Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	***Asylum Eligibility Part III: Nexus and the Five Protected Characteristics***
Rev. Date	March 12, 2009
Lesson Description	This lesson discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial caselaw. The primary focus of this lesson is the determination as to whether an applicant has established that past harm suffered or future harm feared is on account of one of the five protected characteristics.
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to correctly apply the law to determine eligibility for asylum in the United States.
Academy Training Performance Objective	Given written and roleplay asylum scenarios, the trainee will correctly apply the law to determine eligibility for asylum in the United States.
Interim (Training) Performance Objectives	1. Identify factors to consider in evaluating the motive of the persecutor. 2. Identify factors to consider in determining whether persecution or feared persecution is on account of race. 3. Identify factors to consider in determining whether persecution or feared persecution is on account of religion. 4. Identify factors to consider in determining whether persecution or feared persecution is on account of nationality. 5. Identify factors to consider in determining whether persecution or feared persecution is on account of membership in a particular social group. 6. Identify factors to consider in determining whether persecution or feared persecution is on account of political opinion or imputed political opinion. 7. Identify factors to consider in distinguishing prosecution from persecution. 8. Identify factors to consider when determining whether an applicant possesses, or is imputed to possess, a protected characteristic.
Instructional Methods	Lecture, discussion, practical exercises
Student Materials/	Participant Workbook; *UNHCR Handbook*; *INS v. Elias-Zacarias,* 502

References

U.S. 478 (1992); *Fatin v. INS,* 12 F.3d 1223 (3rd Cir. 1993); *Matter of S-P-*, 21 I & N Dec. 486 (BIA 1996); *Matter of C-A-*, 23 I & N Dec. 951 (BIA 2006); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007), *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007).

Method of Evaluation

Observed Lab exercise with critique from evaluator, practical exercise exam, Written test

Background Reading

1. Grover Joseph Rees III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion -- Addendum,* Memorandum to John Cummings, INS Office of International Affairs (Washington, DC: 4 March 1993), 3 p. (attached)

2. Grover Joseph Rees III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion*, Memorandum to Jan Ting, INS Office of International Affairs (Washington, DC: 19 January 1993), 12 p. (attached)

3. Paul W. Virtue. INS Office of General Counsel. *Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA*, Memorandum to Kathleen Thompson, INS Office of International Affairs (Washington, DC: 9 December 1993), 7 p. (attached)

4. Rosemary Melville. INS Office of International Affairs. *Follow Up on Gender Guidelines Training,* Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 7 July 1995), 8 p. (*See*, lesson, *Female Asylum Applicants and Gender-Related Claims*)

5. Phyllis Coven. INS Office of International Affairs. *Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines)*, Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. (*See*, lesson, *Female Asylum Applicants and Gender-Related Claims*)

6. David A. Martin. INS Office of General Counsel. *Asylum Based on Coercive Family Planning Policies -- Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Memorandum to Management Team (Washington, DC: 21 October 1996), 6 p. (*See*, lesson, *Eligibility Part I: Definition of Refugee, Definition of Persecution, Eligibility Based on Past Persecution*)

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

International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/02/02, 7 May 2002, 5 pp.

8. Brief of the Department of Homeland Security In re: Rodi Alvarado-Pena, filed with the Attorney General of the United States, February 19, 2004 (2004 DHS brief in R-A-).

9. United Nations High Commissioner for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.* HCR/GIP/04/06, 28 April 2004, 12 pp. (attached to lesson *The International Religious Freedom Act (IRFA) and Religious Persecution Claims*)

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

11. Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

CRITICAL TASKS

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

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
012	Identify issues of claim.
024	Determine if applicant is a refugee.
SS 8	Ability to read and interpret statutes, precedent decisions and regulations.
SS 13	Ability to analyze complex issues.

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Presentation | **References**

I. INTRODUCTION

The purpose of this lesson is to provide asylum officers with an understanding of the requirements needed to establish that persecution or feared persecution is "on account of" any of the five protected characteristics in the refugee definition. To properly determine whether persecution is on account of a protected characteristic, the asylum officer must have a firm understanding of 1) the "on account of" requirement, which involves the motive of the persecutor, and 2) the parameters of the five grounds for refugee status listed in the refugee definition.

II. "ON ACCOUNT OF" (NEXUS)

A. General Rule -- Persecutor's Motive is Critical

To establish that he or she is a refugee within the meaning of INA § 101(a)(42), the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or would be at least one central reason for the persecutor's motivation.

INA § 208(b)(1)(B)(i), as amended by Section 101(a) of the Real ID Act, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, P.L. 109-13 (hereinafter, "REAL ID Act"). The REAL ID Act added the words "at least one central reason" to describe the extent to which persecution must be on account of a protected ground.

The protected characteristics in the refugee definition are also referred to as the "statutorily protected grounds," or the "protected grounds." At least one central reason for the persecutor's motivation to persecute the applicant must be the applicant's possession or imputed possession of at least one of these characteristics in order to establish the required nexus (or connection) between the persecutor's motive and a protected ground.

INA § 208(b)(1)(B)(i); *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992)

B. Establishing Motive

The applicant does not bear the burden of establishing the exact motivation of a persecutor where different reasons for actions are possible, but must establish facts on which a

Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 211 (BIA, 2007); *Matter of Fuentes*, 19 I & N Dec. 658,

reasonable person would fear that at least one central reason for the persecution was or would be the protected characteristic. While the applicant is not required to show that the protected characteristic is the sole reason for the persecutor's action, the protected characteristic cannot be tangential or incidental to the persecutor's motivation.

662 (BIA 1988); *Matter of S-P-*, 21 I & N Dec. 486 (BIA 1996)

See House Conf. Rpt., 109-72, 2005 USCCAN 240, 288.

In *Matter of J-B-N- & S-M-*, the Board of Immigration Appeals ("Board" or "BIA") interpreted the "at least one central reason" requirement by reviewing the Real ID Act's legislative intent that the protected characteristic cannot be tangential or incidental to the persecutor's motivation and the plain meaning of those words "tangential and incidental." The BIA found that a tangential motivation is one that is only "superficially relevant" and an incidental motivation is one that is "of minor, casual, or subordinate to another" motive for persecution. The Board therefore held that in asylum claims the protected characteristic cannot be either superficially relevant to the reason for harm or subordinate to another motive for the persecution.

Matter of J-B-N- & S-M-, at 212-213.

Example: In *J-B-N- & S-M-*, the applicant and his wife, Rwandan citizens born in Burundi, moved to Rwanda in 1996. In 2004 his aunt took over a valuable parcel of land that had been deeded to the applicant by his uncle and that the applicant had begun to develop. After a legal ruling declared him the land's owner, the applicant received calls telling him to return to Burundi. He believed that his aunt and a cousin were responsible for the calls, his aunt could not bear to lose the property, and that she was also hostile to him because he came from Burundi. Later, the applicant's cousin, a major in the national police, and two other men dressed in police uniforms went to the applicant's home and told his wife that the applicant should return to Burundi. The applicant then fled Rwanda. An expert witness testified that Rwandan citizens born in Burundi have low social status in Rwanda and that land disputes are common there. Country conditions also indicated that land disputes are common in Rwanda and that the disputes frequently turn violent.

Matter of J-B-N- & S- M-.

The applicant claimed that at least one central reason for the threats from his extended family was the applicants' imputed Burundian nationality. The applicant and his wife both testified that before the land dispute relations between the applicant and his aunt had had been friendly. The BIA rejected the applicant's asylum claim finding that the imputed nationality motive was tangential to the persecution, and that

Id. at 216.

See section II.C.3., "Imputation of Protected Ground," below, for a discussion on "imputed" characteristics.

the relative's dispute with the applicant was not centrally motivated by a protected characteristic possessed by the applicant. Rather, it was fundamentally a personal dispute.

To determine whether the applicant's protected characteristic or perceived protected characteristic is central to the persecutor's motivation to target the applicant, the adjudicator should consider all relevant direct or circumstantial evidence regarding the persecutor's motivation. No one particular type of evidence is required.

INS v. Elias-Zacarias, 502 US 478 (1992); *In re J-B-N- & S-M-*, at 214. *See also* section II.B.6., "Evidence of Motive," below for further discussion on the types of evidence that should be considered in making a determination regarding the persecutor's motivation.

1. Persecutor's perception of the applicant

   The determinative factor in establishing a nexus between the harm or feared harm and a protected ground is that the persecutor must perceive the applicant to possess a protected characteristic.

   For example, the fact that the persecutor has a political goal or represents a political entity is not sufficient in itself to establish persecution on account of political opinion. Rather, there must be evidence that the persecutor is motivated to persecute the applicant because ***the applicant*** possesses (or is believed to possess) a particular political opinion.

INS v. Elias-Zacarias, 502 U.S. 478 (1992); *See also*, *Pedro Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000) [The evidence does] "not indicate that the Kanjobal Indians have been recruited because of their race, political opinion, or any other protected ground."

2. Exact motive need not be established

   The BIA has explained that "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." However, the applicant must establish "facts on which a ***reasonable person*** would fear that the danger arises on account of" one of the five protected grounds.

Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 211 (BIA, 2007); *Matter of Fuentes*, 19 I & N Dec. 658, 662 (BIA 1988); *Matter of S-P-*, 21 I & N Dec. 486 (BIA 1996)

3. Mixed motives

   The persecutor may be motivated by several reasons, some unrelated to a protected ground. There is no requirement that the persecutor be motivated ***only*** by a desire to target the protected characteristic of the

Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 213 (BIA, 2007); *See* House Conf. Rpt., 109-72, 2005 USCCAN 240, 288; *See*

applicant. In *Matter of J-B-N- & S-M-* the BIA found that in drafting the amendment to INA section 208 to read that the protected characteristic in asylum claims must be "***at least one*** central reason" for persecution rather than requiring that it be "***the*** central reason" for persecution, Congress reflected its intent to continue to afford asylum protection to applicants whose asylum claims involve mixed motives.

also, Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996); *Girma v. INS*, 283 F.3d 664 (5th Cir. 2002). See also, *Parussimova v. Mukasey*, 533 F.3d 1128 (9th, Cir. 2008) as amended and superseded by Parussimova v. Mukasey, 2009 WL 161220 (9th Cir. 2009) (agreeing with Matter of J-B-N- & S-M- and finding that the applicant failed to establish ethnicity as a central motive for persecution); *Ndayshimiye v. U.S. Att'y Genl*,, 2009 WL 440909, (3d Cir. 2009)

Note that the Third Circuit has upheld as reasonable the BIA's "one central reason" standard as set forth in *Matter of J-B-N- & S-M-* but noted a caveat in so far as the BIA stated that the central motive cannot be "subordinate" to another. The circuit court stated that the "plain language [of the statute] indicates that a persecutor may have more than one central motivation for his or her actions; [and that] whether one of those central reasons is more or less important than another is irrelevant."

Indeed, the Conference Report on the REAL ID Act indicates that the amendments to the INA requiring that an applicant's possession of a protected characteristic be "at least one central reason" for the persecutor's motivation do not require that a persecutor be motivated *solely* by the applicant's protected characteristic. Rather, the statute as amended "allows for the possibility that a persecutor may have mixed motives…It does, however, require that the victim's protected characteristic be central to the persecutor's decision to act against the victim."

House Conf. Rpt., 109-72, 2005 USCCAN 240, 288

Furthermore, the standard for mixed motivation cases now integrated into the statute through the REAL ID Act amendments reflects past precedents of the BIA and many reviewing courts. For example, in *Matter of Kasinga*, in finding that the harm that the applicant feared (female genital mutilation) would be on account of the applicant's membership in a particular social group, the BIA characterized the persecutor's motivation as being "at least in some significant part to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM."

House Conf. Rpt., 109-72, 2005 USCCAN 240, 288; *See Matter of J-B-N- & S-M-* at 214 ("Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motives cases has not been radically altered by the amendments."); *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996)

Prior to the REAL ID Act, the Third and Fifth Circuits have interpreted the BIA's standard regarding mixed motivation as requiring that a persecutor's motivation for

Amanfi v. Ashcroft, 328 F.3d 719, 727 (3d. Cr. 2003) (emphasis added); *See also, Kulvier Singh v. Gonzales,*

persecution to be "in significant part" or "meaningful part" on account of the applicant's protected characteristic. In *Amanfi v. Ashcroft*, the Third Circuit interpreted the BIA's approach on mixed motivation articulated in *Matter of S-P-* as requiring "…that an alien need only prove that the persecutor was motivated *in significant part* by a protected characteristic," in overturning the BIA's decision that harm on account of imputed homosexuality was not on account of a protected ground.

406 F.3d 191, 198 (3d. Cir. 2005) (finding that statements about a free Khalistan made to the applicant during his arrest and beating support a determination that these actions were "motivated in significant part by the police's desire to punish" the applicant for his father's political activities, a determination supported by the fact that the applicant was never questioned about weapons supposedly kept in his home – the purported reason for his detention)

In *Girma v. INS*, the Fifth Circuit upheld a BIA determination that the applicant failed to establish that the harm she suffered in connection with her abduction in Ethiopia was motivated, at least in part (the articulation of the standard at that time), on account of a protected characteristic. In reaching it's decision, the court viewed favorably the BIA's description of the mixed motivation standard: "…that an applicant for asylum must present evidence sufficient for one to reasonably believe that the harm suffered was motivated in meaningful part by a protected ground."

Girma v. INS, 283 F.3d 664, 668 (5th Cir. 2002)

The Conference Report on the REAL ID Act further indicated that the amendment to the statute was designed to foreclose an analysis employed by the Ninth Circuit that "[i]f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person... there arises a presumption that the motive for harassment is political." Congress took issue with the Ninth Circuit's presumption, believing it inconsistent with the precedent set out in *INS v. Elias-Zacarias*, which requires the applicant to provide evidence of the persecutor's motivation.

House Conf. Rpt., 109-72, 2005 USCCAN 240, 289; *See also Matter of J-B-N- & S-M-* at 214, n.9.

Harpinder Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995)

Cases in which the targeting of the applicant is based in part on economic concerns have provided courts with an opportunity to comment on mixed motivation:

a. "The conclusion that *a* cause of persecution is economic does not necessarily imply that there cannot exist other causes of persecution." A government agent may be motivated to harm a

See e.g., *Osorio v. INS*, 18 F.3d 1017, 1028 (2nd Cir. 1994)

union leader for both economic reasons (labor disputes cost money) and political reasons (government views the union activists as politically subversive). The BIA's characterization (in *Osorio*) of the labor/management dispute as economic (while not erroneous) did not prevent a finding that the persecutor's motivation was political.

b. If the evidence indicates that the persecutor is motivated solely by a desire for economic gain, or purely personal vengeance, there is no nexus to a protected ground even if the applicant possesses a protected characteristic.

See e.g., *Cuevas v. INS* 43 F.3d 1167 (7th Cir. 1995); and *Kozulin v. INS*, 218 F.3d 1112 (9th Cir. 2000)

4. Initial motivation not determinative

There is no requirement that the persecutor's harmful contact with the applicant be initially motivated by the applicant's possession of a protected characteristic.

Tarubac v. INS, 182 F.3d 1114 (9th Cir. 1999)

Example: In *Tarubac*, the NPA initiated contact with the applicant to recruit her to their cause and to extort a "revolutionary tax" from her. The applicant refused to join the NPA or pay the tax. Note that at the point of the applicant's refusal to join or pay, there is no evidence that the NPA was motivated to harm the applicant on account of a protected ground.

Tarubac v. INS, 182 F.3d 1114 (9th Cir. 1999)

However, the applicant also told the NPA that she would not join or pay the tax *because* she did not like the communist system and because the NPA had no God. It was after she made statements identifying her opposition to the NPA's political viewpoint that the NPA kidnapped her, held her for three days, and threatened to kill her.

Even though the NPA had attempted to take money from the applicant and force her to assist them for reasons unrelated to a protected ground, the court found that the threat to kill her was triggered, in part, by the political and religious opinion that she articulated in her refusal.

5. No punitive or malignant intent required

See, lesson, *Asylum Eligibility Part I: Definition of a Refugee; Definition of Persecution* for a more detailed discussion on

whether "harm" is "persecution."

The BIA has held that that a "punitive" or "malignant" intent is *not* required for harm to constitute persecution. For example, the persecutor may believe that he or she is "helping" the applicant by attempting to change the protected characteristic. The relevant inquiry regarding motivation, therefore, is whether the persecutor has committed an intentional action, or intends to commit an action that is seriously harmful to the applicant, because of a characteristic (or perceived characteristic) of the victim, regardless whether the persecutor intends the victim to experience the harm as harm.

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

Note, however, that this does *no*t mean that the persecutor's intent *cannot* be punitive in order for the inflicted harm to constitute persecution.

Examples:

a. Applicant established required motive, by showing that forced female genital mutilation (FGM), as described in her case, was practiced "in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM."

Matter of Kasinga, 21 I & N Dec. 357 (BIA 1996)

The required persecutory motive was established even though the FGM may have been practiced by the applicant's tribe with "subjectively benign intent."

b. Applicant was detained, harassed, beaten, and forced to undergo psychiatric treatment because of her sexual orientation. The court found that the fact that the authorities' intent was to "cure" the applicant, not "punish" her, was an improper basis to conclude that the applicant did not suffer persecution.

Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) ("The fact that a persecutor believes the harm he is inflicting is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution.")

6. Evidence of motive

Both direct and circumstantial evidence may be relevant to determining whether a persecutor was motivated to act against an applicant on account of the applicant's possession or perceived possession of a protected characteristic.

a. direct evidence

Sometimes, an applicant is able to provide direct evidence of motive. For example, the persecutor may warn the applicant to stop all political activities or face arrest. This would be direct evidence of motive.

b. circumstantial evidence

INS v. Elias-Zacarias, 502 U.S. 478 (1992)

Generally, an applicant will not be able to provide direct evidence of motive, since persecutors usually do not announce their motives or explain their actions. However, motive may be established by circumstantial evidence.

(i) Examples:

(a) Evidence that the persecutor seeks to act out against other individuals who share the applicant's protected characteristic may support an applicant's claim that he or she was targeted on account of a protected characteristic.

See Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1076 (9th Cir 2004) (evidence that every family in a Guatemalan village lost a male member to the guerrillas and that the military raped a woman every eight to fifteen days, based on the mistaken belief that the villagers had voluntarily joined the guerrillas, compelled a finding that the applicant's rape by soldiers was on account of a political opinion imputed to her)

Note, however, that while evidence that the persecutor seeks to harm others is relevant, it is not required.

In *Matter of R-A-*, a case involving a Guatemalan woman who suffered severe domestic violence from her husband, the Board reasoned that the abuse was not on account of the applicant's membership in any group, however it was defined, because there was no evidence that her husband would seek to harm anyone other than the applicant herself.

2004 DHS Brief in R-A-, 34-35; *See* section VI., "Membership in a Particular Social Group," for more details regarding the procedural history of *Matter of R-A-*.

When the Attorney General requested

To make the point that in some cases, a persecutor may

briefing on this case, DHS argued that "[a]s an evidentiary matter, it is certainly reasonable to expect that a person who is motivated to harm a victim because of a characteristic the victim shares with others would often be prone also to harm others who share the targeted characteristic. But evidence on this point should not be required in all cases in order for the applicant to satisfy the "on account of" requirement." DHS viewed the Board's reasoning on this point as fundamentally flawed and raised concerns that such reasoning would yield anomalous results if applied to other types of cases.

in fact target an individual victim because of a characteristic the victim shares with others, even though the persecutor does not act against others who possess the same characteristic, DHS raised the example of a slave owner in a slave-owning society. The slave owner who may freely beat his own slave might not have the opportunity or inclination to beat his neighbor's slave. Despite that, it would be reasonable to conclude that the beating is motivated by the victim's status as a slave. Because other slaves in the society share the victim's status as a slave, the abused slave is a member of a group, who is at risk of being beaten because of the shared characteristic of being slaves.

(b) Close proximity in time of arrest to participation in an opposition party meeting may be circumstantial evidence of a connection between the arrest and the applicant's political opinion.

(c) Country conditions reports may also provide circumstantial evidence of motive. For example, a reliable report may establish that the persecutor views as opponents individuals who are similarly situated to the applicant (e.g., human rights workers or members of cooperatives or unions, in certain countries).

(d) The facts that a police officer arrested an asylum applicant only after having asked if the applicant was gay and only after seeing him with a friend whom the officer believed to be the applicant's gay partner, as well as the officer's statements regarding the applicant's sexuality during a sexual assault, provide circumstantial evidence that the officer

Boer-Sedano v. Gonzales, 418 F.3d 1082, 1089 (9th Cir. 2005)

was motivated to target the applicant on account of his homosexuality.

(ii) Circumstantial evidence may be relevant to the persecutor's identity, as well as motivation.

In *Bace*, the Court of Appeals for the Seventh Circuit pointed to both the proximity in time between the applicant's political activity and the harm he suffered, as well as his attackers' comments referring to the political activity as suggestive that the attackers were likely members of the opposing political party. Despite that the applicant could not establish the identity of the attackers, he provided sufficient evidence that he was harmed on account of his political opinion.

Bace v. Ashcroft, 352 F.3d 1133 (7th Cir. 2003)

c. duty to elicit information

Asylum applicants are not expected to understand the complexities of asylum law and may not realize that they are required to establish the motive of the persecutor. An applicant may not know what evidence would help establish the persecutor's motive.

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

Although the applicant bears the burden of proof to establish a nexus between the harm or feared harm and a protected ground, the asylum officer has an affirmative duty to elicit all information relevant to the legal determination that the officer will need to make regarding any nexus between the harm experienced or feared and any protected ground.

8 C.F.R. § 208.9(b) *See also, Matter of S-M-J-*, 21 I & N Dec. 722 (BIA 1997) and lesson, *Asylum Eligibility Part IV, Burden of Proof and Evidence*

The UNHCR *Handbook* points out that the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the adjudicator. The role of the adjudicator is to "ensure that the applicant presents his case as fully as possible and with all available evidence."

UNHCR Handbook, para.196

C. Protected Characteristics

1. Broad construction

The five protected characteristics should be construed

broadly. However, claims based on purely personal matters, such as personal vendettas fall outside the protection of asylum law.

2. Duty to elicit information regarding all potential connections to protected characteristic

   An asylum applicant may be unable to articulate a connection to a particular protected characteristic. He or she may state that the claim is based on one characteristic, while the facts indicate that there is an alternative connection to another characteristic, or that a connection to another characteristic may be more relevant to whether the applicant is a refugee. The asylum officer must determine which protected characteristic[s], if any, has a relation to the experiences of the applicant.

   Example: If the applicant states that he or she fears harm on account of religion, but the facts of the case indicate that the persecutor was motivated by the applicant's political opinion, then the asylum officer must evaluate the claim based on political opinion, as well as religion.

3. Imputation of protected ground

   Persecution inflicted on an applicant because the persecutor attributes to the applicant a characteristic connected to one of the five protected grounds in the refugee definition constitutes persecution "on account of" that characteristic regardless of whether the applicant possesses the characteristic.

   See, Grover Joseph Rees III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion,* Memorandum to Jan Ting, Acting Director, Office of International Affairs (Washington, DC: 19 January 1993), 12 p.

   The Court of Appeals for the Third Circuit has held that persecution on account of membership in a particular social group includes what the persecutor *perceives* to be the applicant's membership in a particular social group. In *Amanfi v. Ashcroft*, the court found that the BIA departed from established precedents when it concluded that an applicant could not establish persecution on account of imputed membership in the social group of homosexuals when the applicant testified that he was not in fact a homosexual.

   Amanfi v. Ashcroft, 328 F.3d 719, 730 (3rd Cir. 2003)

Example: An individual who has relatives who belong to the B'hai religious sect is arrested and badly beaten by the police during a government crackdown on the B'hai movement. The harm she experienced could be on account of a characteristic B'hai membership (religion) imputed to her because of her association with her relatives, even though she does not belong to the sect herself.

This issue will be discussed in greater detail in the section below on political opinion, though the concept applies to all characteristics.

III. RACE

A. Definition

UNHCR Handbook, para. 68

"Race" should be understood in its widest context to include all kinds of ethnic groups that are "referred to as races in common usage." It may also entail membership in a specific social group of common descent. Race sometimes overlaps with nationality as a protected ground.

B. Considerations

1. Mere membership in a racial group

See, *UNHCR Handbook*, para. 70

Mere membership in a racial group generally will not provide a basis for asylum, unless there is a pattern or practice of persecution against members of that racial group.

2. Discrimination

See, lesson, *Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution*, section VI.D., *Discrimination and Harassment*.

Claims based on race often involve discrimination. Discrimination generally is not persecution. However, severe discrimination or an accumulation of discriminatory acts may constitute persecution.

UNHCR Handbook, para. 69

Racial discrimination may also amount to persecution where "a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences."

IV. NATIONALITY

A. Definition

For purposes of asylum eligibility, "nationality" includes membership in an ethnic or linguistic group in addition to

citizenship. The broader definition of "nationality" contrasts with the meaning applicable to the first part of the refugee definition (that defines a refugee as someone outside his or her country of "nationality"). "Nationality" in that context does simply mean "citizenship."

UNHCR Handbook, para. 74

Note that harm on account of nationality may also overlap with harm on account of race and/or religion.

For example: Consider a Quiche applicant from Guatemala. The characteristic of being Quiche may be perceived by the persecutor or feared persecutor as a racial characteristic, an ethnic characteristic (nationality), an immutable characteristic shared with other members of a distinct group (particular social group), a religious characteristic (some communities still practice indigenous religions), or a political characteristic (indigenous communities were often linked with guerrilla organizations). The important inquiry is whether the persecutor is motivated to harm the applicant on account of his or her being Quiche; if so, any one of the protected characteristics would likely apply.

B. Considerations

1. Conflicts between ethnic groups

When there is conflict between two or more national (ethnic, linguistic) groups in a country, persecution on account of nationality may overlap with persecution on account of political opinion, particularly where a political movement is identified with a specific nationality.

UNHCR Handbook, para. 75

In some conflicts, members of an ethnic group may be at risk of harm even though they are not themselves directly involved in the conflict, because the persecutor or feared persecutor automatically associates them with the members of their ethnic group who are involved in a conflict.

When there is conflict between one or more "nationalities," asylum officers should take care not to assume that claims arising from the conflict are based solely on civil strife. Rather, the asylum officer must consider carefully the nature of the strife and determine whether the harm the applicant suffered or fears is connected to his or her nationality, or is harm that is incidental to armed conflict, irrespective of the applicant's nationality.

See, Section VIII.G., *Civil Strife*, below
See, *Matter of H*, 21 I & N Dec. 337, Interim Dec. 3276 (BIA 1996)

2. Minorities and majorities

UNHCR Handbook, para. 76

Claims based on persecution or feared persecution on account of nationality are often brought by individuals who belong to a national minority. However, there are situations in which individuals belonging to a national majority have reason to fear persecution by a dominant minority. For example, Hutu is the majority tribal group in Rwanda, while Tutsi, the minority group, controls the government. Both Hutus and Tutsis have presented valid claims for asylum.

C. Examples of claims based on nationality

In the former Soviet Union, "Jewish" was considered a nationality and marked as such on identification documents. Other examples of individuals who have been harmed on account of nationality include Armenians in Azerbaijan (overlaps with religion); Muslims, Croats, and Serbs in the former Yugoslavia (overlaps with religion); Tibetans in the People's Republic of China (also may overlap with religion).

V. RELIGION

See lesson, *The International Religious Freedom Act (IRFA) and Religious Persecution* for more detailed information about religion-based claims.

Universal Declaration of Human Rights (Art. 18); *The International Covenant on Civil and Political Rights* (Art. 18)

The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* proclaim the right to freedom of religion. This includes the right to have or adopt a religion of one's choice; the freedom, either individually or in a community with others and in public or private, to manifest a religious belief in worship observance, practice, and teaching; and the right not to be subjected to coercion that would impair freedom to have or adopt a religion or belief of one's choice.

Pub. L. 105-292 International Religious Freedom Act of 1998. Section 102(b)

In 1998 Congress passed the International Religious Freedom Act (IRFA), which expressed concern about religious freedom throughout the world and established an Annual Report on International Religious Freedom by the Department of State. IRFA requires that the Annual Report, together with other relevant documentation, shall serve as a resource for asylum officers in cases involving claims of persecution on the grounds of religion. Absence of reference by the Annual Report to conditions described by the alien shall not constitute the sole grounds for a denial of the alien's claim.

Pub. L. 105-292 International Religious Freedom Act of 1998. Section 601

A. General Forms of Religious Persecution

Referring to international human rights law, the *UNHCR Handbook* explains that persecution on account of religion takes various forms, some of which may include:

UNHCR Handbook, para. 72

1. Prohibition of membership in a religious community
2. Prohibition of worship in private or in public
3. Prohibition of religious instruction
4. Serious measures of discrimination imposed on persons because they practice their religion or belong to a religious community

B. Conversion

In some countries, it may be illegal to convert from one religion to another, and the penalties may be severe. For example, in some Islamic countries, the conversion from Islam to another religion is considered apostasy (renunciation of faith), which may be punishable by death. Punishment for conversion in such cases may be considered persecution on account of religion, depending on the degree of the harm imposed.

See e.g., *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992) (prosecution under law against apostasy found to be "on account of" religion)

C. Forced Compliance With Laws or Punishment for Violation of Laws

1. General issues to consider
   a. Is the law neutral in intent?
   b. Is the law neutrally or unequally enforced?
   c. How does the persecutor view those who violate the law?
   d. How does compliance with the law affect the applicant's own religious beliefs?
2. Laws of neutral intent that affect religious beliefs

A law with a neutral purpose may have a more harmful impact on a particular religious group than the general population. The fact that the impact of the law adversely affects a religious group does not mean that the harm

Fisher v. INS, 79 F.3d 955 (9th Cir. 1996), vacating 61 F.3d 1366, superseding 37 F.3d 1371

endured by that group as a result of enforcement of the law is "on account of" religion for purposes of asylum law.

Example: A curfew imposed during a period of civil unrest could prevent individuals from attending evening religious services. Since the law was not intended to target individuals because of their religious beliefs, but rather to protect public safety, no nexus to religion would be established.

Contrast a curfew of neutral intent with a law that specifically prohibits a particular religious sect from meeting. Such a law would not be neutral in intent and the harm that individual members of the sect experience when the law is enforced may be considered to be harm on account of religion.

3. Unequal enforcement of the law

Unequal enforcement of a law that appears neutral may be evidence of persecutory intent. For example, if a law that prohibits proselytizing is enforced only against members of one particular religion, the selective enforcement would be evidence that the persecutor's intent is to punish members of the particular religion because of their religious beliefs.

4. Laws based on religious principles

Note: In some countries religious principles are inseparable from civil and criminal laws. In such countries harm on account of religion may overlap with harm on account of political opinion

Punishment for refusal to comply with religious norms or laws (such as dress codes or gender roles based on religious principles) may constitute persecution on account of religion.

The asylum officer should focus on whether the persecutor perceives the applicant as a simple law-breaker, or as someone who should be punished for possessing "improper" religious values. In many cases, the persecutor will view the applicant as both a law-breaker and an individual possessing "improper" religious values. Although there may be mixed motives, if one central reason for the punishment is the applicant's real or perceived religious values, that is sufficient to establish that the harm is on account of religion.

When a civil or criminal law is itself based on religious laws or principles in a country where there is little

separation between church and state, the evaluation of the persecutor's intent may be complex. A thorough understanding of country conditions will help the asylum officer evaluate how the authorities view individuals who violate religious laws.

5. Forced compliance with religious laws or practices that are abhorrent to the applicant's own beliefs

The Third Circuit has indicated that forced compliance with laws that are fundamentally abhorrent to a person's deeply held religious convictions may constitute persecution.

Fatin v. INS, 12 F. 3d 1233 (3rd Cir. 1993)

Example: Being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.

Note that the persecutor's motive would still need to be established.

6. Forced compliance with religious beliefs and practices as they relate to the proper role of a woman in society

Example: The BIA found that where a daughter's religious opinions were different than her father's concerning how she should dress and whom she should associate with, and the father attempted to impose his religious opinion on his daughter through physical force, the serious harm that the daughter suffered was "persecution on account of religion." The BIA found that, although the daughter and father both practiced Islam, the father harmed his daughter because her religious beliefs did not conform to his, particularly with respect to the way women should behave.

Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000)

VI. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Analysis of whether the harm the applicant experienced or feared is on account of membership in a particular social group must include three parts:

1. Identification of a group that constitutes a particular social group within the meaning of the refugee definition;

2. Determination of whether the applicant is a member, or perceived to be a member, of that group; and

3. Determination of whether the persecutor or feared persecutor is motivated to harm the applicant on account of his or her membership (or perceived membership) in the particular

See Fatin v. INS, 12 F.3d 1233, 1240 (3rd Cir. 1993); *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998) *See Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3rd Cir. 2003); *Kechikian v. Mukasey*, 535 F.3d 15 (1st Cir, 2008) (applicant not a member of the proposed

social group. particular social group)

This analysis is fundamentally the same as it is for cases involving the other protected characteristics; the asylum officer must determine 1) whether the applicant possesses or is perceived to possess a protected characteristic and 2) whether the persecution or feared persecution is on account of that protected characteristic. The first two elements of the particular social group analysis comprise the first part of the inquiry for all protected grounds– whether the applicant possesses, or is perceived to posses, a protected characteristic (membership in a particular social group). For cases based on membership in a particular social group, the analysis is expanded, requiring the officer to identify the characteristics that form the particular social group and explain why persons with those characteristics form a particular social group within the meaning of the refugee definition. This part of the analysis is generally not required with other protected characteristics, of which there tends to be a common understanding or usage among those applying this area of law.

To determine whether a group to which the applicant belongs may be considered a particular social group within the meaning of the refugee definition, the asylum officer should first consider any precedent decisions analyzing similar facts and rely on any such decisions in reaching a conclusion. If there is no precedent decision on point, asylum officers should analyze the facts using the principles set forth below to determine whether the group constitutes a particular social group.

A. Is the Applicant a Member of a Particular Social Group? Defining the Group

1. Definition

The BIA has established a two-prong test for evaluating whether a group meets the definition of a particular social group.

Matter of C-A-, 23 I&N Dec. 591 (BIA 2006)

First, the group must comprise individuals who share a common, immutable characteristic – such as sex, color, kinship ties, or past experience – that members cannot change or a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it.

Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985)

Second, the group must be recognizable and distinct in the society. To determine whether a group is recognizable and distinct, asylum officers must examine the shared trait asserted to define the group. Evidence that the society in question distinguishes individuals who share that common trait from individuals who do not posses that trait can establish that the group is recognizable and distinct in the society.

Matter of C-A-, 23 I&N Dec. 591 (BIA 2006). The Eleventh Circuit has had occasion to review the BIA's "social visibility" element set out in Matter of C-A- and found that requirement to be a reasonable interpretation of the INA. *Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190, 1198 (11th Cir. 2006)

A group cannot be considered a particular social group within the meaning of the refugee definition if it fails to meet either of the two prongs set forth in *Matter of C-A-* for evaluating whether a particular social group exists. A group of individuals who share characteristics that meet the first prong of the test is not "a particular social group" within the meaning of the refugee definition if the group fails to meet this social "distinction" or "visibility" prong. Similarly, even when a group of individuals is socially recognizable and distinct, it must still be established that the group's members share a trait that meets the first prong in order to qualify as a particular social group. Both prongs are required.

a. immutable or fundamental characteristic

Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985)

In developing the first prong of the above definition, the BIA explained that only where the common characteristic that defines the group is one that either cannot be changed or is so fundamental

to each member's identity or conscience that it ought not be required to be changed, does the membership in the particular social group become something comparable to the other four protected characteristics. The BIA explained: "By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."

(i) immutable characteristics – examples

See, *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)

Some examples of shared characteristics that cannot be changed include common past experiences, gender, skin color, and certain family relationships.

(ii) fundamental characteristics

(a) objective and subjective elements

In determining whether a characteristic is fundamental to an applicant's identity or conscience, officers should consider how the applicant experiences the characteristic as part of his or her identity or conscience. This is the subjective element of the requirement. Whether the applicant should be required to change the characteristic, even if it is fundamental to the applicant's identity or conscience, involves an objective element.

See, *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)

To assess this objective component, officers should consider basic human right norms. For example, a fundamental characteristic that an applicant should not be expected to change is the quality of having intact female genitalia, in the context of an applicant's fear that she will be forced to undergo female genital mutilation against her will. In contrast, even though an applicant may consider being a member of a terrorist or criminal organization as being fundamental to his

or her identity or conscience, there is no basic human right to pursue such an association.

When the membership in a particular social group is only imputed to the applicant, and the applicant does not in fact possess this trait, the subjective component of this analysis does not apply. Because the applicant in such a case does not actually posses the trait, it is not relevant to enquire whether it is actually fundamental to his or her identity. In such a case, the officer should assess the objective component to determine fundamentality.

(b) assumption of the risk considerations

The fact that group members voluntarily assume an extraordinary risk of serious harm in taking on the trait that defines the group may in some cases be evidence of fundamentality. An applicant's decision to assume group membership in spite of significant risks could, in some cases, provide evidence that it is so fundamental to his or her identity that he or she should not be required to change it. The relevance of an applicant's voluntary assumption of risk must be considered on a case-by-case basis.

See, Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

Not all individuals assume the risk of a particular activity because the activity is fundamental to their identities. For example, risks assumed solely for material reward would not support a claim of fundamentality.

b. social "distinction" or "visibility"

In *Matter of C-A-* the BIA held that, in addition to meeting the "immutable or fundamental characteristic" test, a cognizable social group must also reflect society's perceptions of the group. Essentially, the social "visibility" or "distinction" element requires that the group be recognizable or

Matter of C-A-, at 959-601. See, *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (the Ninth Circuit appears to adopt the social distinction prong as part of its test to determine membership in a particular social group)

distinct. This requirement can be met by showing that members of the group possess a trait or traits that make the members recognizable or distinct in the society in question.

The BIA reasoned that the inclusion of this element ensures that "particular social group" is defined in a way that does not dilute the refugee definition by becoming a "catch-all" protective ground for all forms of persecution including persecution carried out solely for purely personal reasons.

Matter of C-A-, at 960 (citing to UNHCR *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. HCR/GIP/02/02, 7 May 2002, 5 pp.)

(i) A distinctive shared trait(s) is an indicator of social distinction or visibility

See, Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

A distinctive trait shared among group members can be an indication that the group is perceived as socially visible or distinct. One means of assessing this requirement is to examine the shared trait that is asserted to define the social group. Evidence that the society in question distinguishes people who share that trait from people who do not possess that trait can establish the requisite social "visibility" or "distinction" of the group.

Applying this reasoning in *Matter of C-A-*, the BIA found that the group composed of "non-criminal informants" did not constitute a particular social group within the meaning of the refugee definition. In doing so the Board cited evidence that the Cali cartel is not influenced to target informers because of their social status or distinction, but rather that it targets informers simply to seek revenge:

> The record in this case indicates that the Cali cartel and other drug cartels have directed harm against anyone and

everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises. In this sense, informants are not in a substantially different situation from anyone who has crossed the Cali cartel or who is perceived to be a threat to the cartel's interests.

In addition to finding that the group composed of "non-criminal informants" is not a particular social group, in *Matter of C-A-* the BIA found that two other possible group formulations, "non-criminal informants working against the Cali drug cartel" and "*former* non-criminal informants working against the Cali drug cartel," did not constitute particular social groups because they did not meet the social "distinction" requirement, i.e. members of these groups did not share a trait or traits distinguishable within Colombian society.

Matter of C-A-, at 960-961 (internal citations omitted).

(ii) The group does not have to self-identify as a group to be socially distinct

It is not necessary for a group to identify itself explicitly as a group in order for the social distinction or visibility requirement to be met. Group members may hide their identity or choose not to associate with each other in order to avoid persecution and, thus, may not appear cohesive or display the traditional hallmarks of a group that shows its existence openly. If the society in question distinguishes group members from others because of their shared trait, then the group is socially visible or distinct.

See, Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

(iii) Social distinction must be evaluated in context

In *Matter of A-M-E- & J-G-U*, the BIA indicated that determining whether a group has a common trait or shared characteristic that is socially distinct must be "considered in the context of the country of concern and the persecution feared."

Matter of A-M-E- & J-G-U-, 24 I& N Dec. 69, 74 (BIA 2007). Compare with *Tapiero de Orejuela*, 423 F.3d 666, 672 (7th Cir. 2005), discussed below.

In that case, the BIA reviewed country conditions to evaluate whether, in context, the proposed particular social group shared socially distinct characteristics. The BIA found that the Guatemalan applicants did not establish the existence of a particular social group because the proposed particular social group – "affluent Guatemalans" – did not share a common trait that was socially distinct in Guatemalan society. A review of country conditions for Guatemala demonstrated that "affluent Guatemalans" were not at greater risk of criminality or extortion in particular. Instead the country conditions evidence demonstrated that criminality is pervasive in all Guatemalan socio-economic groups. The evidence was scant on who was subjected to extortion or robberies but the one mention found regarding these specific crimes indicated that impoverished Indians were subjected to both crimes. For the same reason the Board also rejected the following possible formulations of the group: "wealth," "upper income level," "socio-economic level," "the monied class," and "the upper class." The Board specifically noted, however, that wealth" or "class" based social groups must analyzed in context, and that, under some circumstances, such groups might qualify as particular social groups. These concepts are discussed in more detail in sections C(7)(d) and C(11), below.

See also, Donchev v. Mukasey, 553 F.3d 1206 (9th Cir. 2009) ("friends of Roma individuals or of the Roma people" not a socially distinct group because country conditions did not show that the Bulgarian government and society placed restrictions on the applicant's freedoms due to his friendship with Roma people, and members of the group, such as the applicant's family members, were not viewed or treated by Bulgarian society in an uniform manner)

2. Other requirements

   a. A particular social group must be defined with particularity such that "the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized in the society in question as a discreet class of persons." The definition of the group must provide a benchmark for determining who the members of the group are so that membership may be delimited or ascertained. Particular social groups defined in terms that are amorphous, indeterminate, subjective, inchoate, or variable will fail the particularity requirement because membership in groups defined in this manner are difficult to delimit. Also, the

Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 76 (BIA 2007), *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) *See also, Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) (adopting the BIA's particularity requirement and finding that "tattooed gang member" failed as a particular social group for lack of particularity.)

claim likely will fail on the "on account" of element if the group is too broadly defined, such that the characteristic that defines the group is not a central motivating factor behind the persecution.

For example, in *Matter of A-M-E- & J-G-U-* the BIA found that the group composed of "affluent" or "wealthy" Guatemalans also failed as a particular social group because the group was too amorphous and indeterminate and, hence, its membership could not be delimited. The Board reasoned that the concept of wealth, in an impoverished nation such as Guatemala, can be subjectively defined to include a broad range of individuals, from those in the top echelons of wealth to those who are relatively comfortable, and that group members could encompass as little as 1% of society or as much as 20% of society. Given these circumstances, the BIA found the proposed group definition to be inchoate and variable; its membership was indeterminable and, therefore, the applicants failed to establish the particularity required in defining a *particular* social group.

See also, *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) (group composed of "male children who lack stable families and meaningful adult protection , who are from middle and low income classes, who live in territories controlled by the MS-13 gang, and who refuse [gang] recruitment" lacks particularity because the meaning of the various terms used to define the group are too amorphous and subject to different interpretations.)

Similarly, in *Matter of C-A-*, the BIA found that the Colombian applicants' proposed particular social group of "noncriminal informants" was too loosely defined to meet the refugee definition's particularity requirement. The BIA indicated that a group constituted of "noncriminal informants" could have a variable membership that might encompass *any* noncriminal informant who passed information between the various guerilla groups or drug cartels to either the Colombian government or any of the guerilla factions or drug cartels.

Matter of C-A-, at 957.

b. A social group cannot be defined by terrorist, criminal or persecutory activity or association, past or present

Under general principles of refugee protection, the shared characteristic of terrorist, criminal or persecutory activity or association, past or present, cannot form the basis of a particular social group. Asylum officers should keep this requirement in mind, in addition to the requirements that a social group must be defined by an "immutable or fundamental characteristic" and must reflect social

Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007); *See, e.g.*, *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992) ("Whatever its precise scope, the term 'particular social groups' surely was not intended for the protection

distinctions.

of members of the criminal class in this country….").
See also, *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (current or former gang membership does not give rise to a particular social group due to gang members' criminal activities).

c. Avoid circular reasoning – social group must exist independently of persecution experienced or feared.

See, *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3rd Cir. 2003)

The particular social group in which the applicant claims membership cannot be defined by the harm that the applicant experienced (for evaluating past persecution) or fears (for evaluating well-founded fear. Circular reasoning should not be used to describe the group; the particular social group must have existed before the persecution began.

Example: An applicant was raped and battered by Salvadoran guerrillas. The harm she experienced in the past was not on account of membership in a particular social group defined as "women who were raped or battered by Salvadoran guerrillas."

See, *Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991)

Note though, that if women who were raped by guerrillas in country X were viewed distinctly by elements of society in that country, and ostracized or otherwise treated differently because of their past experience, that treatment might then be considered to be on account of their membership in a particular social group based on the past experience of harm. The harm the women would fear from society (ostracism) is distinct from the past experience (rape) that defines the group.

See also, *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3rd Cir. 2003) (noting that while an applicant cannot support a claim that his abduction by rebel soldiers was on account of his membership in the particular social group of "children from Northern Uganda who are abducted and enslaved by the LRA," the shared experience of enduring past harm may support defining a particular social group for purposes of establishing a well-founded fear of future persecution)

3. General principles

a. Voluntary association is not required

Matter of C-A-, at 956; *See Hernandez-Montiel* clarifying *Sanchez-Trujillo; but see Safaie v. INS*, 25 F.3d 636, 640 (8th Cir.

under the BIA test for establishing a particular social group, but can be a shared trait that defines a particular social group so long as the two-pronged test of *Matter of C-A-* is met. In order to satisfy the requirements of *Matter of C-A-*, the voluntary association must be fundamental to the identity or conscience of the member, and it must be a trait that distinguishes the group members from others in society. Thus, a voluntary association should be analyzed as any other trait asserted to define a particular social group.

1994); *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003)

In *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) the Ninth Circuit clarified that its alternate "voluntary association" test requires that the group's voluntary association must exist for reasons fundamental to human dignity such that the applicant should not be required to change the association.

b. Cohesiveness or homogeneity is not required

Cohesiveness or homogeneity of group members is not a required component of a particular social group but may be a factor that may indicate the existence of a particular social group.

Matter of C-A-, at 957; *See also*, UNHCR *Guidelines On International Protection: "Membership of a Particular Social Group'*, *para.15.*

c. Overly-broad categories

Courts have held that a particular social group should not be defined so broadly as to make it difficult to distinguish group members from others in the society in which they live, nor so narrowly that what is defined does not constitute a meaningful grouping. DHS has taken the position that "these decisions should not be read to mean that a group must be small in order to qualify as a particular social group. Rather, the best reading of these cases is that a social group is "overbroad" if it is broadly defined by general traits that are not the specific characteristic that is targeted by the persecutors." In other words, it was not defined with the necessary particularity. To avoid characterizing a possible particular social group in overly-broad terms, asylum officers must focus their inquiry on the specific trait because of which the persecutor seeks to target the applicant.

See, *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575-1577 (9th Cir. 1986); *Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3rd Cir. 2003); *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003)

2004 DHS brief in R-A- at 22

d. Consider all relevant information, including country conditions information

Asylum officers should look at all relevant information, including the applicant's individual circumstances, the circumstances surrounding the events of persecution and country conditions, before making the determination. Country conditions indicating that the immutable characteristic reflects social distinctions may be relevant to an analysis of whether a group constitutes a particular social group. For example, in a country that operates in a caste system, members of a particular caste may be found to be members in a particular social group and may be targeted for harsh treatment.

See, *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) (noting that a society's reaction to a group may provide evidence that a particular social group exists, so long as the persecutors' reaction to the members of the group is not the central characteristic of the group); *see also*, *Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991) ("A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – on in the eyes of the outside world in general.")

B. Is the Harm "on Account of" the Applicant's Particular Social Group Membership?

1. To determine whether an applicant has been persecuted or has a well-founded fear of persecution *on account of* his or her membership in a particular social group, the asylum officer must elicit and consider all evidence, direct and circumstantial, providing information about the motivation of the persecutor.

Note: For a more complete discussion of "on account of" *See*, Section II of this lesson. The "on account of" inquiry is similar, and is controlled by *Elias-Zacarias*, regardless of which protected characteristic is being considered.

2. At least one central reason the persecutor harmed or seeks to harm the applicant must be because the applicant possesses or is perceived to possess to a group-defining characteristic that the applicant and other group members share. An asylum officer's finding that an applicant is a member of a particular social group does not necessarily mean that the applicant was persecuted or has a well-founded fear of persecution on account of membership in the particular social group. Having found that the applicant is a member of a particular social group, the asylum officer must then determine if the applicant's membership in the particular social group was or will be at least one central reason for the persecutor harming or wanting to harm the applicant.

C. Precedent Decisions (Specific groups)

Provided below are some examples of precedent decisions that have identified certain groups that may constitute particular social groups, and certain groups that, based on the facts of the case, do not constitute particular social groups. The examples are not meant to be an exhaustive list. Since this area of law is evolving rapidly, it is important to be informed about current cases and regulatory changes.

1. Family membership

It has been said that a group of family members constitutes the "prototypical example" of a particular social group.

Sanchez-Trujillo, 801 F.2d at 1576; *See also*, *Matter of Acosta*, 19 I&N 210, 232 (BIA 1985)

In examining whether a specific family group qualifies as a particular social group, the shared familial relationship should be analyzed as the common trait that defines the group.

See, Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: DATE).

Asylum officers should first assess whether the family relationship is something either that the applicant cannot change or that is so fundamental to the applicant that he should not be expected to change it.

Then asylum officers should assess whether the society in question distinguishes individuals who share that type of relationship from individuals who do not. The question here is not whether a specific family is well-known or visible in the society. Rather, the question is whether that society views the degree of relationship shared by group members as so significant that the society distinguishes groups of people based on that type of relationship.

See, *Matter of S-E-G-*, 24 I&N Dec, 579, 585 (BIA 2008) ("family members" of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang" not a particular social group as the familial relationship was not defined with particularity)

In most societies, for example, the nuclear family would qualify as a particular social group, while those in more distant relationships, such as second or third cousins, would not. In other societies, however, extended family groupings may have greater social significance, such that they could meet the requirement of social "visibility" or "distinction." Asylum officers should carefully analyze this issue in light of the nature and degree of the family group asserted and should pay close attention to country conditions evidence about the relevant social attitudes toward family relationships.

The First Circuit found that a nuclear family constituted a particular social group. The court found that a link

Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993); *See*

could be established between the harm the applicant experienced and his family membership, and that therefore the harm experienced was persecution on account of the applicant's membership in a particular social group (his family). The Fourth and Seventh Circuits have similarly found family to constitute a particular social group under certain circumstances.

also, *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (holding that "family" constitutes a particular social group); *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (recognizing that family could constitute a particular social group)

The Ninth Circuit has found that family membership constitutes a particular social group where there is a sufficiently strong and discernible bond between the family members, such that the relationship becomes the foreseeable basis for persecution.

Lin v. Ashcroft, 377 F.3d 1014, 1028 (9th Cir. 2004) *See*, *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (finding that an extended family relationship of 2nd cousins living far apart does not satisfy the requirements of a particular social group

The Court of Appeals for the Seventh Circuit found that parents of Burmese student dissidents share a common, immutable characteristic sufficient to comprise a particular social group.

See, *Lwin v. INS*, 144 F. 3d 505 (7th Cir. 1998)

2. Clan membership

A clan is an extended family group that has been found to be a particular social group. The BIA held that membership in a Somali subclan may form the basis of a particular social group. In 1993 the Immigration and Naturalization Service (INS) Office of the General Counsel issued a legal opinion that a Somali clan may constitute a particular social group. Although extended family groups may not always be recognized as particular social groups, in the Somali context, a clan is a discrete group, whose members are linked by custom and culture. Clan members also are usually identifiable as members of their clan.

Matter of H-, 21 I & N Dec. 337 (BIA 1996). *Malonga v. Mukasey*, 546 F.3d 546 (8th Cir. 2008) (concluding that Lari ethnic group of the Kongo tribe is a particular social group for purposes of withholding of removal; members of the tribe share a common dialect and accent, which is recognizable to others in Congo, and members are identifiable by their surnames and by their concentration in southern Congo's Pool region); *See also*, Paul W. Virtue. INS Office of General Counsel. *Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA*, Memorandum to Kathleen Thompson, Director, Refugee Branch, OIA (Washington, DC: 9 December 1993), 7 p.

3. Gender

In *Acosta*, the BIA indicated that gender alone may form the basis for a particular social group.

In *Matter of Kasinga*, the BIA specifically held that gender, in conjunction with other characteristics, may form the basis of a particular social group. The BIA found eligible for asylum a woman who feared persecution on account of her membership in the particular social group defined as "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice."

Though some circuits have discussed gender as a basis of a particular social group, few have found an individual to be eligible for asylum on the basis of a particular social group defined solely by the applicant's gender. Generally, this is because the persecutor was not motivated to harm the applicant solely because of her gender, but because of her gender and some other characteristic she possessed.

In *Fatin v. INS*, the Third Circuit indicated that while the applicant had established that the group of Iranian women may well satisfy the *Acosta* definition of a "particular social group," she had not demonstrated that she had a well-founded fear based solely on her gender. Similarly, the Eighth Circuit in *Safaie v. INS* rejected the applicant's claim that Iranian women, by virtue of their sex and the harsh restrictions placed upon them, are a particular social group, "because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender."

The Ninth Circuit has held that an applicant established that she was subjected to FGM on account of her membership in the particular social group of Somali females. In reaching this conclusion, the court reasoned that an applicant's gender is an immutable characteristic that satisfies the *Acosta* definition of a particular social group. The court found support for its conclusion that

Refer to lesson, *Female Asylum Applicants and Gender-Related Claims*, Section VII., *Legal Analysis – Nexus*

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)

Matter of Kasinga, 21 I & N Dec. 357 (BIA 1996)

As indicated below in section VI.C.4, "Opponents of cultural or social norms," the government argued and concurring opinions in Kasinga indicate that the applicant's status as an uncircumcised female, not her opposition to FGM, is the key shared characteristic.

Fatin v. INS, 12 F.3d 1233, 1240 (3rd Cir. 1993); *see* section VI.C.4, "Opponents of cultural or social norms," below, for further discussion of the Third Circuit's analysis of Fatin's asylum claim.

Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994); *see* section VI.C.4, "Opponents of cultural or social norms," below, for further discussion of the Eighth Circuit's analysis of Safaie's asylum claim.

Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005)

applicant's nationality and gender were the motivating characteristics for the FGM in evidence that FGM "in Somalia is not clan specific, but rather is deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of all females."

An even more narrowly tailored particular social group that more appropriately describes the characteristic that is being targeted would be "Somali females who have not been subject to FGM as practiced in their society." It is likely Somali women who have undergone FGM as required by the relevant cultural expectations are not targeted for FGM. Rather it is only those who have not yet undergone it in the way required by their culture who are targeted. In most FGM cases, officers should consider whether the trait of "not having undergone FGM as practiced in their society" should be included in the social group definition.

Similarly, the Tenth Circuit held that both gender and tribal membership are immutable characteristics. In responding to concerns that, if gender alone is recognized as forming a social group (and stating parenthetically that it certainly is one) half a population could be eligible for asylum, the Court explained that the focus should be on whether members of that group are sufficiently likely to be persecuted "on account of" their membership. While acknowledging that gender alone could form a particular social group, the Court analyzed the case with respect to a particular social group defined as female members of the Tukulor Fulani tribe.

Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (finding that being subject to FGM on account of the applicant's membership in the Tukulor Fulani tribe constitutes persecution on account of membership in a particular social group).

The Second Circuit found that the class of women who were previously raped and battered by Salvadoran guerrillas did not form the basis of a particular social group. Applicant failed to produce evidence that members of the group in which she claimed membership share characteristics, other than gender and youth, such that potential persecutors could identify them. The Second Circuit then clarified in *Gao v. Gonzalez*, that it had rejected Gomez's claim not because the social group she defined was too broadly-based, but rather because she failed to show that she would be singled out for further harm on account of her past victimization. While *Gao* was later vacated by the Supreme Court and remanded, it was not because of this clarification by the Second Circuit on its position regarding gender-based claims.

Gomez v. INS, 947 F.2d 660, 664 (2nd Cir. 1991)

Gao v. Gonzales, 440 F. 3d 62 (2d Cir. 2006), *vacated by Keisler v. Hong Yig Gao*, 128 S. Ct. 345 (Mem)(U.S., 2007).

Gender-based claims have also been raised by young, male applicants fearing recruitment by government or opposing forces engaged in civil strife.

See Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)

In a series of cases arising out of the conflict in El Salvador, the Ninth Circuit considered whether young Salvadoran men could establish eligibility for asylum based on their fear of recruitment into the conflict. In *Chavez v. INS*, the Court found that the applicant's "status as a 'young urban male' [was] not specific enough for political asylum." The Court later found in *Zapeda-Melendez v. INS* that a "male of military age who has sworn allegiance to neither faction" in the Salvadoran conflict failed to establish eligibility for asylum because the danger faced by the applicant was the same danger faced by other Salvadorans at that time.

Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984)

Zapeda-Melendez v. INS, 741 F.2d 285, 290 (9th Cir. 1984); *see also Vides-Vides v. INS*, 783 F.2d 1463 (9th Cir. 1986)

In *Sanchez-Trujillo*, the Ninth Circuit provided a more thorough explanation for its finding that the class of "young, urban working class males of military age who have never served in the military or otherwise expressed support for the government" was too broad and sweeping to form a particular social group. The Court relied on the fact that members of the group "naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings" in making its determination. Furthermore, the Court found that though a substantial number of the victims of persecution in El Salvador were young males, evidence indicated that the risk of persecution related principally to the existence of an actual or imputed political opinion and not the victims' gender or youth.

Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986)

Note: The law on particular social group has evolved since this decision was decided more than 20 years ago. The current definition and analysis of a particular social group does not require homogeneity of the group, as this opinion may suggest. See, for example, *Matter of C-A-*, 23 I & N Dec. 951, 957 (BIA 2006) ("Nor do we require an element of "cohesiveness" or homogeneity among group members.")

4. Opponents of cultural practices or social norms

Individuals who oppose or refuse to conform to a cultural practice or social norm enforced in a region or country may, in certain circumstances, constitute a particular social group.

a. FGM

In *Kasinga*, the BIA held that women of a particular tribe in Togo who had not been subject to FGM and

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) Concurring opinion by Board

opposed it constituted a particular social group. However, the government argued, and concurring opinions emphasize, the importance of the applicant's status as a woman who had not experienced the procedure and de-emphasize the importance of her opposition to the practice with respect to the particular social group definition. Later decisions by the BIA and federal courts analyzing similar fact patterns do not focus on the applicant's opposition to the practice in the formulation of the particular social group. The applicant's opposition to the practice, of course, would be highly relevant to the analysis of whether FGM would be persecution to the applicant.

member Filppu, joined by Heilman, and Concurring decision by Board member Rosenberg.

The Ninth and Tenth Circuits have held that opposition to FGM is not required in order to establish persecution on account of membership in a particular social group where there is evidence that the persecutor was motivated by the applicant's gender and tribal/clan membership and/or nationality.

Mohammed v. Gonzales, 400 F.3d 785, 797 n.16 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (finding that because the applicant's gender and her membership in the Tukulor Fulani tribe are immutable characteristics and thus meet the *Acosta* definition of a particular social group, she was not required to provide evidence of opposition to FGM)

Note that the Tenth Circuit in *Niang* indicated that its holding was not intended to indicate "that an adult's voluntary submission to FGM necessarily constitutes persecution."

b. Gender-specific dress codes

Where refusal to abide by gender-specific dress codes could result in severe punishment or consequences, an applicant may establish that treatment resulting from her noncompliance amounts to persecution on account of her membership in a particular social group.

Both the Third Circuit, in *Fatin*, and the Eighth Circuit, in *Safaie*, stated that Iranian women who would refuse to conform to the country's gender-specific laws may constitute a particular social group. However, neither applicant in the cases before those courts established that she was a member of such a group, because each applicant failed to demonstrate that she would refuse to comply with the gender-specific laws.

Fatin v. INS, 12 F.3d 1233, 1241 (3rd Cir. 1993); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994)

In *Fatin*, the Third Circuit found the applicant to be

Fatin v. INS, 12 F.3d 1233,

a member of the particular social group of "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them." The Court examined whether, for this applicant, compliance with the laws would be so abhorrent to her that wearing the chador would itself be tantamount to persecution. Because the applicant testified that she would only try to avoid compliance and did not testify that wearing the chador would be abhorrent to her, the Court concluded that the applicant had not established that her compliance with the gender-specific laws was so abhorrent to her such that it could be considered persecution.

1241-1242 (3rd Cir. 1993)

Similarly, the Seventh Circuit in *Yadegar-Sargis v. INS* considered whether an applicant who established her membership in the particular social group of "Christian women in Iran who do not wish to adhere to the Islamic female dress code" would suffer persecution by her compliance with the dress code. Looking to *Fatin* for guidance, the Court found that because the applicant did not testify that compliance with the dress code violated a tenet of her Christian faith and testified that she was not prevented from attending church or practicing her faith when she complied with the dress code, the evidence could be interpreted such that the dress requirements were "not abhorrent to [the applicant's] deepest beliefs." The issue in this case did not turn on whether the group constituted a particular social group, but rather on whether forced compliance with dress codes constituted persecution.

Yadegar-Sargis, 297 F.3d 596, 604-605 (7th Cir. 2002)

5. Female Genital Mutilation (FGM)

There have been a number of cases involving forced FGM in which eligibility for asylum was based on membership in a particular social group related to gender, or gender plus another characteristic, such as tribe and/or opposition to FGM.

a. Examples from caselaw

(i) Matter of Kasinga

As discussed above, in *Matter of Kasinga*, the

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); *Matter of A-T-*, 24 I&N Dec. 617 (AS.G. 2008)

BIA found the applicant eligible for asylum based on her fear of persecution on account of membership in the particular social group defined as "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice." The separate concurring opinions in Kasinga emphasized that opposition to the practice was not a necessary component to the particular social group. The applicant's opposition to the practice, of course, would be highly relevant to the analysis of whether FGM would be persecution to the applicant.

(ii) Niang v. Gonzales

Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005)

In *Niang v. Gonzales*, the Tenth Circuit held that being targeted for FGM because of one's membership in the group of female members of the Tukulor Fulani tribe would constitute persecution on account of membership in a particular social group. The Tenth Circuit noted that the particular social group could be defined as gender alone, as gender is an immutable characteristic. In responding to concerns that, if gender alone is recognized as forming a social group (and stating parenthetically that it certainly is one) half a population could be eligible for asylum, the Court explained that the focus should be on whether members of that group are sufficiently likely to be persecuted "on account of" their membership. While acknowledging that gender alone could form a particular social group, the Court analyzed the case with respect to a particular social group defined as female members of the Tukulor Fulani tribe.

(iii) Mohammed v. Gonzales

Mohammed v. Gonzales, 400 F.3d 785, 796 (9th Cir. 2005)

In *Mohammed v. Gonzalez*, the Ninth Circuit held that an applicant established that she was subjected to FGM on account of her membership in the particular social group of Somali females. In reaching this conclusion, the court reasoned that an applicant's gender is an immutable characteristic that satisfies the

Acosta definition of a particular social group.

See, *Matter of A-T-*, 24 I&N Dec. 617 (AS.G. 2008)

b. Framework for analysis

Caselaw has taken a variety of approaches to defining a particular social group in cases involving FGM. As the Attorney General's decision on certification in *Matter of A-T-*, the framework for analyzing such cases depends in critical ways on how the group is formulated. In many cases, the best formulation of the particular social group may be "females [of the applicant's tribe or nationality] who have not yet undergone FGM as practiced in their culture," because it more appropriately identifies the characteristic motivating the persecutor. For example, the Somali female in *Mohammed* was subject to FGM, not simply because she was a female, but because she was a female who had not already undergone FGM as practiced in her culture. The particular social group of "Somali females," is broader than the group targeted.

Thus, in most FGM cases, officers should consider whether the relevant social group should be defined as some subset of women who possess (or possessed) the trait of not having undergone FGM as required by the social expectations under which they live. This would not preclude a valid claim by a women previously subjected to FGM who fears FGM in the future, if she can establish that she would be subject to additional FGM (for example, it may be the practice of a woman's tribe to subject her to a second infibulation after she has given birth; or the first time she was subject to FGM the procedure was not performed to the extent required by her culture).

Matter of A-K, 24 I&N Dec. 275 (BIA 2007)

c. Eligibility based on feared FGM of children

In *Matter of A-K*, the BIA made clear that an applicant cannot establish eligibility for asylum based **solely** on a fear that his or her child would be subject to FGM if returned to the country of nationality. The persecution an applicant fears must be on account of the ***applicant's*** a protected characteristic (or perceived protected characteristic). When a child is subjected to FGM, it

If the child of an opponent of FGM were specifically targeted for FGM in order to harm the parent because of the parent's opposition to FGM, it might be possible to establish a nexus to the parent's membership in a particular social group defined as parents who

is generally not because of a parent's protected characteristic. Rather, the FGM is imposed on the child because of the ***child's*** characteristic of being a female who has not yet undergone FGM as practiced by his or her culture.

oppose FGM, if that group, viewed in the applicant's society, meets the requirements to be considered a particular social group.

6. Sexual orientation

Persecution on account of sexual orientation constitutes persecution on account of membership in a particular social group. The BIA found a homosexual male in Cuba persecuted on account of his status as a homosexual to have been persecuted on account of membership in a particular social group.

Matter of Toboso-Alfonso, 20 I & N Dec. 819 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994); *see also Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005)

The Ninth Circuit held that gay men with female sexual identities in Mexico constitute a particular social group. The applicant's female identity is immutable because it is an inherent characteristic.

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000)

The Third Circuit, in *Amanfi v. Ashcroft*, recognized that harm suffered or feared on account of an applicant's *perceived* homosexuality, even where the applicant is not homosexual, could be sufficient to establish past or future persecution on account of an imputed membership in a particular social group.

Amanfi v. Ashcroft, 328 F.3d 719, 730 (3rd Cir. 2003)

7. Unions

In *Matter of Acosta*, a case that involved a member of a Salvadoran taxi cooperative, the BIA considered a social group with the defining characteristics of "being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages." The BIA found that neither characteristic was immutable, because the members of the group could either change jobs or cooperate in work stoppages. However, the BIA did not address whether being a member of a cooperative or union membership is a characteristic an individual should not be required to change.

Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985)

In *Carranza*, the Second Circuit found that an individual who had established a fear on account of his union activities was eligible for asylum, although it made no specific finding on particular social group.

Carranza-Hernandez v. INS, 12 F.3d 4, (2nd Cir. 1993). The INS did not raise the particular social group issue in appeal before BIA.

The Fifth Circuit, while not specifically holding on the issue, indicates in *Zamora* that a trade union may constitute a particular social group. The court held that the applicant was not persecuted and did not have a well-founder fear *on account of* his membership in the union, analyzing the case as if the union was a particular social group.

Zamora-Morel v. INS, 905 F.2d 833 (5th Cir. 1990)

8. Students, professionals, and landowners

a. Groups of students have been found not to be members of a particular social group. These holdings do not preclude a finding that a specific, identifiable, group of students could constitute a particular social group.

Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981) [Note circular reasoning] *See also*, Civil v. INS, 140 F.3d 52 (1st Cir. 1998) (social group of pro-Aristide young students overbroad and not specifically targeted).

b. The First Circuit recognized that persons associated with the former government, members of a tribe, and educated or professional individuals could be members of a social group.

Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985)

c. The Seventh Circuit held that parents of Burmese students may constitute a particular social group.

Lwin v. INS, 144 F. 3d 505 (7th Cir. 1998)

d. The Seventh Circuit found that the group of "educated, landowning class" in Colombia who had been targeted by the Revolutionary Armed Forces

of Colombia (FARC) constituted a particular social group for asylum purposes. The court distinguished the situation in Colombia from other situations where the risk of harm flowing from civil unrest affects "the population in a relatively undifferentiated way" and found that members of this group were the "preferred victims" of the FARC.

Tapiero de Orejuela, 423 F.3d 666, 672 (7th Cir. 2005), citing *Ahmed v. Ashcroft*, 348 F.3d 611, 619 (7th Cir. 2003)

The court further distinguished this group from groups based solely on wealth, a characteristic that had been rejected as the basis of a particular social group when considered standing alone by the BIA in *Matter of V-T-S*, as including the applicants' social position as cattle farmers, their level of education, and their landownership. These shared past experiences were of a particular type that set them apart in society such that the FARC would likely continue to target the group members, even if they gave up their land, cattle farming, and educational opportunities.

Id. Cf. Matter of A-M-E- & J-G-U-, 24 I& N Dec. 69 (BIA 2007) (finding that the group of "affluent Guatemalans" was not sufficiently distinct in society to constitute a particular social group. Country conditions indicated that "affluent Guatemalans" were not at greater risk of criminality or extortion in particular.)

See section VI.C.12., "Wealth or Affluence," below for further discussion and comparison to the "landowner" particular social group.

9. Ancestry

The BIA found that "Filipino with Chinese ancestry" could define a particular social group, because of the immutability of the characteristic.

Matter of V-T-S, Int. Dec. # 3308 (BIA 1997)

10. Age

Membership in a particular age group has been considered along with other factors and found not to constitute membership in a particular social group. The cases addressing age have generally involved young, urban males who feared either conscription by the military or forcible recruitment by guerrillas.

Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276 (BIA 1985) *See also*, *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998).

Note that, in such cases, the alleged persecutor generally is targeting the young men because they are desirable combatants. The issue appears to be more a failure to establish the requisite motive ("on account of"), than failure to establish membership in a particular social group.

The Third Circuit, in *Lukwago v. Ashcroft*, noted that age changes over time, possibly lessening its role in identity. The court further noted that children as a class represent a large and diverse group, thus supporting the government's argument that age does not qualify as the basis of a particular social group.

Lukwago v. Ashcroft, 329 F.3d 157. 171-172 (3rd Cir. 2003); *see also Escobar v. Gonzales*, 417 F.3d 363 (3d. Cir. 2005) (indicating that "youth," as well as "poverty" and "homelessness," are too vague and all encompassing to be characteristics that set the parameters for a particular social group under the INA in concluding that "Honduran street children" do not constitute a particular social group)

The BIA has noted, in *Matter of S-E-G-*, that it is possible for a particular social group to be established in which age is a trait. The BIA stated that though age is not immutable it may give rise to a particular social group since "the mutability of age is not within one's control and … if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable." In other words, in the context of age based particular social groups, asylum officers should consider the immutability of age at the time of the events of past persecution or at the time the applicant expresses a fear of future persecution.

Matter of S-E-G-, 24 I&N Dec, 579, 583-84 (BIA 2008)

11. Military/police membership

When a particular social group is asserted that involves past or present service as a police officer or a soldier, the officer must first determine whether, whether in the context of the applicant's society, those who hold current or former status as a police officer or soldier form a particular social group. If a particular social group is established in such cases, the "on account of" inquiry may be especially difficult and may require special scrutiny. In order to succeed in such a claim, the applicant would have to demonstrate that at least one central reason motivating the alleged persecutor is the social *status* that attaches to the applicant by virtue of his or her current or former service.

Matter of C-A-, 23 I&N Dec. at 959; *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988); *see also Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004) (finding that the rationale of *Fuentes* applies to threats from terrorist organizations resulting from an applicant's work as a law enforcement official targeting terrorist groups because the threat was received as a result of the employment, not the

a. Former military/ police membership

applicant's political opinion) *See*, Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

The BIA recognized in both *Matter of C-A-* and *Matter of Fuentes* that *former* military leadership is an immutable characteristic that may form the basis for a particular social group under some circumstances. Similarly, while holding that the dangers arising solely from the nature of employment as a policeman in an area of domestic unrest do not support a claim, the Board indicated in *Fuentes* that *former* service in the national police is an immutable characteristic that, in some circumstances, could form the basis for a particular social group. In order to satisfy the definition of a particular social group, the applicant also must demonstrate that the purported social group has a distinct, recognizable identity in society to meet the "social distinction" test established in *Matter* of *C-A-*.

If the applicant has established membership in a particular social group of former police officers or soldiers, the applicant would also have to demonstrate that at least one central reason motivating the alleged persecutor is the social *status* that attaches to the applicant by virtue of his or her former service in order to succeed on the claim. For example, if the persecutor targets a former police officer principally out of reprisal for the former officer's role in disrupting particular criminal activity, the persecution would not be considered to be on account of the applicant's membership in a group of "former police officers." Harm inflicted on a former police officer or soldier in order to seek revenge for actions he or she took in the past is not on account of the victim's status as a former police officer or soldier.

b. Current membership in the military/police

See, Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

Current service as a soldier or police officer, under some circumstances, could define a particular social group if that service is so fundamental to the applicant's identity or conscience that he or she should not be required to change it. The applicant would also have to demonstrate that the purported social group has a distinct, recognizable identity in the society. If these requirements are met, it is possible that an applicant could establish a

cognizable social group in such circumstances.

Even if membership in a particular social group is established in such a case, however, the determination that the persecution was or will be "on account" of the particular social group is especially difficult and requires special scrutiny.

Harm inflicted on a police officer or soldier in order to prevent or frustrate the performance of his or her duties is not on account of the applicant's membership in a group of current "police officers" or "soldiers." Such a claim would therefore fail on the "on account of" element, even if the applicant has established membership in a group that constitutes a particular social group.

It is only where the harm is inflicted because of the applicant's status, rather than to interfere with his or her performance of specific duties, that the nexus requirement may be met. This is a particularly difficult factual inquiry. One factor that may assist in making this determination is whether the harm inflicted on the applicant or threats occur while the applicant on official duty, as opposed to once the applicant has been taken out of combat or is no longer on duty.

c. Federal court and BIA interpretations

The Ninth Circuit also has held that the general risk associated with military or police service does not, in itself, provide a basis of eligibility. The Ninth Circuit, as does the BIA, recognizes a distinction between *current* service and *former* service when determining the scope of a cognizable social group.

Cruz-Navarro v. INS, 232 F.3d. 1024,1029 (9th Cir. 2000); *Velarde v. INS*, 140 F.3d 1305 (9th Cir.1998) (former bodyguard of daughters of Peruvian President threatened by Shining Path. Threats referred to specific acts the applicant engaged in); *see also Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (suffering while in military on account of applicant's race, not participation in military)

It is important to note that the fact of current service does not preclude eligibility. A police officer or soldier may establish eligibility if he or she can show that the persecutor is motivated to harm the applicant because the applicant possesses, or is perceived to possess, a protected characteristic. The following passage from *Cruz-Navarro*, is instructive:

> *Fuentes*, therefore, does not flatly preclude "police officers and soldiers from establishing

claims of persecution or fear of persecution." [citing *Velarde* at 1311] Rather, Fuentes suggests that persecution resulting from membership in the police or military is insufficient, by itself, to establish persecution on account of membership in a particular social group or political opinion.

The Seventh Circuit has not adopted the distinction between current and former police officers set forth in *Fuentes*. In dicta, the Court expressed disapproval of any reading of *Fuentes* that would create a *per se* rule that dangers encountered by police officers or military personnel during service could never amount to persecution. However, in the case before it, the Court upheld the BIA's determination that the dangers the applicant experienced while serving as a military and police officer arose from the nature of his employment and were not on account of a protected characteristic.

Ahmed v. Ashcroft, 348 F.3d 611, 616 (7th Cir. 2003)

12. Groups based on "Wealth" or "Affluence"

In *Matter of A-M-E- & J-G-U-*, the BIA indicated that groups defined by wealth or socio-economic levels alone often will not be able to establish that they possess an immutable characteristic because wealth is not immutable; it is possible to divest oneself of wealth. Wealth is, however, a characteristic that the group should not be required to change, and therefore could be considered fundamental within the meaning of *Acosta*. In evaluating groups defined in terms of wealth, affluence, class or socio-economic level, however, asylum officers must closely examine whether the proposed group also shares any traits that make it distinct or visible in the society in question and whether the group is defined with particularity such that the group's membership can be delimited. In the context of the facts established in *Matter of A-M-E & J-G-U-*, the BIA rejected various particular social group formulations involving wealth and socio-economic status for failure to establish social distinction and particularity. The BIA stressed that this analysis must be conducted in the context of the relevant country conditions. Within the context of the Guatemalan country conditions at issue in that case, the Board found a variety of groups to fail as particular social groups, including groups defined by "wealth," "affluence," "upper income level," "socio-economic

Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007); *See also, Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007)(upholding *Matter of A-M-E); Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008) (adopting the social distinction component and rejecting as not socially distinct and lacking particularity the group defined as 'family business owners in Guatemala.')

level," "the monied class," and "the upper class."

Id. at 75, n.6.

The BIA, however, did not reject altogether the possibility that a group defined by wealth could, in some circumstances, constitute a particular social group, but noted that these types of social groups must be assessed in the context of the claim as a whole. For example, the Board hypothesized that such a group might be established in an instance in which a government targets for persecution individuals within certain economic levels.

Id. at 75, n.6.

The BIA's emphasis on social context is consistent with the Seventh Circuit's approach in *Orejuela*, discussed above at section C(7)(d), where members of the "educated, landowning class" in Colombia were recognized as members of a particular social group. Although affluence was a shared trait for this group, group members also shared a distinctive social status (albeit one derived in significant part from affluence and the attributes of affluence) that made them preferred targets of the FARC. The significance of this social status was evident when the claim was viewed in the context of the country conditions that showed that the alleged persecutor (the FARC) is a "leftist guerilla group that was originally established to serve as the military wing of the Colombian Communist Party" and that class status, not merely "wealth," was an important factor to the persecutor.

Tapiero de Orejuela, 423 F.3d 666 (7th Cir. 2005)

Asylum officers encountering groups based in whole or in part on wealth must assess the viability of the particular social group asserted in each case, with careful consideration of the relevant country conditions information and any other relevant evidence, to determine if the group constitutes a particular social group as defined by the BIA and other courts.

Davila-Mejia v. Mukasey, 531 F.3d 624, 629 624 (8th Cir. 2008) ('family business owners in Guatemala' not a not a socially distinct because no country conditions evidence presented that the group was at greater risk of crime in general or to specific types of crimes in Guatemala)

13. Non criminal drug informants

As explained earlier in this lesson, the BIA found that the group composed of "non-criminal informants," as well as two other possible group formulations, "non-criminal informants working against the Cali drug cartel" and "*former* non-criminal informants working against the Cali drug cartel," did not constitute particular social groups because they did not meet the social "distinction" requirement.

Matter of C-A-, 23 I & N Dec. 951 (BIA 2006)

14. Drug traffickers

An applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear because the Iranian government executes individuals who traffic in illegal drugs. The Seventh Circuit stated:

> Whatever its precise scope, the term "particular social groups" surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other. We suppose there might be an exception for some class of minor or technical offenders in the U.S. who were singled out for savage punishment in their native land, but a drug felon sentenced to thirty years in this country (though Bastanipour's sentence was later reduced to fifteen years) cannot be viewed in that light.

Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) (citations omitted)

15. Criminal deportees

In *Elien v. Ashcroft*, the First Circuit upheld a finding by the BIA that deported Haitian nationals with criminal records in the United States does not qualify as a "particular social group" for the purposes of asylum. The First Circuit found that the BIA provided sufficient rationale for its determination – that it would be unsound policy to recognize criminal deportees as a particular social group and that it had never extended the particular social group to encompass persons who had voluntarily engaged in illicit activities.

Elien v. Ashcroft, 364 F.3d 392(1st Cir. 2004); *see also Toussaint v. Attorney General of U.S.*, 455 F.3d. 409, 417 (3rd Cir. 2006) (adopting the reasoning of the First Circuit in ruling that criminal deportees to Haiti do not constitute a "particular social group")

16. Tattooed youth

The Sixth Circuit has found that group of "tattooed youth" does not constitute a particular social group under the INA. In support of its finding, the court cited the facts that having a tattoo is not an innate characteristic and that those in the category are not closely affiliated with one another. Further, the court stated that "the concept of a refugee simply cannot guarantee an individual the right to have a tattoo."

Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003

17. Gangs- refusal or resistance to join a gang

In *Matter of S-E-G-* the Board of Immigration Appeals rejected as a particular social group "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities" because it lacked "well-defined boundaries" that make a group particular and it also lacked social visibility.

Matter of S-E-G-, 24 I&N Dec. 479 (BIA 2008). See also,, *Santos-Lemus v.* Mukasey, 542 F.3d 738 ((9th Cir. 2008) (relying on *Matter of S-E-G-* the court found that "young men in El Salvador resisting gang membership" failed as a particular social group because the group lacked social distinction and lacked particularity),

18. Gang Members

The Ninth Circuit has found that "tattooed gang members" is not a particular social group because the group is not defined with particularity. The court also found that neither former nor current gang membership will give rise to a particular social group.

Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007)

A group defined as "gang members" is not a particular social group, despite having the common trait of a shared past experience and though perhaps able to establish the social distinction prong, because the group's shared experience stems from criminal activity. A shared criminal experience is not an innate characteristic. Criminality based traits are not innate because such traits are "materially at war with those [characteristics] we have concluded are innate for purposes of membership in a social group." To find otherwise, said the court, would pervert the humanitarian purpose of refugee protection

Id, pp. 945-946.

by giving "sanctuary to universal outlaws." The court also found that "participation in criminal activity is not fundamental to gang members' individual identities or consciences."

In *Arteaga v. Mukasey* the Ninth circuit also analyzed whether current gang membership gives rise to a particular social group using the Ninth Circuit's alternate "voluntary association" test. The court found that current gang membership does not give rise to a particular social group because the gang association is for the purpose of criminal activity. Thus, it is not an association that is fundamental to human dignity; i.e. it is not the kind of association that a person should not be required to forsake. Therefore current gang members are not members of a particular social group on the basis of that gang membership.

Id, p.946

Id, p. 946

The applicant in *Arteaga v. Mukasey* did not establish a particular social group of "former" gang members. Disassociation from a gang does not automatically result in the creation of a new social group. Citing to *In re A-M-E-*, the court found that "non-association" and "disaffiliation" are unspecific and amorphous terms, even if qualified such as with the word tattooed in "former tattooed gang members."

19. Individuals with disabilities

In an opinion later vacated and remanded by the Supreme Court, the Ninth Circuit held in *Tchoukhrova v. Gonzales* that Russian children with serious disabilities that are long-lasting or permanent in nature constitute a particular social group. The court reserved the question of whether individuals with disabilities from any country would constitute a particular social group, but found that in Russia, children with disabilities constitute a specific and identifiable group, as evidenced by their "permanent and stigmatizing labeling, lifetime institutional[ization], denial of education and medical care, and constant, serious, and often violent harassment."

Tchoukhrova v. Gonzales, 404 F.3d 1181, 1189 (9th Cir. 2005), *reh'g and reh'g en banc denied*, 430 F.3d 1222 (9th Cir. 2005), *vacated*, 127 S.Ct. 57 (U.S. 2006)

Tchoukhrova v. Gonzales, 404 F.3d 1181, 1190 (9th Cir. 2005), citing *Sanchez-Trujillo v. INS*, 801 F.2d 1511 (9th Cir. 1986)

NOTE: Because the Supreme Court vacated the Ninth Circuit's opinion in *Tchoukhrova v. Gonzales*, this opinion is no longer precedent. However, the concerns with the case that were raised on appeal were other than the formulation of the particular social group. Indeed the

particular social group formulation in the Ninth Circuit's opinion is consistent with agency interpretation. The Asylum Division has granted asylum to persons with disabilities in cases in which the applicant established that he or she was persecuted in the past or would be persecuted in the future on account of his or her membership in a particular social group defined as individuals who shared those disabilities. The proper analysis is whether 1) the disability immutable; and 2) persons who share that disability are socially distinct in the applicant's society. The officer must also carefully analyze the persecution claim, as a country's inability to provide medical care does not constitute persecution.

20. Mentally ill

Raffington v. INS, 340 F.3d 720, 723 (8th Cir. 2003) (citing *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994)

In *Raffington v. INS*¸ the Eighth Circuit found that the groups of "mentally ill Jamaicans" or "mentally ill female Jamaicans" do not constitute a particular social group. The court based its conclusion that the members of the group are not "a collection of people closely affiliated with each other, who are actuated by some common impulse or purpose." While being closely affiliated or actuated by a common impulse or purpose is not a requirement for the particular social group formulation, the court did not analyze the facts using the immutability and social distinction framework. The claim mainly failed for the applicant's failure to establish that she had a well-founded fear of persecution.

21. "Street children"

Escobar v. Gonzales, 417 F.3d 363 (3d. Cir. 2005)

In *Escobar v. Gonzales*, the Third Circuit held that Honduran "street children" do not constitute a particular social group. In reaching its conclusion, the court identified the three main characteristics of the proposed particular social group – poverty, homelessness, and youth – and found that the treatment and experiences of impoverished children in Honduras were not necessarily different from those of children in other countries. The court noted that the "incidents of deprivation and suffering" endured by these children were not unique to Honduras and that the government of Honduras was not "significantly more derelict than others in the developing world." In addition the three characteristics of poverty, homelessness, and youth were determined to be too vague and all-encompassing to set the parameters of a particular social group under the INA.

22. Small businesspeople indebted to private creditors

The Tenth Circuit held in *Cruz-Funez v. Gonzales* that being indebted to the same creditor is not the kind of group characteristic that a person either cannot change or should not be required to change. Therefore, the court concluded that the applicants in that case could not establish that the harm they feared was on account of their membership in a particular social group.

Cruz-Funez v. Gonzales, 406 F.3d 1187, 1191 (10th Cir. 2005)

VII. POLITICAL OPINION

A. Definition

Expression of a "political opinion" should not be viewed only in the narrow sense of participation in a political party or the political process. As one expert explained, the meaning of "political opinion" in the refugee definition "should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of state, government and police may be engaged."

Guy Goodwin-Gill. *The Refugee in International Law* (Oxford: Clarendon Press, 1983), p.30.

The Fourth Circuit has described "political opinion" as "prototypically" exhibited by "evidence of verbal or openly expressive behavior by the applicant in furtherance of a particular cause." In recognizing that "less overtly symbolic acts may also reflect a political opinion," the court set as a baseline that "whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum."

Saldarriaga v. Gonzales, 402 F.3d 461, 466 (4th Cir. 2005)

Expression of a political opinion may take various forms, and there are many types of opinions or views that may fall within the broad category of "political." Depending on the case, some examples of expression of political opinions outside the traditional political process may include:

1. Expression of feminist beliefs

Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993)

2. Exposure of government human rights abuses

See Gao v. Gonzales, 407 F.3d 146, 153 (3d. Cir. 2005)

3. Activities to protect or establish the right to association (such as union membership), workers rights, or other civil liberties

Osorio v. INS, 18 F.3d 1017 (2nd Cir. 1993); *Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988)

4. Participation in certain student groups

Osorio v. INS, 18 F.3d 1017 (2nd Cir. 1993)

5. Participation in community improvement organizations or cooperatives, or movements for land reform

See, e.g., *Zamora-Morel v. INS*, 905 F.2d 833 (5th Cir. 1990); *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998)

6. Refusal to follow orders to commit human rights abuses

See e.g., *Barraza Rivera v. INS*, 913 F. 2d 1443 (9th Cir. 1990)

7. Whistleblowing or otherwise exposing government corruption

Grava v. INS 205 F.3d 1177 (9th Cir. 2000); *See also*, *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245 (9th Cir.1999); cf. *Marquez v. INS*, 105 F.3d 374, 381 (7th Cir.1997); *Hasan v. Ashcroft*, 380 F.3d 1114 (9th Cir. 2004); *see Zhang v. Gonzales*, 426 F.3d 540, 548 *But cf*. *Marku v. Ashcroft*, 380 F.3d 982 (6th Cir. 2004) (distinguishing *Grava* and *Reyes-Guerrero*, because Marku provided no evidence that her refusal to participate in public corruption was viewed as an expression of a political opinion); *Musabelliu v. Gonzales*, 442 F. 3d 991(7th Cir. 2006) (finding that harm suffered was not on account of political opinion where the applicant's disclosure of public corruption to his military chain of command and a prosecutor was part of his duties as a brigadier general and not "a public political stand")

Note: Informing the government about individuals involved in illegal activities does not necessarily constitute a basis for eligibility. However, doing so in a political context may be. For example, providing the government with information about a guerrilla group, where the guerrilla group would see informing as an expression of opposition to it was the basis of a well-founded fear of persecution on account of political opinion (imputed).

Thuri v. Ashcroft, 380 F.3d 788 (5th Cir. 2004) (evidence did not compel a finding that reporting a single incident of crime by police officers was viewed by government as an expression of a political opinion) *Saldarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005)

B. Opinion Must Be Applicant's, or One Attributed to Applicant

Persecution on account of political opinion means persecution on account of the ***applicant's*** political opinion, or one attributed to the applicant, not the persecutor's opinion.

INS v. Elias-Zacarias, 502 U.S. 478 (1992)

The fact that the persecutor is motivated by political goals or represents a political entity does not in itself establish that the persecution is on account of political opinion. The persecutor must be motivated by the applicant's opinion or perceived opinion.

C. Neutrality

1. The BIA

Although the BIA has not granted asylum or withholding based on an applicant's conscious decision to remain neutral during periods of controversy, the Board has analyzed claims under the principle that, in some cases, neutrality may form a political opinion.

See, *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988); and *Matter of Maldonado-Cruz*, 19 I&N Dec. 509, 516 (BIA 1988); *Novoa-Umania v. INS*, 896 F.2d 1 (1st Cir. 1990)(indicating BIA used neutrality analysis)

2. Federal Circuit Courts of Appeals

The First and Ninth Circuits have held that neutrality may constitute a political opinion. The Eighth Circuit has indicated that neutrality might, in some cases, form a political opinion.

Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990); *Arriaga-Barrientos v. U.S. I.N.S.*, 937 F.2d 411 (9th Cir. 1991); *Lopez –Zeron v. INS*, 8 F.3d 636 (8th Cir. 1993)

3. Hazardous neutrality

The Ninth Circuit follows the doctrine of "hazardous neutrality." Remaining neutral in an environment where neutrality brings hazards from the government, or from uncontrolled anti-government forces, is an expression of political opinion.

For example, the failure to favor either side in a civil war may be perceived as opposition by participants from both sides of the conflict.

Political neutrality may include the absence of any political opinion. Neutrality can be established by pronouncement or action[s].

Rivera-Moreno v. INS, 213 F.3d 481 (9th Cir. 2000); *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir.1997); *Arriaga- Barrientos v. INS*, 937 F.2d 411, 413-414 (9th Cir.1991); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir.1995) (applicant deserts rather than illegally shoot deserters.)

4. Perception of applicant's neutrality

Ramos-Vasquez v. INS, 57 F.3d 857 (9th Cir.1995); *Arriaga-Barrientos v. U.S.I.N.S.*, 937 F.2d 411, 414 (9th Cir. 1991)

The critical issue is how the persecutor views the applicant's neutrality and whether the persecutor targets he applicant because of his or her neutrality. If the applicant has not articulated or otherwise affirmatively expressed his or her neutrality, then the persecutor may not be aware of it.

Often during conflict, in the point of view of the feared persecutor, there can be no neutrality. In the persecutor's eyes, "either you are with us or against us." The persecutor may *impute* an opposition political opinion to anybody who is neutral.

D. Imputed Political Opinion

See, Grover Joseph Rees III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion*, Memorandum to Jan Ting, Acting Director, Office of International Affairs (Washington, DC: 19 January 1993), 12 p.

Persecution "on account of political opinion" includes persecution because of a political opinion that has been attributed to an applicant, even if the applicant does not actually possess that opinion. Again the determinative issue is how the persecutor views the applicant. Some factors to consider include:

1. Whether the applicant has taken any actions that the persecutor would view as expressions of political opinion, even if the applicant did not intend them as such.

Example: The de-facto government in Haiti during the exile of President Aristide associated members of neighborhood improvement committees with President Aristide. In the eyes of the military and their supporters, sweeping a street or participating in a literacy campaign indicated support for the exiled President.

See Gao v. Gonzales, 424 F.3d 122 (2d Cir. 2005)

Example: In 1999, the government of China outlawed the practice of Falun Gong, a philosophy that blends aspects of Taoism, Buddhism, and the meditation techniques of qigong with the teachings of Li Hongzhi. The government views those who practice Falun Gong to hold an anti-government political opinion. An applicant who is targeted by the Chinese authorities for selling Falun Gong literature may establish persecution on account of an *imputed* political opinion, even if the applicant does not support the movement and only sold

the books for profit, so long as there is evidence that the government perceived the applicant as opposing the government.

2. Statements made by the persecutor that may provide evidence of the persecutor's view of the applicant or individuals similarly situated to the applicant

3. The persecutor's treatment of individuals similarly situated to the applicant

4. Country conditions reports

   An understanding of the overall political situation in the applicant's country can provide context for the persecutor's actions.

5. The severity of any punishment the applicant has received

   Circumstantial evidence of persecutory intent has "most commonly consisted of punishment so severe as to seem obviously directed at real or perceived enemies rather than at ordinary lawbreakers."

See, Grover Joseph Rees III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion,* Memorandum to Jan Ting, Acting Director, Office of International Affairs (Wash., DC: 19 January 1993), 12 p.

6. Whether the persecutor has reasons unrelated to the applicant's political opinion to exert its authority against the applicant (e.g., a legitimate criminal investigation in which the applicant has been implicated)

Matter of S-P-, 21 I & N Dec. 486 (BIA 1996)

E. Attempts to Overthrow a Government

1. General Rules

   a. Prosecution for an attempt to overthrow a government may constitute persecution on account of political opinion if there are no legitimate political means in place to change the government.

Chanco v. INS, 82 F.3d 298 (9th Cir. 1995); *Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990); *Perlera-Escobar v. EOIR and INS*, 894 F.2d 1292 (11th Cir. 1990); *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y. 1988)

   b. Legitimate government investigation and punishment of individuals who fought against the government in civil conflict is generally not persecution on account of political opinion.

Perlera-Escobar v. EOIR and INS, 894 F.2d 1292, 1299 (11th Cir. 1990) (noting a duly established government's internationally recognized right to defend itself against attack and rebellion).

2. Considerations

a. The inquiry and analysis are similar whether the applicant is a participant in an attempted *coup d'etat* or an armed insurrection. The focus is first on the motivation of the feared government in prosecuting the applicant, and then on whether the actions of the applicant bar him or her from protection. If institutions are in place to provide peaceful means to change the government, prosecution of an individual who attempts to violently overthrow the government will not usually be found to be persecution, if the law, and the enforcement of that law are neutral in intent. A "duly established" government has the right to investigate its suspected enemies.

See *Chanco v. INS*, 82 F. 3d 298 (9th Cir. 1996); *Perkovic v. INS*; 33 F.3d 615 (6th Cir. 1994)

Perlera-Escobar v. E.O.I.R. and INS; 894 F.2d 1292, 1297-1299 (11th Cir. 1990)

b. If the government prosecutes those who attempt to overthrow it in a manner that is unusually severe or unequally harsh to individuals who share the same protected characteristic, the applicant may demonstrate that he or she was persecuted on account of a protected ground, even if some institutions for peaceful change exist.

c. In analyzing fear of prosecution for actions taken to overthrow the government the asylum officer should look to the legitimacy of the law being enforced. When a government does not recognize the international human right to peacefully protest, punishment for a politically motivated act against it may not constitute a legitimate exercise of authority.

Chanco v. INS, 82 F.3d 298, 302 (9th Cir. 1996)

d. The asylum officer must also consider the actions taken by the applicant in furtherance of the attempt to overthrow the government. If those actions involved persecution or torture of others, severe harm to civilians, or terrorist activity, they may warrant a mandatory or discretionary denial. Note that this is a basis for denial that is separate from the question of whether the nexus requirement has been met.

Grounds for mandatory and discretionary denials will be discussed in lessons, *Mandatory Bars to Asylum and Discretion* and *Bars to Asylum Relating to National Security*

Example: The US Supreme Court looked at whether violent actions taken as part of an effort to overthrow the government of Guatemala were the

Aguirre-Aguirre v. INS, 526 U.S. 415 (1999); *See also,* lesson, *Mandatory Bars to Asylum and Discretion.*

basis of eligibility or disqualification as a particularly serious crime. The court adopted the BIA test of balancing whether the criminal nature of the action outweighed the political gain sought. Where the actions included harming civilians, burning buses and destroying property, the criminal nature of the action outweighed the political end sought.

Note that this decision preceded the amendments to the terrorist-related bars to asylum under the USA Patriot Act and the Real ID Act. Under the law as amended by these statutes, the applicant's activity might also render him ineligible for having engaged in terrorist activity. *See* INA section 212(a)(3)(B)(iii).

VIII. COMMON NEXUS ISSUES

The following issues have arisen in many cases. Generally, the cases cited indicate that, regardless of the context in which the applicant's fear develops, there must be direct or circumstantial evidence that indicates the persecutor or feared persecutor is motivated by a protected characteristic that the applicant possesses or is imputed to the applicant. Therefore, in situations arising from avoidance of military service, forced recruitment by guerillas, service in the police or military, widespread civil strife or personal disputes, there must be more specific evidence related to the persecutor's motivation to harm the applicant than simply the conflictive circumstance, to establish eligibility. Cases involving Coercive Family Planning issues do not require such evidence, because Congress, in statute, has determined that evidence of the harm or risk of harm establishes motivation. Some of the nuances of common nexus issues are described below.

A. Conscription, Military Service

1. Draft evasion and desertion from the military are not always political acts. There are a variety of reasons why an individual might refuse to perform military service that are not political.

UNHCR Handbook, para. 167; *Nguyen v. Reno*, 211 F.3d 692 (1st Cir 2000) *Castillo v. INS*, 951 F.2d 1117 (9th Cir. 1991); M.A. v. INS, 899 F.2d 305, 312 (4th Cir. 1990); *Canas-Segovia v. INS* 970 F.2d 599, 601 (9th Cir. 1992)

2. It follows that a government will not always perceive draft evasion or desertion as a political act. Punishment for draft evasion or desertion, without some evidence that the government's motivation in punishing the evader or deserter is connected to something other than the act of evasion or desertion, generally is not persecution on account of any of the protected grounds.

3. A government has a sovereign right to conscript its citizens or nationals and maintain a military for the purpose of self-defense. Laws pertaining to required military service ordinarily are not intended to punish

Matter of Vigil, 19 I&N Dec. 572, 578 (BIA 1988); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir 2000); citing *Foroglou v. INS*, 170 F.3d 68, 71 (1st Cir. 1998); *see*

individuals on account of any of the protected grounds, but rather to form and maintain military forces for purposes of national security. Punishment for refusing to serve, without evidence of the additional motivation described above, is not persecution on account of religious or political opinion, but prosecution for refusing to obey the law.

also Islami v. Gonzales, 412 F.3d 391, 397 (2d Cir. 2005)

4. It is difficult, but not impossible, for a claimant to make a case based on desertion or draft evasion. The applicant may establish a nexus to a protected characteristic by demonstrating that he or she:

See, Nguyen v. Reno, 211 F.3d 692, 696 (1st Cir 2000)

- Was selected for military service because he or she possesses or is perceived to possess, a protected characteristic; or

- Was subject to disproportionate punishment because of a possessed or imputed protected characteristic.

5. Disproportionate punishment

a. "Disproportionate" means out of proportion with what is normal. The term can be used to describe situations where the penalty for draft evasion or desertion is out of proportion with international norms (unduly harsh), or where the penalty is out of proportion with that experienced by others who do not share an applicant's protected characteristic.

Webster's II New Riverside Dictionary, Riverside Publishing Co. (Houghton Mifflin Company 1994)

b. If there is evidence that an applicant may be subject to disproportionate punishment because of his or her refusal to serve, or to perform an action during service, the disproportionate punishment may be evidence that the applicant was harmed or targeted on account of a protected characteristic.

Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); *Vujisic v. INS*, 224 F.3d 578, (7th Cir.2000) *M.A. v. INS*, 899 F.2d 305 (4th Cir. 1990); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 126 (1st Cir. 2004); *UNHCR Handbook,* para. 169

c. An applicant does not have to establish possession of a protected characteristic, but must establish that the persecutor perceives him or her to possess the characteristic. Disproportionate punishment may be evidence that the persecutor perceives the applicant to possess a characteristic the persecutor desires to target. For example, evidence that those persons who refuse to comply with conscription policy are

Canas-Segovia v. INS, 902 F.2d 717, 729 (9th Cir.1990) (vacated for other reasons, on remand, 970 F.2d 599 (9th Cir. 1992))

exposed to severe danger, including torture and extrajudicial execution, may indicate that the persecutor perceives a neutral applicant to possess an opposition political opinion.

6. Refusal to serve in a military or commit an action that is condemned by the international community

   a. UNHCR guidance indicates that when an individual refuses to participate in a military action that is condemned by the international community, any punishment for such refusal could in itself be seen as persecution. — *UNHCR Handbook*, para. 171

   b. US courts have interpreted "military action" to apply both to those who refuse to perform a specific military action that would be internationally condemned, and to those who refuse to serve in a military unit or army that engages in internationally condemned activities. — *Mojsilovic v. INS* 156 F.3d 743 (7th Cir. 1998); *M. A. v. INS*, 858 F.2d 210, 214-215.

   c. US law does require the asylum adjudicator to determine whether there is evidence that the feared persecutor is motivated to act by the applicant's opposition to the condemned acts — *Gomez-Mejia v. INS*, 56 F.3d. 700, 703 (5th Cir. 1995)

      (i) The Fifth Circuit emphasized the need for evidence of the persecutor's motivation in *Gomez-Mejia.* The applicant never revealed his opposition to the actions taken by the Nicaraguan military and there was no evidence that such an opposition viewpoint was imputed to him; therefore any punishment he faced as a result of desertion was not on account of a protected characteristic. — *Gomez-Mejia v. INS*, 56 F.3d. 700, 703 (5th Cir. 1995)

      (ii) The Ninth Circuit held that an applicant who openly voiced his opposition to internationally condemned actions and was punished because of his refusal to carry out those actions was persecuted on account of the applicant's opposition political opinion. — *Barraza Rivera v. I.N.S.*, 913 F.2d 1443 (9th Cir.1990)

      (iii) The BIA held that punishment (for desertion) must emanate from a protected characteristic. — *Matter of A-G-* , 19 I. & N. Dec. 502 (BIA 1987), *aff'd*, 899 F.2d 304 (4th Cir.1990)

   d. The Seventh Circuit adopted paragraph 171 of the — *Mojsilovic v. INS*, 156 F.3d 743, 747 (7th Cir. 1998);

UNHCR Handbook and indicated that, "when an alien does not wish to be associated with a military that engages in universally condemned acts of violence, 'the only relevant factor is the likelihood that the alien will be punished.'"

citing *M.A. v. INS*, 858 F.2d 210, 214-215 (4th Cir. 1988); *see also Islami v. Gonzales*, 412 F.3d 391, 397 (2d Cir. 2005)

(i) The Seventh Circuit did not find that the record indicated Mojsilovic's reasons for evading military service were to avoid serving in a universally condemned army. Even assuming that his reasons were as stated, the court concluded that there was little evidence that he would suffer punishment as a consequence of the evasion. He was found to be ineligible for asylum.

(ii) The Seventh Circuit did find a Slovenian applicant eligible for asylum when he deserted from the Yugoslav military because he did not want to participate in ethnic cleansing against people of his own ethnicity. The court found that the ethnic cleansing was condemned by the international community, and the applicant faced disproportionately serious harm because he deserted.

Vujisic v. INS, 224 F.3d 578, 581 (7th Cir. 2000)

e. The BIA and the Fourth Circuit held that the condemnation of the military must come from recognized international governmental bodies, not private organizations or the news media. Such reasoning does not appear to be shared by the other circuits.

Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987*);* *M.A. v. INS*, 899 F.2d 305, 312 (4th Cir. 1990)

f. The First Circuit has adopted a three-part test to determine whether punishment resulting from an applicant's refusal to serve in the military because of the military's participation in acts condemned by the international community as contrary to the basic rules of human conduct will amount to persecution.

Mekhoukh v. Ashcroft, 358 F.3d 118, 126 (1st Cir. 2004)

In order to satisfy the three prongs of the First Circuit's test, the applicant must demonstrate that;

(i) the military in question has been condemned by the international community as a military that commits human rights abuses;

(ii) there is a reasonable possibility that the

In analyzing this prong, the First Circuit also required

applicant will have to serve in the military upon return or face punishment for refusal to serve; and

the applicant to demonstrate that forms of alternative service in a non-combat role would be unavailable.

(iii) the applicant has a genuine conscientious objection to service.

g. In two cases where the applicants refused to participate in specific acts ordered by the military, the courts focused on whether the specific acts the applicants sought to avoid were contrary to international norms governing human conduct (as opposed to whether the military itself had been condemned).

Barraza Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990) (applicant ordered by military officer to participate in paid killing of two men); *Ramos-Vasquez v. INS*, 57 F.3d. 857 (9th Cir. 1995) (applicant deserted Honduran military to avoid having to execute a deserter)

(i) In those Ninth Circuit cases, punishment for refusal to participate in specific illegal killings required by military service was found to constitute persecution.

(ii) It should be noted that when punishment comes as a direct result of a refusal to perform an action, the evidence of cause and effect is much more specific than when punishment is the result of general refusal to serve, without indication of a statement about the reasons for the refusal.

7. Conscientious objection

Matter of Canas, 19 I&N Dec. 697 (BIA 1988); *Canas-Segovia v INS*, 970 F.2d 599 (9th Cir. 1992). *See also*, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)

a. Conscientious objection to military service in general is insufficient to establish eligibility for asylum. However, as noted above, refusal to participate in specific acts contrary to international standards governing human conduct may, in some cases, provide eligibility for asylum.

UNHCR Handbook, paras. 170, 172

b. United States asylum law regarding conscientious objection diverges from guidance in the *UNHCR Handbook.* The *Handbook* indicates that refusal to perform military service may be the sole basis for a claim to refugee status if the refusal is due to valid reasons of conscience. U.S. law requires evidence of the persecutor's motivation. Where U.S. law differs from *UNHCR Handbook* guidance, the asylum officer must follow U.S. law.

8. Assignments to life-threatening duties

The Seventh Circuit has held that individuals who are assigned to life-threatening duties on account of a protected characteristic may establish persecution on account of that protected trait.

Begzatowski v. Ashcroft, 278 F.3d 665, 670 (7th 2000); *see also Miljkovic v. Ashcroft*, 376 F.3d 754, 756 (7th Cir. 2004) (finding that an ethnic Croatian applicant who fled Yugoslavia because he was drafted to perform hazardous duties could be a victim of persecution even though he fled prior to being forced into service)

In *Begzatowski v. Ashcroft* the court found that an ethnic Albanian conscripted into the Yugoslavian military who was deprived of bathing facilities, denied adequate military training, experienced physical abuse by the Serbian officers and was sent to the front lines of battle without either bullets or a shovel suffered persecution on account of his ethnicity. The court reasoned that because the applicant was singled out to "provide a human shield for Serbian solders," he was subjected to treatment distinct from the dangerous conditions affecting an entire nation during a time of war.

B. Recruitment by Guerrilla Forces

1. General rule

INS v. Elias-Zacarias, 502 U.S. 478 (1992); *Matter of C-A-L-* 21 I&N Dec. 754 (BIA 1997); *Miranda v. INS*, 139 F.3d 624 (8th Cir. 1998); *Pedro Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000); *Habtemicael v.*

Forced recruitment by guerrillas and harm for refusing to join or cooperate with guerrilla forces do not, ***per se***, constitute persecution on account of any of the protected grounds.

Ashcroft, 370 F.3d 774 (8th Cir. 2004)

To establish eligibility for asylum, there must be some evidence that the forcible recruitment, related harm, or threats are motivated by the applicant's possession or perceived possession of a protected characteristic.

2. Explanation

INS v. Elias-Zacarias, 502 U.S. 478 (1992); *Matter of C-A-L-* 21 I&N Dec. 754 (BIA 1997) (applicant testified that guerrillas contacted him to obtain information and to attempt to recruit him due to his expertise as an artillery specialist).

Guerrilla forces may recruit for reasons unrelated to any protected ground, such as the need to increase their ranks or because they believe an individual possesses certain knowledge or expertise. Individuals may refuse to cooperate with guerrilla forces for a variety of reasons unrelated to any protected ground (e.g., the fear of government reprisal, or the need to remain home to work on the farm). Therefore there must be some additional evidence, aside from the recruitment effort and/or refusal, to establish a connection to a protected ground.

3. Considerations

a. duty to elicit information

While forcible recruitment and threats or harm for refusal to cooperate do not in themselves provide a basis for asylum, the asylum officer must elicit information from the applicant to determine whether there is any additional evidence connecting the persecutor's actions to any of the protected grounds. The entire circumstances must be considered.

b. consider entire circumstances

Consider the content of the threats and any statements the applicant made when refusing to cooperate.

(i) Even if an applicant does not divulge an opinion to the guerrillas or military when refusing to cooperate, there may be other evidence that connects the threats or harm to a protected ground.

See, *Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993)

(ii) Other evidence connecting the threats to a protected ground could include prior utterances against the guerrillas or military, activities in support of the opposing force or a

family member's association with the opposing force. All the facts must be considered in evaluating the recruiter's perception of the applicant's refusal to assist them.

Example: While beating a Quiche applicant after he had refused to join them, the Guatemalan military accused the applicant of being a guerrilla and demanded information about his "guerrilla friends." The Ninth Circuit found that the statements of the military, together with country conditions evidence that the Guatemalan military viewed indigenous people as pro-guerrilla, was sufficient evidence to support a finding that the harm occurred on account of (imputed) political opinion.

Chanchavac v. INS, 207 F.3d 584 (9th Cir. 2000)

c. Country conditions

In many conflicts, the warring parties may view refusal to cooperate as opposition. Therefore country conditions information may be useful in evaluating how a guerrilla group views those who refuse to cooperate with its cause.

C. Dangers Arising From Duties as Government Official or Military Combatant

1. General rule

Dangers arising from military or civil service without additional evidence of specific motivation of the persecutor do not provide a basis for asylum eligibility.

See section VI.C.11., "Military/police membership," above, for a detailed discussion of considerations when analyzing claims based on dangers arising from official duties as related to a particular social group.

2. Explanation

In *Matter of Fuentes*, the BIA reasoned that policemen in a conflictive area embody the authority of the state, and in such circumstances, the dangers they face "are no more related to their personal characteristics or political beliefs than are the dangers faced by military combatants." Rather, they are usually a result of attempts to frustrate or prevent the policemen's exercise of that state authority in the accomplishment of specific duties.

Matter of Fuentes, 19 I&N Dec. 658, 661 (BIA 1988); *see Matter of C-A-*, 23 I&N Dec. at 959; Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations

(Washington, DC: January 12, 2007); *see also Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004); *Tamara-Gomez v. Gonzales*, 447 F.3d 343 (5th Cir. 2006) (holding that political opinion not established where applicant was viewed by FARC as part of the Colombian police. Although the applicant was a civilian, working for the police as a contractor helicopter mechanic, while working he dressed in police officer uniform making him indistinguishable from police officers and the event that led to harm occurred when he was present as "police" during police action.)

3. Exception

An applicant may be eligible for asylum based on harm experienced while serving as a government official if the applicant can demonstrate that he or she was targeted on account of one of the five protected characteristics and not solely to frustrate or prevent his or her action taken in furtherance of his or her official duties. In some cases, it may be possible that harm directed at a policeman or soldier is actually on account of some social status that is related to the police or military service. In such cases, if that status establishes a particular social group, then the fact that the status stems from police or military service would not preclude a finding of the requisite nexus. Or if the harm is directed at the applicant on account of some other protected trait, then the fact that it occurs in the context of police or military service would not preclude satisfaction of the nexus requirement. The Ninth Circuit has identified particular situations in which applicants whose claims were based on their official duties have met this burden.

See section VI.C.11, "Police/military membership," for a more detailed discussion of status v. acts in the context of the particular social group analysis.

a. A prosecutor in Colombia feared members of the opposition political party after he prosecuted them for corruption. The prosecutor was found to have established a nexus between the feared persecution and his political opinion.

Reyes-Guerrero v. INS, 192 F.3d 1241, 1245 (9th Cir. 1999)

b. A former government official who exposed corruption of other government officials in the Philippines established that the feared harm was on account of a political opinion imputed to him because of the government corruption he exposed.

Grava v. INS 205 F.3d 1177 (9th Cir. 2000)

c. A high-ranking military official was persecuted by his soldiers because of his race and (imputed) political opinion when the harm occurred after a dramatic change in the treatment of ethnic Indians in Fiji.

Gafoor v. INS, 231 F.3d 645 (9th Cir. 2000)

4. Ex-combatants and former government service

Former combatants and former officials are not treated the same as current combatants and officials.

a. current policemen distinguished from former policemen

In *Matter of Fuentes*, the BIA distinguished the applicant's current service as a policemen from the status of ***former*** policeman. The BIA indicated that harm on account of one's status as former policeman might provide a basis for eligibility, although the issue was not before it.

Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988); *see also Marku v. Ashcroft*, 380 F.3d 982, 987 n.8 (6th Cir. 2004) (noting that applicant may fit into the particular social group of "former government employees" or "former government employees who refused to comply with their employer's demands," but she had not established a reasonable possibility of suffering persecution on account of her membership in the group)

b. guerrillas may impute political opinion to ex-soldier

The Ninth Circuit held that when an ex-soldier has resumed life as a civilian it is reasonable to conclude that guerrilla threats against him are on account of political opinion, since the guerrillas would identify the individual with the government he served.

Montecino v. INS, 915 F.3d 518 (9th Cir. 1990)

c. must consider entire circumstances

There may be evidence of motivating factors unrelated to the applicant's political opinion or identification with the government, such as retribution for abuses committed by the ex-soldier,

or furtherance of a personal vendetta. The entire circumstances of the case must be considered.

D. Extortion

1. Extortion combined with threats of physical harm may form the basis for a valid asylum claim, if there is some evidence connecting the threats or harm to one of the protected grounds.

Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988) (government-sponsored extortion found to be "on account" of victim's political opinion, because people who resisted extortion were marked as subversives); *Tapiero de Orejuela*, 423 F.3d 666, 673 (7th Cir. 2005)

See, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)

2. The mere fact that the extortioner is a political entity or has a political agenda (i.e., is extorting money to support a political cause) is not sufficient to establish the requisite nexus. The applicant must show that the persecutor is motivated by the applicant's opinion or perceived opinion.

3. Credible evidence that the extortion came at the instance of a government entity, where the applicant belonged to an anti-government party, led to a finding that the extortion was persecution on account of political opinion.

Yazitchian v. INS, 207 F.3d 1164 (9th Cir. 2000)

4. Where the extortionist has branded the applicant a political opponent, the applicant may establish that she has been targeted on account of her political opinion despite the fact that the extortionist is also interested in the applicant's wealth.

De Brenner v. Ashcroft, 388 F.3d 629, 637 (8th Cir. 2004); *Tapiero de Orejuela*, 423 F.3d 666, 672 (7th Cir. 2005)

E. Coercive Population Control Policies

1. Statutory provisions

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which added the following sentence to the statutory definition of refugee:

See also, lesson, *Eligibility Part I: Definition of a Refugee* for a discussion of asylum eligibility based on resistance to a coercive population control program.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (September 30, 1996), Section 601

> "For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo

INA § 101(a)(42)

such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion."

The amendment effectively overruled previous BIA precedent decisions in which the BIA concluded that imposition of national population control policies (including forced sterilization and abortion) did not in itself constitute persecution on account of a protected characteristic in the refugee definition.

See, Matter of X-P-T-, 21 I&N Dec. 634 (BIA 1996); *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) and *Matter of G-*, 20 I&N Dec. 764 (BIA 1993)

2. Nexus to a protected characteristic

The applicant is not required to demonstrate that the population control program was being selectively applied to him or her on account of a protected ground. The statute requires that the harm (either the forced abortion or sterilization itself, or harm for resisting a coercive population control program) be considered to be on account of political opinion. The applicant still must meet the other elements in the refugee definition to establish eligibility (harm amounting to persecution, reasonable possibility of persecution, etc.).

See, David A. Martin. Office of General Counsel. *Asylum Based on Coercive Family Planning Policies -- Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1966,* Memorandum to Management Team (Washington, DC: 21 October 1996), 6 p.

3. "Other resistance"

In *Matter of S-L-L-* the BIA indicated that "resistance" may take many forms and cover a wide range of circumstances. Resistance can include, for example:

- expressions of general opposition;
- attempts to interfere with enforcement of government policy in particular cases; or
- other overt forms of resistance to the requirements of the family planning law.

Matter of S-L-L-, 24 I&N Dec. at 11-12 (holding that the applicant's efforts in seeking waivers of the age restrictions were not indicative of resistance but rather were indicative of a desire to comply with the coercive population control program).

The BIA held, however, that impregnating a girlfriend or fiancée or seeking permission to marry or have children outside age limits does not constitute "resistance" under the refugee definition.

In *Shi Liang Lin*, the Second Circuit held that the spouse or partner would need to demonstrate "past persecution

Shi Liang Lin v. United States Dep't. of Justice, 494

or a fear of future persecution for 'resistance' that is directly related to his or her own opposition to a coercive family planning policy." The court also held that where an applicant himself has not demonstrated resistance to coercive family control policies, but his spouse or partner has, whether by failure or refusal to undergo a procedure, or for other resistance, he may be able to demonstrate, though persuasive direct or circumstantial evidence, that his partner's resistance has been or will be imputed to him.

F.3d 296 (2d Cir. 2007) (en banc); *see also Xu Ming Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc).

In *Cao v. Gonzales*, the Third Circuit found that writing an article critical of population control practices and exposing the practice of infanticide constitutes "other resistance" to a coercive population control program and that an applicant engaged in such activities could establish eligibility for asylum based on harm resulting from that resistance, even if the applicant was not personally subjected to forced abortion or sterilization.

Cao v. Gonzales, 407 F.3d 146, 153 (3d. Cir. 2005)

Illegally removing a government-imposed intrauterine device (IUD) may constitute a type of "other resistance to a coercive population control program."

See Lin v. Ashcroft, 385 F.3d 748, 757 (7th Cir. 2004); *Feng Chai Yang*, 418 F.3d 1198, 1205 (11th Cir. 2005)

The Ninth Circuit has held that hardships, including economic deprivation and denial of access to education, suffered by a child as a result of her parents' resistance to a population control program were on account of an imputation of the parents' resistance to the child.

Xue Yun Zhang v. Gonzales, 408 F.3d 1239, 1246 (9th Cir. 2005)

F. Personal Problems

1. Definition

A personal problem is one that arises from a dispute or crime unrelated to any of the five protected grounds. For example, fear of retribution from a victim of a car accident for which the applicant was responsible would be a personal problem.

See Cruz-Funez v. Gonzales, 406 F.3d 1187 (10th Cir. 2005) (finding that applicants who feared an unscrupulous private creditor connected to the allegedly corrupt Honduran government, did not fear harm on account of membership in a particular social group, especially where the applicants' debt was settled by a court, which ordered them to pay their creditor back)

Since a personal problem by definition is not connected to a protected ground, a personal problem does not alone provide the basis for asylum eligibility.

2. Considerations

a. what appears to be a personal problem may evolve into valid asylum claim

If a connection between the persecutor's motivation and a protected characteristic he or she perceives the applicant to possess is established, the fact that the threat or harm originated from a personal problem does not render the claim invalid.

Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988)

Example: A woman who was abused by a sergeant for what may be considered personal reasons established eligibility for asylum because the sergeant threatened that, if she reported his abuse, he would tell the authorities that she was a subversive (which she was not).

Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987)

b. personal relationship with persecutor

The fact that an applicant has a personal relationship with the persecutor will not, in itself, defeat the claim. For example, the persecutor may be a spouse or other family member.

See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000)

In some cases where there is a personal relationship between the persecutor and the applicant, the applicant might be targeted because of a trait that is not immediately obvious to the adjudicator. The officer should carefully consider whether the applicant is in fact being targeted because of a trait that might define a social group. Characteristics of an applicant may include, but are not limited to: social status based, for example, on position within a domestic relationship; physical trait; voluntary association; past experience; cultural identity.

If a nexus is established in such cases, the issues that often arise are

These issues are discussed in lesson, *Asylum Eligibility Part II, Well-Founded Fear*.

(i) whether the government is unable or unwilling to protect the victim from the persecutor; and

(ii) whether the threat of harm exists nationwide, or if it would be unreasonable for the applicant to relocate within the country to avoid a

localized threat of harm.

G. Civil Strife

1. General Rule

Fear of general civil strife or war and incidental harm resulting from such violence does not, by itself, establish eligibility for asylum. However, the existence of civil strife or war in the applicant's country does not preclude a finding of eligibility for asylum, if the applicant is harmed or at risk for reasons related to a protected ground.

Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988); *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 (BIA 1988); *UNHCR Handbook*, para. 164; *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000); *Eduard v. Ashcroft*, 379 F.3d 182, 190 (5th Cir. 2004)

2. Presence of civil strife does not preclude eligibility

The BIA has found that widespread chaos and violence caused by civil strife and the type of individualized harm that constitutes persecution on one of the five protected grounds are not mutually exclusive. Persecution often occurs during civil war.

Matter of Villalta, 20 I&N Dec. 142 (BIA 1990);

Example: Inter-clan violence in Somalia may fall within the general category of civil strife, but harmful acts committed by members of one clan against another because of clan membership are persecutory. The number of people who might be at risk of clan violence in Somalia is not relevant to the decision.

Matter of H-, 21 I &N Dec. 337, (BIA 1996)

3. Civil unrest between rival political factions may not be sufficient to establish nexus to a protected characteristic

The Sixth and Seventh Circuit have indicated that when political factions are engaged in civil strife that effects the populace in whole or in large part, acts of violence by one group against another may not be sufficient to establish an individual claim for asylum. In such situations the Sixth and Seventh circuits have looked to whether the police or other state authorities condoned the harm or demonstrated an inability to protect the victim.

Where an applicant claims harm from a rival political group on account of the applicant's political opinion, the officer should consider the degree to which civil strife effects larger portions of the country, the context in which the applicant was harmed (e.g. during a violent conflict with the rival group), and whether the applicant

Meghani v. INS, 236 F.3d 843, 847 (7th Cir. 2001), citing to *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir.1995); *Ali v. Ashcroft*, 366 F.3d 407 (6th Cir. 2004) (finding that a leader of the Jamaat party of Bangladesh who was detained by police as a result of his participation in violent conflicts with members of opposing political parties had not established persecution on account of his political opinion)

was singled out individually.

4. Incidental Harm

Incidental harm resulting from the violence of civil strife or war is not persecution, because it is not directed at the applicant on account of a protected ground. The applicant may be caught in the middle of crossfire or other violence that would occur regardless of his presence.

5. Considerations

To evaluate whether the harm suffered or feared is incidental to strife or whether it was or might be directed at the applicant on account of one of the protected grounds, the asylum officer will need a firm understanding of the applicant's specific situation and the nature of the civil strife.

a. fact that threat occurs during civil war does not in itself weaken the claim

The significance of a specific threat against an applicant is not weakened by the fact that the applicant lives in a country where the lives and freedom of a large number of people are threatened. To the contrary, that fact may make the threat more serious or credible.

M.A. v. INS, 899 F.2d 304, 315 (4th Cir. 1990); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985)

b. consider whether non-combatants are targeted

In any situation in which non-combatants are intentionally targeted, the asylum officer should try to ascertain why non-combatants are targeted, whether the non-combatants share a protected characteristic in the refugee definition, and whether the applicant also possesses that characteristic.

For example, in some situations, the civil strife in itself may be rooted in a protected ground, such as nationality or race. In such situations, the targeting of non-combatants on account of nationality or race would be considered "on account of" a protected ground.

c. "legitimate" acts of war vs. violations of humanitarian law

See, lesson, *International Human Rights Law*

The asylum officer should consider whether the harm or feared harm is a result of a "legitimate" act of war, or a violation of humanitarian law. Even if the applicant is a combatant, he or she may be subject to persecution if the opponent (either government or revolutionary/guerrilla group) acts outside of the internationally recognized parameters of "legitimate" warfare.

d. evaluate the specific treatment of the applicant

Though the experiences of others mistreated during a period of civil strife are relevant to the evaluation of an applicant's claim, an examination of the particular circumstances of the applicant's experience must be taken into consideration.

Ndom v. Ashcroft, 384 F.3d 743, 750 (9th Cir. 2004)

For example, in *Ndom v. Ashcroft*, the Ninth Circuit overturned a decision by an Immigration Judge that two arrests of a Senegalese applicant living in the Casamance region of the country at the time of civil unrest were not on account of the applicant's political opinion. The Immigration Judge concluded that the applicant was "indiscriminately arrested" with others living in the town and thus was a "victim of civil and military strife."

Ndom v. Ashcroft, 384 F.3d 743, 755 (9th Cir. 2004)

In reversing the Immigration Judge's conclusion, the Ninth Circuit identified evidence indicating that the applicant was targeted on account of his imputed political opinion. Though he was arrested during mass arrests in his town, the applicant was individually accused of supporting the Mouvement des forces démocratiques de Casamance (MFDC), a group seeking independence for Casamance, and was ordered to sign a confession form stating that he participated in a "rebellious manifestation." The court found that this evidence compelled the conclusion that the applicant had been targeted on account of his political opinion.

H. Prosecution vs. Persecution

1. General rule

Matter of A-G-, 19 I&N Dec. 502 (BIA 1987); *UNHCR Handbook*, para. 56

Legitimate prosecution for a common law offense is not persecution.

2. Explanation

   A government has a right to investigate and punish individuals for violations of legitimate laws.

   See Dinu v. Ashcroft, 372 F.3d 1041 (9th Cir. 2004) (harassment resulting from an investigation does not give rise to an inference of political persecution where police are trying to find evidence of criminal activity and there is a logical reason for pursuit of the individual)

3. Exceptions

   a. prosecution that is used as a ***pretext*** to persecute an individual on account of any of the five protected grounds

      Punishment that is unduly harsh given the nature of the offense committed may be evidence of pretext.

      Matter of A-G-, 19 I&N Dec. 502 (BIA 1987); *Rodriguez-Roman v. INS*, 98 F.3D 416 (9th Cir. 1996); *UNHCR Handbook*, para. 57-59

   b. harsher punishment of the applicant than is imposed on others who do not possess protected characteristic

      If the applicant is subjected to harsher punishment than others who do not share a protected characteristic that he or she possesses or is perceived to possess, the harsher punishment may be on account of that protected characteristic.

   c. prosecution of a possessed protected characteristic

      Examples: Prosecution for the crime of attending religious services could constitute persecution on account of religion. Prosecution under a statute aimed at the expressive conduct of political dissidents may constitute persecution on account of political opinion.

      See e.g., *Chang v. INS*, 119 F.3d 1055 (3rd Cir. 1997); *Perkovic v INS*, 33 F.3d 615 (6th Cir. 1994) (holding that prosecution for violation of laws against expressing political opinions hostile to the government or engaging in political activity outside of country constitutes persecution on account of political opinion); *but see*, *Kimumwe v. Gonzales*, 431 F.3d 319, 322 (8th Cir. 2005) (finding that expulsion from school and arrest for two instances of sexual misconduct did not amount to persecution on account of the applicant's

homosexuality)

d. prosecution for a political crime

Matter of Izatula, 20 I&N Dec. 149 (BIA 1990)

(i) The adjudicator must determine whether an individual was prosecuted for a political opinion or for politically motivated acts that violate the law. The adjudicator should consider the nature and motive of the act and the nature of the law on which the prosecution is based.

See, section VII.E., *Attempts to Overthrow a Government*, above.

(ii) In a country where there is no legitimate method of peaceful government reform, punishment for violent rebellion can form the basis for a valid asylum claim.

e. Prosecution for violation of departure laws

Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983); *Nazaraghaie v. INS*, 102 F.3d 460 (10th Cir. 1996)

(i) The fact that a country may punish an applicant for violating departure laws does not, without more, establish eligibility for asylum. This is because a government has legitimate authority to establish and enforce laws governing departure from the country.

See, *Rodriguez-Roman v. INS*, 98 F.3D 416 (9th Cir. 1996) ("a state which severely punishes unlawful departure views persons who illegally leave as disloyal and subversive and seeks to punish them accordingly."); *Chang v. INS*, 119 F.3d 1055 (3rd Cir. 1997)

(ii) However, punishment for violation of travel laws might be used as a pretext to persecute the individual on account of one of the protected grounds. Evidence that the punishment is used as a pretext for persecution may include punishment disproportionate to the crime and/or country reports that the country in question views individuals who violate departure laws as traitors or subversives.

4. General considerations

As noted above, disproportionate punishment may be evidence that prosecution is being used as a pretext to harm someone on account of a protected characteristic. When evaluating claims involving investigation for alleged criminal conduct, it is important to consider the circumstances of the arrest and the treatment of the applicant while in detention. The fact that an applicant does not receive the due process expected in the U.S. does not establish that the investigation or prosecution is pretextual. However, the fact that a detainee is deprived

of basic due process rights or is harmed while detained may be evidence of pretext.

The BIA has provided the following guidance to be considered in identifying motive in this context:

a. indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct, e.g., statement or actions by the perpetrators or abuse out of proportion to nonpolitical ends

Matter of S-P-, 21 I & N Dec. 486 (BIA 1996)

b. treatment of others in the population who might be confronted by government agents in similar circumstances

c. conformity to procedures for criminal prosecution or military law including developing international norms regarding the law of war

d. the extent to which anti-terrorism laws are defined and applied to suppress political opinion as well as illegal conduct (e.g., an act may broadly prohibit "disruptive" activities and be applied to peaceful as well as violent expressions of views)

e. the extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse

IX. SUMMARY

A. General Principles Regarding Nexus

1. Nexus

To be eligible for asylum, the applicant must establish that the persecutor harmed or seeks to harm the applicant because the ***applicant*** possesses, or is believed to possess, one or more of the protected grounds.

2. Motive of the persecutor

The motive of the persecutor is determinative in evaluating whether a nexus to one of the protected grounds has been established. The applicant's possession or imputed possession of a protected characteristic must be at least one central reason for persecuting the applicant. Motive may be established by

either direct or circumstantial evidence.

3. Exact motive need not be established

   The applicant does not bear the burden of establishing the exact motive of the persecutor, but must establish that a ***reasonable person*** would fear that the danger arises on account of the applicant's possession of a characteristic connected to one of the protected grounds in the refugee definition.

   The persecutor may be motivated by several factors; there is no requirement that the persecutor be motivated only by a desire to overcome or change a protected characteristic.

4. Motive need NOT be punitive

   There is no requirement that the persecutor's motive be punitive, although it may be punitive.

5. Imputed characteristic

   Persecution inflicted upon an individual because the persecutor attributes to the individual one of the protected characteristics constitutes persecution on account of that characteristic.

B. Five Protected Characteristics

1. Race

   "Race" includes all kinds of ethnic groups and may also entail membership in a specific social group of common descent. Discrimination on account of race generally will not amount to persecution. However, severe discrimination, an accumulation of discriminatory acts, and discrimination that seriously affects an individual's dignity because of a person's race, may constitute persecution on account of race.

   Serious harm imposed for disregard of racial barriers may also constitute persecution on account of race.

2. Religion

   Some forms of persecution on account of religion may include actions that seriously impede an individual's

ability to practice his or her religion; serious harm for conversion from one religion to another; punishment for violating religious-based laws; and forced compliance with religious laws that are abhorrent to an applicant's own beliefs.

3. Nationality

"Nationality" as a protected ground refers to membership in an ethnic or linguistic group as well as country of citizenship. Persecution on account of nationality often overlaps with persecution on account of other protected grounds, such as race and political opinion.

In some ethnically-based conflicts, members of an ethnic group may be at risk of harm, even though they are not themselves directly involved in the conflict, because they are automatically associated with the members of their ethnic group who are involved in a conflict.

4. Particular Social group

A particular social group is a group of persons who share characteristics such as similar background, habits, or social standards. The shared characteristic must be either immutable or so fundamental to the individual's conscience or identity that the individual should not be required to change it. The group must also reflect society's perceptions of the group such that the persecutor is not motivated by purely personal reasons.

A social group cannot be defined by terrorist, criminal or persecutory activity or association, past or present. In addition, the particular social group cannot be defined by the harm that the applicant experienced (for evaluating past persecution) or fears (for evaluating well-founded fear).

5. Political opinion

"Political opinion" should not be interpreted narrowly to include only participation in a political party or the political process. It should be interpreted broadly, and may include opinions regarding women's rights, worker rights, and other human and civil rights.

The fact that the persecutor is associated with a political entity does not establish that the harm or feared harm is

on account of political opinion. Persecution on account of political opinion means persecution on account of the ***applicant's*** opinion or one that has been attributed to the applicant.

Forced abortion or forced sterilization, persecution for refusal to undergo such procedures, and persecution for resistance to population control policies, by law are considered to be persecution on account of political opinion. Coercive family planning cases do not require specific evidence of motivation.

C. Common Nexus Issues

Generally, US law requires specific evidence, either direct or circumstantial, that the persecutor is motivated by a protected characteristic that the applicant possesses or is perceived to possess. Evidence that the applicant is in a conflictive situation is generally not specific enough to establish nexus. Asylum officers are responsible for eliciting evidence surrounding the circumstances of the applicant's claim to determine if such specific evidence exists.