *Garcia v. Att'y Gen*., 665 F.3d 496 (3d Cir. 2011), the Third Circuit found that the petitioner had a common, immutable characteristic with other civilian witnesses who have the shared past experience of assisting law enforcement against violent gangs that threaten communities in Central America. The court reasoned that "it is a characteristic that members cannot change because it is based on past conduct that cannot be undone. To the extent that members of this group can recant their testimony, they ―should not be required to do so." *Garcia v. Att'y Gen*., 665 F.3d 496, 503 (3d Cir. 2011)

However, BIA precedent suggests that social group claims need to be carefully evaluated for the requisite social distinction. *Matter of C–A–,* 23 I&N Dec. 951 (BIA 2006). In *Matter of C-A-*, the BIA found that the group of "former noncriminal drug informants working against the Cali drug cartel" did not constitute a particular social group because the group [did] not have "social visibility."[26] 23 I&N Dec. 951, 961 (BIA 2006). The BIA noted that the very nature of the conduct of confidential informants is such that it is generally out of the public view. *Matter of C–A–,* 23 I&N Dec. 951, 955 (BIA 2006).

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[25] Although not binding, the Seventh Circuit held that tattooed former gang members may be members of a particular social group. *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (distinguishing *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), by reasoning that *Arteaga* dealt with current gang members, not former members like *Ramos* and criticizing the BIA's "social visibility" theory).

[26] Note that the BIA analyzed the group based on "on-sight visibility," not on "social distinction."

g. Membership Based on Deportees/Returning Citizens from the U.S.

The BIA has found that “deportees” is too broad and diverse a group to satisfy the particularity requirement and therefore cannot constitute a particular social group. *Matter of W-G-R-*, 26 I&N Dec. 208, 223 (BIA 2014). Specifically, the BIA stated that this group could include men, women, and children of all ages who have been removed from the United States for a variety of reasons, making it difficult to determine when society would view a person as a deportee after repatriation given varying amounts of time spent in the United States and the recency of removal. *Matter of W-G-R-*, 26 I&N Dec. 208, 223 (BIA 2014).

The Third Circuit has not spoken as to whether “deportees” could form a cognizable social group, but has held that “criminal deportees” are not a recognized social group, stating that it cannot “conceive that Congress would select criminals as a group warranting special protection in removal cases.” *Toussaint v. Att’y Gen.,* 455 F.3d 409, 418 (3d Cir. 2006).

Several other circuits have also found that “deportees” is not a cognizable social group. *See Jutus v. Holder*, 723 F.3d 105, 111 (1st Cir. 2013) (rejecting the notion that one's status as a former inhabitant of the United States triggers statutory protection); *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) (finding that “young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs” lacked immutable characteristics and was too broad and amorphous to provide an adequate benchmark for determining group membership); *Bastanipour v. INS,* 980 F.2d 1129, 1132 (7th Cir.1992); *Matul-Hernandez v. Holder*, 685 F.3d 707 (8th Cir. 2012) (affirming that Guatemalans returning from the United States who were perceived as wealthy was not a particular and socially visible group such that they could be perceived as a group and targeted for persecution); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151-52 (9th Cir. 2010) (per curiam) (holding that “returning Mexicans from the United States” is too broad to qualify as a particular social group).

h. Membership Based on Tattoos/Imputed Gang Membership

Neither the BIA nor the Third Circuit have addressed whether *imputation* of gang membership is a cognizable basis for a particular social group. Although instructive rather than binding, the Sixth and Ninth Circuits have held that “individuals with tattoos” is too broadly defined to form a basis for a particular social group. *See Castellano-Chacon v. INS,* 341 F.3d 533, 549 (6th Cir. 2003) (“Tattooed youth is overbroad and cannot be seen as constituting a collection of people closely affiliated with each other.”); *Arteaga v. Mukasey,* 511 F.3d 940, 945 (9th Cir. 2007) (finding “tattooed gang member” to be too broad to form a particular social group).

i. Membership Based on Wealth

Wealth or affluence, standing alone, does not form the basis for a particular social group because it is too broad and amorphous. *Matter of A–M–E & J–G–U–,* 24 I&N Dec. 69, 76 (BIA 2007) ((holding that respondents failed to establish that their status as affluent Guatemalans was defined with adequate particularity to constitute a particular social group noting that wealth is not

readily defined and might encompass anywhere from 1% to 20% of the population of a Central American country); *Valdiviezo-Galdamez v. Att'y Gen*., 663 F.3d 582, 600 (3d Cir. 2011) (citing *Matter of A–M–E & J–G–U–,* 24 I&N Dec. at 76).

j. Membership Based on Youth or Gender

"[P]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003).

iv. Mixed Motive Cases

In mixed motive cases where the asylum application was filed pre-REAL ID Act of 2005, the applicant is not obliged to show conclusively why persecution has occurred or may occur; however, in proving past persecution, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated *in part* by an actual or imputed protected ground. *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996) (granting asylum where the applicant was detained and abused by the Sri Lankan Government, not only to obtain information about the identity of guerrilla members and the location of their camps, but also because of an assumption that his political views were antithetical to those of the Government).

For applications filed post-REAL ID Act of 2005, the applicant is required to establish that one of the statutorily protected grounds for asylum "was or will be at least *one central reason* for persecuting the applicant. INA § 208(b)(1)(B)(i). The Third Circuit has stressed that the proper standard is "one central reason" and not "the central reason." *See Ndayshimiye v. Att'y Gen.* 557 F.3d 124, 129-31 (3d Cir. 2009) (finding that the BIA's decision in *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212-13 (BIA 2007) is not entitled to *Chevron* deference to the extent that it suggests a hierarchy of motives).

4. Government Unable or Unwilling to Control Persecutors

An applicant for asylum must be unable or unwilling to avail him or herself of the protection of the country of persecution. The applicant is not required to demonstrate that the government or police refused to protect him, the applicant need only establish that the persecution was, or would be, inflicted by the government or by persons or organizations the government is unable or unwilling to control. *Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 288-89 (3d Cir. 2007) (holding that an applicant claiming persecution from a gang was not required to prove that the government "refused" to protect him); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 160-63 (3d Cir. 2005) (finding that the government was unable or unwilling to control the persecutor where a Ghanaian woman was sexually and emotionally abused by her father who was priest in Trokosi sect and the USDOS country report indicated it would have been futile for her to seek police protection); *see also Mendoza-Ordonez v. Att'y Gen.*, 869 F.3d 164 (3d Cir. 2017) (finding that evidence of politically-motivated death threats, inaction on the alien's complaints to the police, a perpetrator and judge who shared a political affiliation in opposition to that of alien, and a politically corrupt justice system that failed to rein in politically motivated violence in Honduras established that the government was unable or unwilling to protect the

alien); *Matter of S-A-*, 22 I&N Dec. 1328, 1333, 1335 (BIA 2000) (finding that the Moroccan government was unable or unwilling to control orthodox Muslim father from abusing his daughter).

The government's decision to relocate someone to another country serves as evidence that the government is unable to protect the applicant. *Garcia v. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011) (finding that although the Guatemalan government displayed great willingness to protect the alien before and after her testimony in a murder trial, that willingness shed no light on Guatemala's ability to protect her, and the fact that Guatemalan authorities saw fit to relocate her to Mexico was tantamount to an admission that she could not be protected in Guatemala).

An applicant seeking to establish persecution based on violent conduct of a private actor must show more than difficulty controlling private behavior. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (internal quotations omitted). The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (internal quotations omitted). The fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018). There may be many reasons why a particular crime is not successfully investigated and prosecuted. *Matter of A-B-*, 27 I&N Dec. 316, 337-38 (A.G. 2018). Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it. *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018).

5. Past Persecution Gives Rise to a Presumption of a Well-Founded Fear of Future Persecution

To establish past persecution, an asylum applicant must demonstrate that he or she suffered persecution in his or her country of nationality or, if stateless, in his country of last habitual residence, on account of an actual or imputed protected ground, and that he or she is unable or unwilling to return to, or avail himself or herself of the protection of that country because of such persecution. *See* INA §§ 101(a)(42)(A), 208(b)(1)(A)-(B); 8 C.F.R. § 1208.13(b)(1).

If past persecution is established, a regulatory presumption arises that the applicant has a well-founded fear of future persecution on the basis of his original claim.[27] 8 C.F.R. § 1208.13(b)(1); *Singh v. Gonzales*, 406 F.3d 191, 196 (3d Cir. 2005) (finding that an applicant who establishes that he or she has suffered past persecution on account of one of the five grounds enumerated in the INA "triggers a rebuttable presumption of a well-founded fear of future persecution, as long as that fear is related to the past persecution."); *Berishaj v. Ashcroft*, 378 F.3d 314 (3d Cir. 2004); *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003); *Matter of N-M-A-*, 22 I&N Dec. 312, 314 (BIA 1998). The inquiry ends once the presumption arising from past

[27] The IJ must make a specific finding that the applicant has or has not suffered past persecution based on a statutorily enumerated ground before applying the regulatory framework contained in 8 C.F.R. § 1208.13(b)(1). *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008).

persecution is rebutted. However, it does not eliminate the possibility of a well-founded fear on another basis. *Matter of N-M-A-*, 22 I&N Dec. 312, 313 (BIA 1998).

a. Changed Country Conditions

DHS has the burden of rebutting the presumption of a well-founded fear of future persecution and must establish by a preponderance of the evidence that the applicant's fear is no longer well-founded due to a fundamental change in circumstances (changed country conditions). 8 C.F.R. § 1208.13(b)(1)(i)(A); *see also Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008) (reversing IJ denial in Kenyan asylum case where past persecution was found but the IJ did not explicitly provide the presumption of future persecution and failed to shift the burden to DHS). A fundamental change in circumstances may include changes in the political conditions of a country. *See Matter of E-P-*, 21 I&N Dec. 860, 863 (BIA 1997) (declining to find that the applicant had a well-founded fear of persecution because country conditions in Haiti had changed after President Aristide was ousted). However, a change in regime does not necessarily rebut past persecution. *See Gabuniya v. Att'y Gen.*, 463 F.3d 316, 324-25 (3d Cir. 2006) (holding that the IJ's reliance solely on the resignation of the President of Georgia as a basis to establish changed conditions was insufficient). In addition, the simple passage of time does not constitute a sufficient rebuttal of past persecution. *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003) (reversing the IJ in a coercive family planning case, finding that "passage of time since the forced sterilization . . . coupled with the lack of enforcement of coercive family planning measures during that period" did not constitute a fundamental change sufficient for rebuttal because forced sterilization is a permanent and continuing act of persecution").

The fundamental change in circumstances standard may also apply to personal changes that affect the applicant's well-founded fear. *See* 8 C.F.R. § 208.13(b)(1)(i)(A) (noting that a fundamental change in personal circumstances is contemplated in the regulations "so long as those changes are fundamental in nature and go to the basis of the fear of persecution"). Information about general changes in the country, as evidenced in a U.S. Department of State Country report, for example, is not sufficient to rebut an applicant's specific grounds for his or her well-founded fear of future persecution. *Berishaj v. Ashcroft*, 378 F.3d 314, 326-28 (3d Cir. 2004) (finding that the use of generalized information is not permissible where no explanation was given as to how or why the Department of State report rebutted the claim).

b. Safe Relocation

The presumption of a well-founded fear of future persecution may also be overcome if the DHS demonstrates that the applicant could avoid future persecution by relocating to another part of the country and that it would be reasonable to do so. 8 C.F.R. § 1208.13(b)(1)(i)(B); *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012) (setting forth criteria to determine whether applicant has the ability to relocate and whether relocation is reasonable). DHS must show that there is a specific area of the country where the risk of persecution to the applicant falls below the well-founded fear level. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012). If evidence indicates that the area may not be practically, safely, or legally accessible, DHS also bears the burden to show, by a preponderance of the evidence, that the area is or could be made accessible to the applicant. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012).

When determining whether it is reasonable to expect an applicant to relocate, the court considers (among other factors) "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. §1208.13(b)(3); *see Etugh v. INS*, 921 F.2d 36, 39 (3d Cir. 1990) (holding that a Nigerian applicant who feared tribal conflict in his hometown, a very small area in Nigeria, was not eligible for asylum); *Abdille v. Ashcroft*, 242 F.3d 477, 487 (3d Cir. 2001) (holding that the evidence in the record did not support petitioner's claim of well-founded fear of future persecution throughout South Africa but remanded on other grounds); *Matter of C-A-L-*, 21 I&N Dec. 754, 757-58 (BIA 1997) (finding that where the problem was confined to the applicant's hometown, he failed to establish countrywide persecution); *Matter of A-B-*¸27 I&N Dec. 316, 345 (A.G. 2018) (noting that victims who have suffered personal harm at the hands of only a few specific individuals face a challenge in answering DHS's evidence that relocation is possible).

Where the persecutor is the government, persecution is government-sponsored, and the applicant has established past persecution, it is presumed that internal relocation is unreasonable unless DHS establishes by a preponderance of the evidence that relocation is reasonable. 8 C.F.R. § 1208.13(b)(3); *Gambashidze v. Ashcroft*, 381 F.3d 187, 192-94 (3d Cir. 2004) (finding that the government must prove that relocation would be successful and reasonable).

6. Humanitarian Asylum

An IJ should consider an applicant's eligibility for humanitarian asylum, where the applicant has established past persecution but no longer has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(iii); *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464, 465-66 (BIA 2008) (holding that a Somali mother and daughter who suffered FGM and continued to suffer side effects were entitled to humanitarian asylum). Before a Respondent can be granted humanitarian asylum, he or she must have demonstrated past persecution and must have thus proven that he or she is a "refugee" under the INA. *See* 8 C.F.R. § 1208.13(b)(1)(iii); *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012).

Humanitarian asylum may be granted if the applicant either (1) demonstrates that he or she has "compelling reasons," arising out of the severity of the past persecution, for being unable or unwilling to return to his or her country; or (2) establishes that there is a reasonable possibility that he or she may suffer "other serious harm" upon removal to that country. 8 C.F.R. § 1208.13(b)(1)(iii)(A)-(B); *Matter of L-S-*, 25 I&N Dec. 705, 710-15 (BIA 2012). An asylum applicant bears the burden of proof to show that either form of humanitarian asylum is warranted. *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012). In determining eligibility for humanitarian asylum, the Court must consider the "totality of the circumstances" on a case-by-case basis. *Matter of L-S-*, 25 I&N Dec. 705, 715 (BIA 2012).

Humanitarian asylum based on "compelling reasons" is warranted if the applicant demonstrates that in the past he or she or his or her family "suffered under atrocious forms of persecution." *Matter of N-M-A-*, 22 I&N Dec. 312, 325 (BIA 1998) (considering the degree of harm suffered, the length of time over which the harm was inflicted, and evidence of severe

psychological trauma stemming from the harm); *see also Matter of Chen*, 20 I&N Dec. 16 (BIA 1989) (granting humanitarian asylum to an applicant who suffered severe persecution in the past, leaving him physically debilitated, anxious and fearful, and often suicidal); *Matter of B-*, 21 I&N Dec. 66, 72 (BIA 1995) (finding humanitarian asylum was warranted where an applicant had been imprisoned for political reasons for thirteen months under "deplorable" conditions, was tortured, and was psychologically abused during detention); *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465-66 (BIA 2008) (finding applicants who had undergone female genital mutilation in Somalia with aggravating circumstances were eligible for humanitarian asylum because they had suffered "an atrocious form of persecution that result[ed] in continuing physical pain and discomfort.").

If the applicant fails to establish "compelling reasons" for the discretionary grant of humanitarian asylum, he or she may nevertheless be eligible for such relief if he or she can establish that there is a "reasonable possibility" that he or she may suffer "other serious harm" in the country of removal. 8 C.F.R. § 1208.13(b)(1)(iii)(B).

First, "other serious harm" need not be inflicted on account of a protected ground and it may be wholly unrelated to the past harm. *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012). Second, the past harm must be "so serious that it equals the severity of persecution," but it need not have been "atrocious" as required under the "compelling reasons" provision of 8 C.F.R. § 1208.13(b)(1)(iii)(A). *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012). Third, the focus should be on current country conditions and the potential for new physical or psychological harm that the applicant might suffer. *Matter of L-S-*, 25 I&N Dec. at 714; *see also Pllumi v. Att'y Gen.*, 642 F.3d 155, 162-63 (3d Cir. 2011) (stating that harm resulting from the unavailability of necessary medical care could constitute "other serious harm" in extreme circumstances).. Relevant country conditions include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the applicant could experience severe mental or emotional harm or physical injury. *Matter of L-S-*, 25 I&N Dec. 705, 714-15 (BIA 2012). *But see Sheriff v. Att'y Gen.*, 587 F.3d 584, 593 (3d Cir. 2009) (stating that mere economic disadvantage or the inability to practice one's chosen profession does not qualify as "other serious harm."). Finally, the asylum applicant need only establish a "reasonable possibility" of such "other serious harm"; a showing of "compelling reasons" is not required under 8 C.F.R. § 1208.13(b)(1)(iii)(B). *Matter of L-S-*, 25 I&N Dec. 705, 715 (BIA 2012).

7. Well-Founded Fear of Future Persecution

If an applicant cannot establish past persecution, he or she may nonetheless demonstrate statutory eligibility for asylum by establishing that he or she has a well-founded fear of future persecution on account of one of the protected grounds. 8 C.F.R. § 1208.13(b)(2). To establish a well-founded fear of future persecution, the applicant must establish that he or she has a subjective fear of persecution and that the fear is objectively reasonable. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *Voci v. Gonzales*, 409 F.3d 607 (3d Cir. 2005).

i. Subjective Fear of Persecution

The subjective prong requires a showing that the fear is genuine. *Ghebrehiwot v. Att'y Gen.*, 467 F.3d 344, 351 (3d Cir. 2006) (quoting *Mitev v. INS*, 67 F.3d 1325, 1331 (7th Cir.1995)). Credible testimony by an applicant of his or her subjective fear of persecution may be enough to satisfy the subjective component, depending on the circumstances. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

ii. Objective Fear of Persecution

Once a subjective fear of persecution is established, the applicant must then show that such fear is grounded in reality to meet the objective element of the test—that is, he or she must present credible, specific and detailed evidence that a reasonable person in his or her position would fear persecution. *Voci v. Gonzales*, 409 F.3d 607, 609 (3d Cir. 2005). The applicant must demonstrate either that he or she will be individually singled-out for persecution, or that there is a pattern or practice of persecution of individuals similarly-situated to him or her on account of one of the statutorily protected grounds. 8 C.F.R. § 208.13(b)(2)(iii)(A). *Elias-Zacarias*, 502 U.S. 478, 480 (1992); *Ghebrehiwot v. Att'y Gen.*, 467 F.3d 344, 351 (3d Cir. 2006); *Gao v. Ashcroft*, 299 F.3d 266 (3d Cir. 2002). In demonstrating the latter, the applicant must also show that he or she is included in and identifies with that group, such that his or her "fear of persecution upon return is reasonable." 8 C.F.R. § 1208.13(b)(2)(iii). The BIA has explained that in order to state a "pattern or practice" claim, an applicant must demonstrate that the persecution against the group in which he or she is included is "systemic or pervasive." *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005); *Ghebrehiwot v. Att'y Gen.*, 467 F.3d at 353-55 (holding that a remand was necessary where an IJ focused only on past persecution and failed to consider a Department of State report and 30 other documents submitted by Eritrean Pentecostal Christian that possibly demonstrated a pattern or practice of persecution); *Sukwanputra v. Gonzales*, 434 F.3d 627, 627 (3d Cir. 2006) (reversing IJ for failing to consider whether Indonesian of Chinese ethnicity is subject to pattern or practice); *Sioe Tjen Wong v. Att'y Gen.*, 539 F.3d 225, 232-35 (3d Cir. 2008) (holding that a pattern or practice claim requires a showing that persecution is systemic, pervasive, or organized). Harm resulting from country-wide civil strife and anarchy is not persecution on one of the five enumerated grounds. *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

The persecutor's knowledge of the applicant's activities, or the likelihood that he would become aware of the applicant, is a consideration. *See Myat Thu v. Att'y Gen.*, 510 F.3d 405 (3d Cir. 2007) (finding that political activities in Japan with BDA and in Burma with the NLD may establish a basis for asylum if the Burmese military was aware of the applicant, which was likely since DOS reports and letters indicated that the Burmese military would be aware of the applicant's activities).

There must be a "reasonable possibility," but not a certainty, that the applicant will suffer persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987); 8 C.F.R. § 1208.13(b)(2). "Reasonable," as interpreted by the U.S. Supreme Court, means a one in ten chance of suffering persecution. *See INS v. Cardoza-Fonseca*, 480 U.S. at 430-31; *see also* 8 C.F.R. § 1208.13(b)(2).

An applicant is not required to prove that he fled his country due to persecution if he has a valid claim now. *Chang v. INS,* 119 F.3d 1055, 1068 (3d Cir. 1997) (granting asylum where the fear of persecution arose only once the petitioner was in the United States).

Evidence concerning treatment of the applicant's family or similarly situated friends may be probative of a threat against the applicant. *See Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005) (noting that "when family members remain in petitioner's native country without meeting harm, and there is no individualized showing that petitioner would be singled out for persecution, the reasonableness of a petitioner's well-founded fear of future persecution is diminished."); *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (holding that the reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure); *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990) (holding that applicant and his immediate family members were singled out and threatened with death by a "Death Squad," and whose brother was subsequently slain in a noncombat situation, demonstrated a well-founded fear of persecution). *But see Matter of A-K-*, 24 I&N Dec. 275, 278-79 (BIA 2007) (holding that an applicant may not establish eligibility for asylum or withholding of removal based solely on his fear that his two United States citizen daughters would be forced to undergo FGM upon return to their home country of Senegal).

iii. Internal Relocation

In order to establish a well-founded fear of future persecution, the applicant has the burden of demonstrating that it would not be reasonable to internally relocate. 8 C.F.R. § 208.13(b)(2)(ii) ("An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality . . . if under all of the circumstances it would be reasonable."); *Matter of C-A-L-*, 21 I&N Dec. 754, 757-58 (BIA 1997) (finding no well-founded fear of future persecution where the problem was confined to an applicant's hometown); *Matter of A-B-*, 27 I&N Dec. 316, 344 (A.G. 2018) (noting that immigration judges must consider, consistent with the regulations, whether internal relocation in the alien's home country presents a reasonable alternative before granting asylum). Criteria for reasonableness of relocation include, but are not limited to, whether the applicant would face other serious harm in place of relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints such as age, gender, health and social and familial ties. 8 C.F.R. § 208.13(b)(3); *Patel v. Att'y Gen.*, 454 F. App'x 91 (3d Cir. Dec. 5, 2011) (holding that a Hindu citizen of India failed to show a fear of future persecution where country reports showed that political party of which alien was a member had become the dominant political force in India's western state of Gujarat, shift in power plausibly neutralized whatever threat alien would have faced in Gujarat, and alien could avoid future persecution by relocating to another part of India); *Matter of A-B-*, 27 I&N Dec. 316, 344 (A.G. 2018) (noting that when the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government).

8. Discretion

The applicant who establishes statutory eligibility for asylum still bears the burden of demonstrating that he or she merits a grant of asylum as a matter of discretion. *See* INA § 208(b)(1); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (noting that the Attorney General is not required to grant asylum to everyone who meets the refugee definition). In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered and the decision should be based on the totality of the circumstances. *See Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987); *see also Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996) (considering humanitarian factors, such as age, health, or family ties, in the exercise of discretion). The danger of persecution should outweigh all but the most egregious adverse factors. *See Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987). The applicant may even warrant a grant of asylum in the exercise of discretion where there is little likelihood of future persecution. *Matter of Chen*, 20 I&N Dec. 16, 21-22 (BIA 1989) (granting asylum to the alien who suffered severe past persecution in China and demonstrated other compelling factors to warrant a favorable exercise of discretion). When an IJ denies asylum solely in the exercise of discretion and grants withholding of removal, 8 C.F.R. § 1208.16(e) requires that he or she reconsider the denial to take into account factors relevant to family unification. *Matter of T-Z-*, 24 I&N Dec. 163, 176 (BIA 2007).

The Attorney General stated in *dicta*, that a relevant discretionary factors include, *inter alia*, the circumvention of orderly refugee procedures; whether an alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether she made attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and her living conditions, safety, and potential for long-term residency there. *Matter of A-B-*, 27 I&N Dec. 316, 345 n.12 (A.G. 2018).

II. WITHHOLDING OF REMOVAL UNDER INA § 241(b)(3)

A. General Principles

1. Reinstatement Proceedings – Withholding Only under INA § 241(a)(5)

i. Eligibility for Asylum in Reinstatement Proceedings

An alien subject to a reinstated order of removal is not eligible to apply for asylum, but may apply for withholding under the INA and relief under the Convention Against Torture. 8 C.F.R. § 1208.31(e). *See also Cazun v. Att'y Gen.*, 856 F.3d 249 (3d Cir. 2017); *Matter of L-M-P-*, 27 I&N Dec. 265, 269-70 (BIA 2018) (finding that the IJ erred in granting asylum to an applicant who was subject to a reinstated order of removal and in withholding of removal only proceedings). In *Cazun v. Attorney General*, the Third Circuit found that the Attorney General's interpretation of the INA, found at 8 C.F.R. § 1208.31(e), that aliens subject to reinstated removal proceedings are ineligible to apply for asylum, is a reasonable interpretation of the statutory scheme, despite existence of apparently conflicting INA provisions, and is thus entitled to Chevron deference. *Cazun v. Att'y Gen.*, 856 F.3d 249, 259 (3d Cir. 2017).

2. Credibility

As with asylum, a threshold determination must be made as to the credibility of the applicant for withholding of removal. INA § 241(b)(3)(C); INA §§ 208(b)(1)(B)(ii)- (iii).[28] The applicant's credible testimony alone may be sufficient to sustain his or her burden of proof. 8 C.F.R. § 1208.16(b).

[For further discussion, *see Asylum – Credibility*]

3. Corroboration

As with asylum, an applicant for withholding of removal under INA § 241(b)(3) bears the evidentiary burden of proof and persuasion. INA §§ 241(b)(3)(C), 208(b)(1)(B)(ii) – (iii); 8 C.F.R. § 1208.16(b); *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985), *modified on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987). Thus, a credibility determination is independent of an analysis of the sufficiency of the applicant's evidence. *Chen v. Gonzales*, 434 F.3d 212, 221 (3d Cir. 2005); INA §§ 241(b)(3)(C); 208(b)(1)(B)(ii). INA § 241, the withholding of removal provision, refers to the corroboration provision contained in INA § 208, indicating that withholding applicants must comply with the same corroboration requirement as asylum applicants.

[For further discussion, *see Asylum – Corroboration*]

4. Statutory Eligibility

An applicant for withholding of removal must demonstrate that, if returned to his or her country, his or her life or freedom would be threatened on account of one of the protected grounds. INA § 241(b)(3). Though factually related to an asylum claim, the standard for withholding of removal is more stringent than the standard for asylum. *See INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Kaita v. Att'y Gen.*, 522 F.3d 288, 296 (3d Cir. 2008). The applicant must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he or she will be subject to persecution on account of a protected ground if returned to the country from which he or she seeks withholding of removal.[29] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *see also Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 591 (3d Cir. 2011). Furthermore, like an asylum applicant, a withholding applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least "one central reason" for the persecution. *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010); *Gonzalez-Posadas v. Att'y Gen.*, 781 F.3d 677, 685 n.6 (3d Cir. 2015) ("We believe the Board's decision in *Matter of C-T-L-* to extend the 'one central reason' test to withholding of removal was sound and we likewise adopt that conclusion now."); INA § 208(b)(1)(B). There is no discretionary element. Therefore, if the applicant establishes eligibility, withholding of removal must be granted. *INS v. Ventura*, 537 U.S. 12, 13 (2002).

Where an asylum claim is denied on the ground that an applicant failed to meet the applicable burden of proof, the applicant necessarily fails to meet the higher burden of proof for a withholding claim. *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 591 (3d Cir. 2011). In

the absence of a grant of asylum, withholding of removal pursuant to INA § 241(b)(3) may not be granted without first entering a removal order. *See Matter of I-S- & C-S-*, 24 I&N Dec. 432, 433 (BIA 2008).

As with asylum, an applicant for withholding is not required to provide evidence that he or she would be "singled out individually" for persecution in the country of removal if he or she establishes that in the country of removal "there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion," and that he or she is included in and identifies with that group, "such that it is more likely than not that his or her life or freedom would be threatened upon return to that country." 8 C.F.R. § 1208.16(b)(2).

[For further discussion, *see Asylum – Statutory Eligibility for Asylum*]

Under INA § 241(b)(3), an applicant may not be removed to *any* country where his or her life or freedom would be threatened because of his or her race, religion, nationality, membership in a particular social group, or political opinion, so it is not required that the applicant establish that he or she is a national or citizen of the country or countries in question. INA § 241(b)(3)(A).

5. Presumption

If an applicant demonstrates past persecution in the proposed country of removal, a regulatory presumption arises that the applicant her life or freedom would be threatened in the future in the country of removal on the basis of the original claim. 8 C.F.R. § 1208.16(b)(1)(i). Additionally, if an applicant proves past persecution, it is presumed that internal relocation would be unreasonable unless DHS establishes by a preponderance of the evidence that under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.16(b)(3)(ii). If the persecutor was a government or is "government-sponsored," a presumption arises that internal relocation is unreasonable. 8 C.F.R. § 1208.16(b)(3)(ii). DHS may rebut the presumption of future persecution by establishing by a preponderance of the evidence that a fundamental change in circumstances has occurred in that country, or that the applicant could safely relocate to another area in the proposed country of removal and that it would be reasonable to expect him or her to do so. 8 C.F.R. § 1208.16(b)(1)(i)-(ii); *Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008).

The IJ must make a specific determination of whether Respondent has established past persecution on account of a particular statutorily enumerated ground by a particular persecutor. *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008).

An applicant who has not demonstrated past persecution may demonstrate that his or her life or freedom would be threatened in the future by establishing that it is more likely than not that he or she would be persecuted on one of the five protected grounds. 8 C.F.R. § 1208.16(b)(2). Unlike a past persecution case, an applicant asserting fear of future persecution bears the burden of establishing that it would not be reasonable to relocate, unless the persecutor is a government or is government sponsored. 8 C.F.R. § 1208.16(b)(3)(i). As with asylum, internal relocation is presumed to be unreasonable where the persecutor is a government or is

"government sponsored," unless DHS can show, by a preponderance of the evidence, that under all the circumstances, relocation is reasonable. 8 C.F.R. § 1208.16(b)(3)(ii). In determining the reasonableness of internal relocation, the court considers, among other factors, "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. §1208.16(b)(3).

6. No Derivative Claim

While a derivative asylum claim is possible, the INA does not permit a derivative withholding of removal under any circumstances. *See Matter of A-K-*, 24 I&N Dec. 275, 279 (BIA 2007) ("Furthermore, while section 208(b)(3)(A) of the Act provides for derivative asylum in certain circumstances, the Act does not permit derivative withholding of removal under any circumstances.").

H. Statutory Bars to Withholding of Removal

[See additional language under ASYLUM on each of these bars to relief]

An applicant is precluded from applying for relief under INA § 241(b)(3) if he or she ordered, incited, assisted, or otherwise participated in the persecution of others, if he or she was convicted of a particularly serious crime, if there are serious reasons to believe he or she committed a serious nonpolitical crime outside of the United States, or if there are reasonable grounds to believe he or she is a danger to the security of the United States. INA § 241(b)(3)(B)(i)-(iv). If the evidence indicates that one of the bars to withholding apply, the burden shifts to the applicant to prove by a preponderance of the evidence that the grounds are inapplicable. 8 C.F.R. § 1208.16(d)(2). Unlike asylum, there is no filing deadline for applications for withholding of removal, and firm resettlement is not a bar to withholding of removal. *See Matter of D-X- & Y-Z-*, 25 I&N Dec. 664, 669 (BIA 2012) (finding that although firm resettlement is "a mandatory bar to asylum," it "does not preclude eligibility for withholding of removal under section 241(b)(3) of the Act.").

1. No One-Year Limit

The one-year filing deadline for applying for asylum does not apply to applications for withholding of removal, and therefore, a person whose life or freedom is in danger my file for withholding of removal under INA § 241(b)(3) even more than one year after his or her arrival in the United States. INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a).

2. Particularly Serious Crime

An alien is ineligible for withholding of removal if he or she has been convicted of a particularly serious crime. INA § 241(b)(3)(B)(ii). The bar to withholding of removal for conviction for a particularly serious crime is not identical to the bar in the asylum context.

i. *Per Se* Particularly Serious Crime Bar

For withholding of removal, an alien has been *per se* convicted of a particularly serious crime if he or she has been convicted of one or more aggravated felonies that result in an aggregate prison sentence of at least five years. INA § 241(b)(3)(B)(iv).

a. Measuring "Aggregate Term of Imprisonment"

The INA defines "term of imprisonment" as including "the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence* in whole or in part." INA § 101(a)(48)(B) (emphasis added); *see also Drakes v. Zimski*, 240 F.3d 246, 251 (3d Cir. 2001). Therefore, the actual length of confinement ordered by the court is what counts, even if the execution of sentence is suspended and the defendant does not serve any actual time in jail. *Drakes v. Zimski*, 240 F.3d 246, 251 (3d Cir. 2001).

A sentence to probation is distinct from a suspended imprisonment sentence. *See Matter of Martin*, 18 I&N Dec. 226 (BIA 1982) (finding that a sentence to probation is not considered a sentence to confinement); *see also United States v. Martinez-Villalva*, 232 F.3d 1329, 1332-34 (10th Cir. 2000) (finding that where the government could not prove that the sentence was a suspended sentence as opposed to probation, there was no aggravated felony); *C.f. Salazar Quiceno v. Att'y Gen.*, 304 F. Appx 40, 42 (3d Cir. Dec. 17, 2008); *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) (finding that where a person sentenced to probation violates the probation resulting in an 18-month incarceration, was not sentenced to imprisonment); and *United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999) (finding that being sentenced to probation does not meet the definition of aggravated felony).

For purposes of determining an "aggregate term of imprisonment" pursuant to INA § 241(b)(3)(B), concurrent sentences should not be added together, but rather should equal the length of the longest concurrent sentence. *See Matter of Aldabesheh*, 22 I&N Dec. 983, 988-89 (BIA 1999).

ii. Discretionary Particularly Serious Crime Bar

An aggravated felony for which the alien has been sentenced to less than five years imprisonment is not a particularly serious crime *per se*; rather, "it [is] left up to the Attorney General" to make the determination. *Lavira v. Att'y Gen.*, 478 F.3d 158, 161 (3d Cir. 2007), *overruled on other grounds by Pierre v. Att'y Gen.*, 528 F.3d 180 (3d Cir. 2008).

In *Alaka v. Attorney General*, the Third Circuit held that an offense must be an aggravated felony to constitute a particularly serious crime for withholding of removal. 456 F.3d 88 (3d Cir. 2006). However, the BIA rejected the Third Circuit's *Alaka* holding in *Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012), stating that *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007) should apply in the Third Circuit. In *Matter of N-A-M-*, the BIA held that an offense need not be an aggravated felony to constitute a particularly serious crime for either asylum or

withholding of removal; rather, the court should consider both the nature of the crime and the circumstances underlying the conviction.[30] 24 I&N Dec. 336, 342 (BIA 2007)

To determine whether Respondent's conviction constitutes a particularly serious crime, the court considers the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction. *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999), *overruled in part*, *Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (AG 2002). The court considers the nature of the crime, and not the likelihood of future serious misconduct. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007). The Third Circuit quoted the BIA in explaining that

> [i]f the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal. On the other hand, once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.

Denis v. Att'y Gen., 633 F.3d 201, 215 (3d Cir. 2011) (quoting *Matter of N-A-M-*, 24 I&N Dec. at 342). The BIA emphasized that no decision "has ever suggested that the categorical approach, used primarily in determining removability, is applicable to the inherently discretionary determination of whether a conviction is for a particularly serious crime." *Denis v. Att'y Gen.*, 633 F.3d 201, 215 (3d Cir. 2011) (quoting *Matter of N-A-M-*, 24 I&N Dec. at 344).

Because the analysis hinges on the crime that was committed, the "inquiry does not involve an examination of an alien's personal circumstances and equities, such as family or communal ties or any risk of persecution in the country of removal." *Matter of G-G-S-*, 26 I&N Dec. 339, 343 (BIA 2014) (citing *Matter of L-S-*, 22 I&N Dec. 645, 651 (BIA 1999); *Matter of Q-T-M-T-,* 21 I&N Dec. 639, 656 (BIA 1996); *Matter of K-,* 20 I&N Dec. 418, 418-21 (BIA 1991); *Matter of Rodriguez-Coto*, 19 I&N Dec. 208, 209-10 (BIA 1985)). Rehabilitation is also irrelevant to the analysis. *Matter of R-A-M-*, 25 I&N Dec. 657, 662 (BIA 2012) (citing *Matter of S-S-*, 22 I&N Dec. 458, 466 (BIA 1999)). The sentence imposed may be considered, but it is not a "dominant factor" because issues unrelated to the commission of the offense are considered in sentencing. *Matter of N-A-M-*, 24 I&N Dec. 336, 343 (BIA 2007) (citing *Matter of Y-L-*, *A-G-,* & *R-S-R-*, 23 I&N Dec. 270, 273-74, 277-78 (AG 2002)). Instead, the BIA held that, the extent of harm suffered by the victim is a "pertinent factor" in the analysis, as is whether the nature of the crime suggests that the alien represents a danger to the community. *Matter of G-G-S-*, 26 I&N Dec. 339, 343 (BIA 2014); *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986).

a. Mental Health

[30] To date, the Third Circuit has acknowledged the BIA's holding in *Matter of M-H-* in two unpublished decisions, but has not otherwise addressed the issue. *See Aguilar v. Att'y Gen.*, 665 Fed.Appx. 184 (3d Cir. Dec. 13, 2016); *Johnson v. Att'y Gen.*, 596 Fed. Appx. 117, 123 n.7 (3d Cir. Dec. 17, 2014).

The BIA also has held that a respondent's mental health at the time of the offense is not relevant to the particularly serious crime analysis. *Matter of G-G-S-*, 26 I&N Dec. 339, 346 (BIA 2014). Such issues are best dealt with in the course of the criminal proceedings, so IJs may not "go behind the decisions of the criminal judge and reassess any ruling on criminal culpability." *Matter of G-G-S-*, 26 I&N Dec. 339, 345 (BIA 2014). An alien's claim that a violent offense was a result of his or her mental illness does not "lessen the danger that his actions posed to others" and thus has no bearing on a particularly serious crime determination. *Matter of G-G-S-*, 26 I&N Dec. 339, 346 (BIA 2014).

b. Controlled Substance Aggravated Felonies

The Attorney General has held that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute particularly serious crimes within the meaning of INA § 241(b)(3)(B)(ii). *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270, 274 (AG 2002); *Matter of G-K-*, 26 I&N Dec. 88, 96 (BIA 2013) (finding that a respondent convicted of conspiracy with intent to distribute and possess with intent to distribute at least a kilogram of heroin is statutorily barred under the INA). This presumption can be rebutted "[o]nly under the most extenuating circumstances that are both extraordinary and compelling." *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270, 274 (AG 2002). Such a rebuttal must include at a *minimum*, evidence of *all* of the following: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles. *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270, 276-77 (AG 2002). Only if all six criteria are demonstrated by an alien would it be appropriate to consider whether other, more unusual circumstances might justify departure from the default interpretation that drug trafficking felonies are particularly serious crimes. *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270, 277 (AG 2002)

Because there are a number of non-violent white collar criminal offenses that are aggravated felonies punishable by at least five years' imprisonment, a financial crime may be a particularly serious crime. *Kaplun v. Att'y Gen.*, 602 F.3d 260, 267 (3d Cir. 2010); INA § 241(b)(3)(B).

3. Serious Nonpolitical Crime

An applicant is statutorily ineligible for asylum and withholding of removal if there are serious reasons to believe that he or she committed a serious nonpolitical crime outside of the United States prior to his or her arrival in the United States. INA § 241(b)(3)(B)(iii). The analysis is the same as the asylum context. *See Matter of E-A-*, 26 I&N Dec. 1, 2 (BIA 2012) (using the same standard for asylum and withholding of removal contexts).

[For further discussion, *see Asylum – Statutory Bars to Asylum – Serious Nonpolitical Crime*]

4. Danger to the Security of the U.S.

A court may not grant withholding of removal to an alien if the Attorney General decides that there are reasonable grounds to believe that the alien is a danger to the security of the United States. INA § 241(b)(3)(B)(iv); 8 C.F.R. § 1208.16(d)(2).

An alien described in INA § 237(a)(4)(B), *i.e.* a terrorist as defined under INA §§ 212(a)(3)(B) and (F), shall be considered an alien for which there are reasonable grounds for regarding as a danger to the security of the United States. INA § 241(b)(3)(B).

[For further discussion, *see Asylum - Danger to the Security of the U.S.*]

5. Persecutor Bar

An applicant is ineligible for withholding of removal under INA § 241(b)(3) if he or she has ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion. INA § 241(b)(3)(B)(i). In *Matter of A-H-*, the Attorney General established a broad standard for determining whether an applicant for withholding of removal participated in the persecution of others. 23 I&N Dec. 774, 783-85 (AG 2005). Assistance does not require "direct personal involvement in the act of persecution." *Matter of A-H-*, 23 I&N Dec. 774, 784-85 (AG 2005). Rather, "in certain circumstances statements of encouragement alone can suffice." *Matter of A-H-*, 23 I&N Dec. 774, 784-85 (AG 2005).

[For further discussion, *see Asylum – Persecutors*]

III. WITHHOLDING/ DEFERRAL OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

Under Article 3 of Convention Against Torture ("CAT"), "[n]o State Party shall . . . expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, art. 3(1), 1465 U.N.T.S. 85, 113. To be eligible for withholding of removal under the CAT, an applicant must demonstrate that it is more likely than not that he or she would be subject to torture if returned to his or her home country. 8 C.F.R. § 1208.16. If an applicant satisfies that burden, withholding of removal or deferral of removal is mandatory. 8 C.F.R. §§ 1208.16–1208.18.

A. Credibility

An adverse credibility finding does not necessarily mandate a denial of a claim under the CAT. *See Zubeda v. Ashcroft*, 333 F.3d 463, 467 (3d Cir. 2003) (finding that because a claim under the CAT is analytically distinct from an asylum claim, the court cannot deny the alien's CAT claim solely on the basis of an adverse credibility finding related to the alien's asylum claim). However, the factual basis of the application for relief under the CAT is the same as the

application for withholding of removal INA § 241(b)(3). *See Jishiashvili v. Att'y Gen.*, 402 F.3d 386, 392 (3d Cir. 2005).

B. Burden of Proof

The burden of proof in a CAT claim is the same as withholding of removal under INA § 241(b)(3), which requires the applicant to prove that he or she is "more likely than not" to be subject to torture upon removal and allows proof of a claim by the applicant's own testimony, if credible, without corroboration. 8 C.F.R. § 1208.16(c)(2); *see also Matter of M-B-A-*, 23 I&N Dec. 474, 479 (BIA 2002) (finding that the applicant failed to establish eligibility for deferral of removal under CAT because evidence of enforcement of a Nigerian law was insufficient to demonstrate that it was more likely than not that she will be tortured by a public official); *Matter of G-A-*, 23 I&N Dec. 366, 369 (BIA 2002) (holding that an Iranian Christian of Armenian descent demonstrated eligibility for deferral of removal under CAT by establishing that it is more likely than not that he will be tortured if deported to Iran based on a combination of factors, including his religion, his ethnicity, the duration of his residence in the United States, and his drug-related convictions in this country).

In assessing whether the applicant has satisfied the burden of proof, the court must consider all evidence relevant to the possibility of future torture, including evidence that the applicant has suffered torture in the past; evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured[31]; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information on country conditions. 8 C.F.R. § 1208.16(c)(3); *see also Pieschacon-Villegas v. Att'y Gen.*, 671 F.3d 303, 313 (3d Cir. 2011). Reports of generalized brutality within a country do not necessarily show that a particular person would be in danger of being subjected to torture upon his or her return to that country. *Zubeda v. Ashcroft*, 333 F.3d 463, 478 (3d Cir. 2003). Specific grounds must exist to indicate that the applicant will be personally at risk of torture. *Sevoian v. Ashcroft,* 290 F.3d 166 (3d Cir. 2002); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 592 (3d Cir. 2011) (citing *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000)); *Matter of G-K-*, 26 I&N Dec. 88, 97 (BIA 2013) (rejecting a deferral of removal CAT claim based on the respondent's wife receiving phone calls containing non-specific non-serious threats and the respondent's failure to demonstrate that an assault on his nephew was more than a random and unrelated act of violence). Eligibility for relief under the CAT cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (AG 2006); *see also Matter of M-B-A-*, 23 I&N Dec. 474, 479 (BIA 2002) (rejecting a CAT claim based upon a chain of assumptions and the applicant's subjective fear of what might happen).

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[31] Unlike the burden shifting in the asylum context, there is no burden on DHS to prove relocation and there is no burden on the applicant to demonstrate that relocation within the proposed country of removal is unreasonable or impossible. Under 8 C.F.R. § 1208.16(c)(3), relocation is simply one factor to consider along with all the relevant evidence.

The likelihood of future torture is a mixed question of law and fact. *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010). The court must examine two distinct parts: 1) what is likely to happen to the respondent if removed; and 2) does what is likely to happen amount to the legal definition of torture?" *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010). The first question is factual and the court must make a finding of fact as to what exactly would happen to an applicant upon his or her return. *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010). For example, "[a] finding that a petitioner is likely to be imprisoned (based, for instance, on the evidence of gross violations of human rights in the country of removal) is a finding of fact." *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010). The second question is legal and the court must determine whether what is likely to happen to the applicant upon his or her return amounts to torture. Torture is a term of art, and whether imprisonment, beating, and extortion are severe enough to rise to the level of torture is a legal question. *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010).

Nonetheless, if the court determines that the applicant has failed to demonstrate the second prong, in that the harm he or she would suffer does not amount to the legal definition of torture, there is no need to make a factual finding as to the first prong. *Green v. Att'y Gen.*, 694 F.3d 503, 508 (3d Cir. 2012) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25, 97 S.Ct. 200, 50 L.Ed.2d 190 (1976) (stating that "[a]s a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.")).

1. Definition of Torture

Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind . . ." 8 C.F.R. § 1208.18(a)(1). The regulations further instruct that "[t]orture is an extreme form of cruel and inhuman treatment, [which] does not include lesser forms of cruel, inhuman or degrading treatment or punishment." 8 C.F.R. § 1208.18(a)(2). In addition, torture does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions." 8 C.F.R. § 1208.18(a)(2).

For an act to constitute torture under the CAT, it must be (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for an illicit or proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or control of the victim; and (5) not arising from lawful sanctions. *Auguste v. Ridge*, 395 F.3d 123, 151 (3d Cir. 2005) (citing *Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002)); *see also* 8 C.F.R. § 208.18(a)(1).

Rape may constitute torture under CAT. *See Kaita v. Att'y Gen.*, 522 F.3d 288 (3d Cir. 2008). The requirement that returning illegal immigrants pay a fine does not fit within the definition of "torture." *Wang v. Ashcroft*, 368 F.3d 347 (3d Cir. 2004). The BIA and Third Circuit have yet to determine whether forced sterilization amounts to torture; however, the Second Circuit found that it is an error to dismiss a CAT claim based on China's family planning

policies without consideration of whether such mistreatment falls within the torture definition. *Shu Ling Ni v. INS*, 439 F.3d 177, 179-80 (2d Cir. 2006); *Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 522-23 (2d Cir. 2005).

2. Specific Intent

An applicant seeking relief under the CAT need not establish that he or she is a refugee and, therefore, need not establish that the torture is inflicted on account of a protected status. *See Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003). Rather, he or she must show that the act is specifically intended to inflict severe physical or mental pain or suffering. *Pierre v. Att'y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008). Specific intent requires the applicant to show that the "prospective torturer will have the motive and purpose to cause him pain or suffering." *Pierre v. Att'y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008); *see also Roye v. Att'y Gen.*, 693 F.3d 333, 341 (3d Cir. 2012) (determining that the BIA erred in requiring the respondent to demonstrate that the specific intent of the Jamaican government was to cause him severe pain and suffering, instead of focusing on whether the physical and sexual abuse that mentally ill prisoners experience was specifically intended *by the torturers* to cause pain and so may qualify as torture); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002) (holding that the indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture). Specific intent requires a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act. *Pierre v. Att'y Gen.*, 528 F.3d at 189. "Mere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture." *Id.*

Generally poor prison conditions are not enough to establish that government officials had specific intent to commit torture. *See Auguste v. Ridge*, 395 F.3d 123, 138-47 (3d Cir. 2005); *see also Pierre v. Att'y Gen.*, 528 F.3d 180, 189 (3d Cir. 2008) (holding that the lack of medical care and the pain that the applicant will likely experience is an unintended consequence of the poor conditions in Haitian prisons, and not specific intent by the government); *Denis v. Att'y Gen.*, 633 F.3d 201, 207–09 (3d Cir. 2011) (holding that the alien's "unsupported speculation as to how he may appear or act, how the prison officials may potentially react, and the purported state of mind of the prison officials that may hypothetically inflict pain upon him" does not establish specific intent of torture); *Matter of J-E-*, 23 I&N Dec. 291, 301 (BIA 2002) (holding that substandard prison conditions in Haiti do not constitute torture where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture).

3. Government Acquiescence

An applicant must also establish the likelihood that he or she will be subjected to torturous acts inflicted by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity. 8 C.F.R. § 1208.18(a)(1); *Silva-Rengifo v. Att'y Gen.*, 473 F.3d 58 (3d Cir. 2007); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000); *Matter of Y-L-*,23 I&N Dec. 270 (AG 2002). The acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and breach his legal responsibility to intervene to stop such activity. 8 C.F.R. § 1208.18(a)(7); *Silva-Rengifo v.*

Att'y Gen., 473 F.3d 58, 68 (3d Cir. 2007). Awareness can be satisfied by showing that the government has actual knowledge of the torturous conduct or is willfully blind to such conduct. *See, e.g., Pieschacon-Villegas v. Att'y Gen.*, 671 F.3d 303, 311 (3d Cir. 2011); *Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 350 (3d Cir. 2008); *Silva-Rengifo v. Att'y Gen.*, 473 F.3d 58, 68 (3d Cir. 2007); *Roye v. Att'y Gen.*, 693 F.3d 333 (3d Cir. 2012).

The determination of "whether likely government conduct equates to acquiescence is a mixed question of law and fact." *Kaplun v. Att'y Gen.*, 602 F.3d 260 (3d Cir. 2010); *see also Myrie v. Att'y Gen. United States*, 855 F.3d 509, 517 (3d Cir. 2017). The IJ must conduct a two-step analysis: first, the IJ must make a factual finding as to how public officials will likely act in response to the harm the petitioner fears. *Myrie v. Att'y Gen. United States*, 855 F.3d 509, 517 (3d Cir. 2017). Next, the IJ must apply the legal standard for acquiescence to determine whether this response establishes that a public official was 'aware[] of [the torturous] activity' and subsequently breaches his or her 'legal responsibility to intervene to prevent such activity.'" *Myrie v. Att'y Gen. United States*, 855 F.3d 509, 517 (3d Cir. 2017) (citing 8 C.F.R. § 1208.18(a)(7)).

The court must also consider circumstantial evidence of willful blindness, as it may establish the government's acquiescence to future torture. *Myrie v. Att'y Gen. United States*, 855 F.3d 509, 517 (3d Cir. 2017) (remanding to the BIA for consideration of circumstantial evidence, such as sworn letters, a letter from the Panamanian Public Safety Department, and an affidavit from a former girlfriend which indicated that the Panamanian government had not taken steps to protect the petitioner or his family, that his family continued to receive threats, and that one incident had been reported to the police).

A government's opposition to or inability to control a group does not bar a showing of acquiescence to torture. *See, e.g., Pieschacon-Villegas,* 671 F.3d 303, 311 (3d Cir. 2011) (remanding to the BIA for consideration of Third Circuit precedent "that an applicant can establish governmental acquiescence even if the government opposes the paramilitary organization that is engaged in torturous acts."); *Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 351 (3d Cir. 2008) (finding that "[t]he mere fact that the Colombian government is engaged in a protracted civil war with the FARC does not necessarily mean that it cannot remain willfully blind to the torturous acts of the FARC."); *Myrie v. Att'y Gen. United States*, 855 F.3d 509, 518 (3d Cir. 2017) (noting that evidence of the government's active engagement against the group the petitioner fears, and the petitioner's failure to report a recent physical attack to the police, do not preclude the petitioner from establishing that the government was willfully blind). However, a government's ability to control groups engaged in torturous activities may be relevant to, but is not dispositive of, an assessment of willful blindness. *Pieschacon-Villegas,* 671 F.3d 303, 311-12 (3d Cir. 2011); *see also Green v. Att'y Gen.*, 694 F.3d 503 (3d Cir. 2012) (indicating that the Jamaican government's pursuit and apprehension of gang members carrying out torture fails to demonstrate willful blindness); *Valdiviezo-Galdamez v. Att'y Gen*., 663 F.3d 582, 609-12 (3d Cir. 2011) (holding that the IJ's reliance on State Department reports and media articles demonstrating that the government was opposed to gang violence provided substantial evidence that the government was not "willfully blind" to possible torture).

C. Bars to Withholding under the CAT

An applicant who establishes eligibility for CAT protection shall be granted withholding of removal unless he or she is subject to mandatory denial of that relief, in which case he or she shall be granted deferral of removal.[32] 8 C.F.R. § 1208.16(c)(4); 8 C.F.R. § 1208.17(a). An applicant is subject to mandatory denial of withholding of removal under the CAT if the applicant participated in the persecution of others, was convicted of a particularly serious crime, committed a serious nonpolitical crime outside of the United States, or if there are reasonable grounds to believe the applicant is a danger to the security of the United States.[33] 8 C.F.R. § 1208.16(d)(2); *see also* INA § 241(b)(3)(B).

An alien's criminal convictions, no matter how serious, are not a bar to deferral of removal under the CAT. *See* 8 C.F.R. § 1208.17(a); *Matter of G-A-,* 23 I&N Dec. 366, 368 (BIA 2002). In addition, there is no statutory time limit for filing a claim under the CAT.

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[32] An alien who is barred from withholding under CAT but who demonstrates that s/he is entitled to protection under the CAT shall be ordered removed, but his or her removal shall be deferred until such time as the deferral is terminated under 8 C.F.R. § 1208.17. Removal is deferred only to the country in which it has been determined that the alien is likely to be tortured, and the alien may be removed at any time to another country where s/he is unlikely to be tortured. 8 C.F.R. § 1208.17(b)(2).
The IJ must inform the alien that deferral of removal: 1) does not confer upon the alien any lawful or permanent immigration status in the U.S.; 2) will not necessarily result in the alien being released from the custody of DHS if the alien is subject to such custody; 3) is effective only until terminated; and 4) is subject to review and termination if it is determined that it is unlikely the alien would be tortured in the country to which removal has been deferred, or the Respondent requests that deferral be terminated. 8 C.F.R. § 1208.17(b)(1).

[33] *See* relevant language under ASYLUM and WITHHOLDING for boilerplate on any of these bars to relief (persecutor, particularly serious crime, serious nonpolitical crime, engaged in terrorist activity, and danger to the U.S.).