PRACTICE POINTERS FOR ASYLUM CASES

Representing clients at individual hearings on the merits of their asylum claim.

- **Points to Address At Hearing** **Asylum Application Requirements**

Points to Address At Hearing

ASYLUM

To be statutorily eligible for asylum, an applicant bears the burden of establishing that they are a refugee, which requires a showing of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d). If eligibility is established, asylum may be granted in the exercise of discretion. INA § 208(b)(1)(A); INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

Applicant Has Burden of Proof

An applicant requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under INA § 208. Under the REAL ID Act, after considering "the totality of the evidence, and all relevant factors,"

A. One Year Filing Deadline

As a threshold matter, an applicant must prove by clear and convincing evidence that their asylum application was filed within one year of the date of their last arrival into the United States. INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2). If the applicant files after the one-year deadline, they must show to the satisfaction of the Court that they qualify for an exception to the filing deadline. *Id.*

B. Past Persecution

To establish past persecution, an asylum applicant must demonstrate that they suffered persecution in their country of nationality on account of a protected ground, and that they are unable or unwilling to return to, or avail themself of the protection of, that country because of such persecution. INA §§ 101(a)(42)(A), 208(b)(1)(B); 8 C.F.R. § 1208.13(b)(1). "Persecution is the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground," and includes "non-life-threatening violence and physical abuse." *Ivanishvili v. U.S. Dep't of Justice***, 433 F.3d 332, 341 (2d Cir. 2006) (internal quotation marks and citations omitted). Moreover, persecution must be inflicted by either the government or by a person or entity the government is "unwilling or unable to control." Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985). When evaluating whether persecution has occurred, events must be considered cumulatively.** *Poradisova v. Gonzales,* **420 F.3d 70, 79-80 (2d Cir. 2005).**

MIXED MOTIVATIONS ARE OK

Aliyev *v.* Mukasey, 549 F.3d 111 (2d Cir. 2008) We have held that asylum claims are subject to mixed-motive analysis: "The protected ground need not be the sole motive: `the plain meaning of the phrase "persecution on account of the victim's political opinion," does not mean persecution solely on account of the victim's political opinion.'" *Uwais v. U.S. Att'y Gen.*, 478 F.3d 513, 517 (2d Cir.2007) (quoting *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir.1994)). "Where there are mixed motives for a persecutor's actions, an asylum applicant need not show with absolute certainty why the events occurred, but rather, only that the harm was motivated, in part, by an actual or imputed protected ground." *Id.* at 517 (citing *Matter of S-P-*, 21 I. & N. Dec. 486, 494-95 (B.I.A.1996)).

C. Well-Founded Fear of Future Persecution

If past persecution is established, a regulatory presumption arises that the applicant has a well-founded fear of future persecution on the basis of their original claim. *See *8 C.F.R. § 1208.13(b)(1).

The U.S. Department of Homeland Security may rebut this presumption if it establishes by a preponderance of the evidence that the applicant’s fear is no longer well-founded due to a fundamental change in circumstances or because the applicant could avoid future persecution by relocating to another part of the country and that it would be reasonable to expect them to do so. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

Must Show Subjective Fear *AND* Objective Fear

To establish a well-founded fear of future persecution, the applicant must establish both that they have a subjective fear of persecution and that the fear is objectively reasonable. *Ramsameachire v. Ashcroft*, **357 F.3d 169, 178 (2d Cir. 2004).**

Subjective Fear

The applicant's credible testimony may satisfy the subjective component. Id. at 178; *see also Diallo v. INS,* **232 F.3d 279, 286 (2d Cir. 2000).**

Objective Fear

To meet the objective element of the test, the applicant need only show that such fear is grounded in reality; that is, they must present "reliable, specific, objective" evidence that their fear is reasonable. *Ramsameachire*, **357 F.3d at 178. The applicant's fear may be well-founded even if there is "only a slight, though discernible, chance of persecution."** *Diallo*, **232 F.3d at 284 (citing** *Cardoza-Fonseca,* **480 U.S. at 431).**

To demonstrate that their fear of persecution is objectively well-founded, an applicant must provide evidence:

(1) that [they] ha[ve] a belief or characteristic that a persecutor seeks to overcome by means of some mistreatment, that the persecutor has the (2) capability and (3) inclination to impose such mistreatment, and (4) that the persecutor is, or could become, aware of the applicant's possession of the

disfavored belief or characteristic.

Kyaw Zwar Tun v. INS, **445 F.3d 554, 565 (2d Cir. 2006).**

Pattern or Practice

An applicant is not required to provide evidence that they would be "singled out individually" for persecution in the country of removal if they establish that, in the country from which they are seeking asylum, "there is a pattern or practice . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion," and that the applicant is included in and identifies with that group, such that their "fear of persecution upon return is reasonable." 8 C.F.R. § 1208.13(b)(2)(iii); *see also Shao v. Mukasey,* **546 F.3d 138, 150 n.6 (2d Cir. 2008) ("Pattern-and-practice analysis affords a petitioner who cannot credibly demonstrate a reasonable possibility that he will be targeted as an individual for future persecution an alternative means to demonstrate that his fear of persecution is objectively reasonable.").**

To establish eligibility for asylum based upon a pattern or practice of persecution, an applicant must demonstrate that the persecution against the group in which they are included is "systemic or pervasive." *Matter of A-M-*, **23 I&N Dec. 737, 741 (BIA 2005).**

D. Nexus to a Protected Ground

An applicant for asylum must also demonstrate that the persecution they fear was or would be "on account of" their race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d).

In post-REAL ID Act cases, the applicant must demonstrate that a protected ground was or will be "at least one central reason for persecuting the applicant." INA § 208(b)(1)(B)(i); *see, e.g., Acharya v. Holder,* **761 F.3d 289, 297 (2d Cir. 2014);** *Matter of N-M-***, 25 I&N Dec. 526, 526, 531 (BIA 2011) ("In cases arising under the REAL ID Act . . . an alien must demonstrate that the persecutor would not have harmed the applicant if the protected trait did not exist.");** *Matter of J-B-N- & S-M-***, 24 I&N Dec. 208, 212 (BIA 2007);** *Matter of A-B-,* **28 I&N Dec. 307 (AG 2021) ("A-B- III");** *Matter of A-C-A-A-***, 28 I&N Dec. 351 (AG 2021).**

In discerning persecutory motives, the Court must consider the "totality of the circumstances." *Matter of S-P-***, 21 I&N Dec. 486, 494 (BIA 1996);** *see Vumi v. Gonzales,* **502 F.3d 150, 157-58 (2d Cir. 2007).**

i. Race/Nationality

As a threshold matter in determining eligibility for asylum, the applicant bears the burden of establishing their nationality. *See Wangchuck v. Dep't of Homeland Security***, 448 F.3d 524, 528 (2d Cir. 2006); 8 C.F.R. § 1208.13(a). An applicant bears the burden of establishing his or her race or nationality when claiming persecution on account of this protected ground. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. § § 1208.13, 1240.8(d) 8 C.F.R. § 1208.16(b). "A national is a person owing permanent allegiance to a state," and "[n]ationality is a status conferred by a state, and will generally be recognized by other states provided it is supported by a genuine link**

between the individual and the conferring state." *Dhoumo v. BIA,* **416 F.3d 172, 175 (2d Cir. 2005) (citing INA § 101(a)(21) and Restatement (Third) of Foreign Relations § 211) (internal quotations omitted). Race, on the other hand, includes "all kinds of ethnic groups that are referred to as 'races' in common usage." United Nations High Commissioner on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 68 (1992);** *see also Duarte de Guinac v. INS,* **179 F.3d 1156, 1160 n.5 (9th Cir. 1999) (noting that race and nationality "may sometimes overlap").**

ii. Religion

"The critical showing that an applicant must make to demonstrate eligibility for asylum on religious persecution grounds is that he [or she] has suffered past persecution, or fears future persecution, on the basis of religion." *Rizal v. Gonzales***, 442 F.3d 84, 90 (2d Cir. 2006). The applicant must establish that they identify with a particular religion or that others perceive the applicant as an adherent to that religion, but the applicant need not demonstrate detailed knowledge of the religion's doctrinal tenets.** *Id.* **Evidence of treatment of religious groups is probative of a threat against an applicant claiming religious persecution.** *See, e.g., Ivanishvili,* **433 F.3d at 339- 43 (IJ failed to evaluate Jehovah's Witness testimony about religious persecution in Georgia).**

Evidence of an applicant's religious conversion where the applicant converted after leaving his or her home country is also probative. *See Rafiq v. Gonzales***, 468 F.3d 165, 166 (2d Cir. 2006) (reversing denial of CAT claim of Muslim who converted to Christianity).**

iii. Particular Social Group

A "particular social group" must be (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, **26 I&N Dec. 227, 237 (BIA 2014). The characteristic may be innate or based upon a shared past experience.** *Matter of Acosta,* **19 I&N Dec. at 233;** *see Matter of C-A-*, **23 I&N Dec. 951, 958 (BIA 2006).**

The "common, immutable characteristic" is determined on a case-by-case basis and "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, **19 I&N Dec. at 233. Next, the particularity requirement is "definitional in nature" and focuses on delineation—whether the particular social group definition is sufficiently discrete and precise as opposed to amorphous.** *Matter of M-E-V-G-*, **26 I&N Dec. at 239-41;** *Matter of W-G-R-*, **26 I&N Dec. 208, 214 (BIA 2014). The proposed particular social group should address the "outer limits" of the group's boundaries and "provide a clear benchmark for determining who falls within the group."** *Matter of M-E-V-G-*, **26 I&N Dec. at 239-41. In making this determination, the definition should be analyzed in the context of the society in question and focus on whether members of the society "generally agree on who is included in the group." Matter of W-G-R-***,* **26 I&N Dec. at 221. Lastly, "social distinction" requires that members of the proposed group would be perceived as a separate or distinct group by society.** *Matter of M-E-V-G-*, **26 I&N Dec. at 242 (clarifying that the perception of the society, and not the persecutor, is determinative for social distinction purposes);** *Quintanilla-Mejia v. Garland,* **3 F.4th 569, 588 (2d Cir. 2021). In other words, the society in question must meaningfully distinguish those with the common immutable characteristic from those who do not have it. Id. at 238.**

Particular Social Group

E. Government Unwilling or Unable

<aside> Matter of C-G-T-, 28 I&N Dec. 740 (BIA 2023)

(1) A respondent's failure to report harm is NOT necessarily fatal to a claim of persecution if the respondent can demonstrate that reporting private abuse to government authorities would have been futile or dangerous.

(2) Determining whether the government is or was unable or unwilling to protect the respondent from harm is a fact-specific inquiry based on consideration of all evidence.

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Persecution must be inflicted by either the government or by a person or entity the government is "unwilling or unable to control." *See Matter of Acosta* **, 19 I&N Dec. at 222;** *see also Pavlova v. INS***, 441 F.3d 82, 91 (2d Cir. 2006) ("[W]e have never held that direct governmental action is required to make out a claim of persecution. On the contrary, 'it is well established that private acts may be persecution if the government has proved unwilling to control such actions.'") (internal citations omitted). The unwilling-or-unable standard contains two distinct prongs: the "unwilling" prong and the "unable" prong, only one of which must be satisfied.** *See Scarlett v. Barr,* **957 F.3d 316, 330 (2d Cir. 2020) (finding that even though applicant may not have demonstrated that the Jamaican police were unwilling to protect him from gang violence, the BIA overlooked evidence that the Jamaican**

authorities were unable to protect him).

F. Discretion

An applicant who establishes statutory eligibility for asylum still bears the burden of demonstrating that they merit a grant of asylum as a matter of discretion. INA § 208(b)(1)(A); *Cardoza-Fonseca,* **480 U.S. at 429 n.5 (noting that the Attorney General is not required to grant asylum to everyone who meets the refugee definition). In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered.** *Matter of Pula***, 19 I&N Dec. 467, 473-74 (BIA 1987) (superseded by regulation on other grounds). General humanitarian factors, such as age, health, or family ties, should also be considered in the exercise of discretion.** *Matter of H-***, 21 I&N Dec. 337, 347-48 (BIA 1996);** *Matter of Pula***, 19 I&N Dec. at 474. In the absence of any adverse factors, asylum should be granted.** *Matter of Pula***, 19 I&N Dec. at 474. In addition, the danger of persecution should outweigh all but the most egregious adverse factors.** *Wu Zheng Huang v. INS,* **436 F.3d 89, 98 (2d Cir. 2006) (citing** *Matter of Kasinga,* **21 I&N Dec. 357, 367 (BIA 1996));** *see Matter of Pula,* **19 I&N Dec. at 474.**

A decision to deny asylum in the exercise of discretion should not be based solely on the noncitizen's use of a smuggler to enter the United States or on a partial adverse credibility determination. *Wu Zheng Huang***, 436 F.3d at 99. Rather, "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted."** *Matter of Pula,* **19 I&N Dec. at 473;** *see Wu Zheng Huang***, 436 F.3d at 99.**

When an Immigration Judge denies asylum solely in the exercise of discretion and grants withholding of removal, they must reconsider the denial to take into account factors relevant to family unification. See 8 C.F.R. § 1208.16(e); *see also Matter of T-Z-*, **24 I&N Dec. 163, 176 (BIA 2007). Factors to be considered include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with their spouse or minor children in a third country. 8 C.F.R. § 1208.16(e).**

OTHER POINTS

Firm Resettlement

An applicant is ineligible for asylum if he or she was "firmly resettled in another country prior to arriving in the United States." INA § 208(b)(2)(A)(vi). The regulations provide that an applicant "is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 1208.15.

The Second Circuit has adopted a "totality of the circumstances" approach to determining whether an applicant was firmly resettled. See Tchitchui v. Holder, 657 F.3d 132, 136 (2d Cir. 2011); Jin Yi Liao v. Holder, 558 F.3d 152, 157 (2d Cir. 2009) (citing Sall v. Gonzales, 437 F.3d 229, 234-35 (2d Cir. 2006) (per curiam)). Under this approach, an official government offer is not necessary for a person to be firmly resettled in another country. Sall, 437 F.3d at 233; Liao, 558 F.3d at 157. Although an actual offer of permanent

residence is of “particular importance,” it is one of many factors, including “whether [the applicant] has family ties [in the country where he or she may have been firmly resettled], whether he [or she] has business or property connections that connote permanence, and whether he [or she] enjoyed the legal rights—such as the right to work and to enter and leave the country at will—that permanently settled persons can expect to have.” Sall, 437 F.3d at 235. The totality of the applicant’s activities in the third country prior to his or her arrival in the United States are relevant to the question of whether he or she was firmly resettled, regardless of whether such activities occurred pre- or postpersecution. See 8 C.F.R. § 1208.15; Tchitchui, 657 F.3d at 136-37.

The BIA has established a four-step analysis for making firm resettlement determinations. Matter of A-G-G-, 25 I&N Dec. 486, 501 (BIA 2011); see also Matter of D-X- & Y-Z-, 25 I&N Dec. 664, 665 (BIA 2012).

In the first step, the Department bears the burden of presenting prima facie evidence of an offer of firm resettlement. Matter of A-G-G-, 25 I&N Dec. at 501. The Department should first secure and produce “direct evidence of governmental documents indicating an alien’s ability to stay in a country indefinitely.” Matter of A-G-G-, 25 I&N Dec. at 501. This may include evidence of refugee status, a passport, a travel document, or other evidence indicative of permanent residence. Matter of D-X- & Y-Z-, 25 I&N Dec. at 665. A facially valid permit allowing an asylum applicant to reside in a third country constitutes prima facie evidence of an offer of firm resettlement, even if the permit was obtained fraudulently. See Matter of D-X- & Y-Z-, 25 I&N Dec. 664, 665-66 (BIA 2012).

If direct evidence of an offer of firm resettlement is unavailable, indirect evidence may be used to show that an offer of firm resettlement has been made “if it has a sufficient level of clarity and force to establish that an alien

is able to permanently reside in the country." Matter of A-G-G-, 25 I&N Dec. at 502. Moreover, "[t]he existence of a legal mechanism in the country by which an alien can obtain permanent residence may be sufficient to make a prima facie showing of an offer of firm resettlement" whether or not the individual applies for that status. Matter of A-G-G-, 25 I&N Dec. at 502.

Accordingly, "a viable and available offer to apply for permanent residence in a country of refuge is not negated by the alien's unwillingness or reluctance to satisfy the terms for acceptance." Matter of K-S-E-, 27 I&N Dec. 818, 821 (BIA 2020) (citing Matter of A-G-G-, 25 I&N Dec. at 503 ("The regulations only require that an offer of firm resettlement was available, not that the alien accepted the offer.")). In the second step of the firm resettlement analysis, the applicant may rebut the Department's evidence of an offer of firm resettlement "by showing by a preponderance of the evidence that such an offer has not, in fact, been made or that he or she would not qualify for it." Matter of A-G-G-, 25 I&N Dec. 486, 503 (BIA 2011); see also 8 C.F.R. § 1240.8(d). In the third step, the Immigration Judge is required to consider the totality of the evidence presented by the parties to determine whether the applicant has rebutted the evidence of firm resettlement. See Matter of A-G-G-, 25 I&N Dec. at 503.

Finally, if the Immigration Judge finds that the applicant has not rebutted the evidence of firm resettlement, the burden shifts to the applicant to establish by a preponderance of the evidence that he or she is eligible for one of the regulatory exceptions to the firm resettlement bar. See Matter of A-GG-, 25 I&N Dec. 486, 503 (BIA 2011); 8 C.F.R. § 1208.15 (a)-(b). An applicant can qualify for an exception to the firm resettlement bar if he establishes that:

(1) his entry into that country was a necessary consequence of his flight from persecution, that he remained in that country only as long as was

necessary to arrange onward travel, and that he did not establish significant ties to that country; or

(2) the conditions of his residence in that country were so substantially and consciously restricted in that county that he was not in fact resettled. 8 C.F.R. § 1208.15 (a)-(b); see Matter of A-G-G-, 25 I&N Dec. at 503; see, e.g., Matter of K-S-E-, 28 I&N Dec. at 822 (determining that the respondent's evidence did not establish that the Brazilian Government "actively supports any mistreatment of Haitians that would constitute a conscious and substantial restriction of the respondent's residence").

Where an asylum applicant who has resettled in a third country travels to the United States and then returns to the country of resettlement, the applicant did not remain in that country "only as long as was necessary to arrange onward travel" for purposes of establishing an exception to firm resettlement. See Matter of D-X- & Y-Z-, 25 I&N Dec. 664, 667-68 (BIA 2012).

Internal Relocation

For an applicant to be able to internally relocate safely, there must be an area of the country where the circumstances are "substantially better" than those giving rise to a well-founded fear of persecution on the basis of the original claim. *Matter of M-Z-M-R-,* **26 I&N Dec. 28, 33 (BIA 2012). When determining whether it is reasonable to expect an applicant to relocate in the proposed country of removal, the IJ should consider, but is not limited to considering, the following factors:**

2. **whether the respondent would face serious harm in the place of suggested relocation;**
3. **any geog**

See **8 C.F.R. § 1208.13(b)(3);** *see also Dong Zhong Zheng v. Mukasey*, **552 F.3d 277, 288 n.7 (2d Cir. 2009).** **

> “ *See Singh v. Garland,* **11 F.4th 106, 117 (2d Cir. 2021) (concluding the Board’s finding that respondent could internally relocate was supported by substantial evidence, where: (1) the record contained evidence that there are 1.2 billion people, including 19 million Sikhs, living in India and that Indian citizens—Sikhs in particular—do not face difficulties relocating within the country; (2) the record also reflected that there is no central countrywide registration system or nationwide police database that members of the Akali Dal Badal could use to track rivals and that only high-profile militants—not local party organizers such as respondent— are of interest to national authorities; and (3) there were no recent reports of persecution against members of the Akali Dal Mann anywhere in India and respondent did not identify any, let alone enough to be arguably nationwide).**

Internal Relocation Presumed Not To Be Reasonable

Where the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the

Department establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3)(ii). An applicant's allegation that he was persecuted by members of a political party—even one that is in power nationally or is aligned with a party in power nationally—does not establish that the applicant was persecuted by the government. *Singh v. Garland,* **11 F.4th 106, 115 (2d Cir. 2021).**

§ 1208.13(b)(3); see also id. § 1208.16(b)(3) ("[A]djudicators should con-sider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of na-tionality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecuto-r.").
Singh Bhagtana v. Garland, 20-1673 (2d Cir. 2023)**

Voluntary Return Trips Standing Alone DOESN'T Kill Claim

The mere fact that an applicant may have made voluntary return trips to his home country, standing alone, does not suggest either any fundamental change in circumstances or the possibility of internal relocation, but rather should be considered as one factor among others in determining whether a presumption of future persecution has been rebutted. See Kone v. Holder, 596 F.3d 141, 148 (2d Cir. 2010).

WITHHOLDING OF REMOVAL

To qualify for withholding of removal, an applicant must establish a "clear probability" of persecution, meaning that it is "more likely than not" that they would be subject to persecution on account of a protected ground. *Cardoza Fonseca*, **480 U.S. at 430 (citing** *INS v. Stevic,* **467 U.S. 407 (1984));** *see* **INA § 241(b)(3). A withholding applicant must establish that a protected ground "was or will be at least one central reason" for the persecution they will face.** *Matter of C-T-L-,* **25 I&N Dec. 341, 348 (BIA 2010).**

Where the applicant establishes that they suffered past persecution on the basis of one such statutory ground, it is presumed that the applicant's life or freedom will be threatened in the future, and the burden shifts to DHS to demonstrate by a preponderance of the evidence that (1) a fundamental change in circumstances has occurred in that country such that the applicant's life or freedom will not be threatened or (2) the applicant could safely relocate to another area in the proposed country of removal and that it would be reasonable to expect them to do so. 8 C.F.R. § 1208.16(b)(1); *see also Makadji v. Gonzales,* **470 F.3d 450, 458 (2d Cir. 2006);** *Serafimovich v. Ashcroft,* **456 F.3d 81, 85 (2d Cir. 2006). If the applicant did not suffer past persecution, or if the fear of future threat to life or freedom is unrelated to the past persecution that they suffered, the applicant must establish "that it is more likely than not" that they "would be persecuted" in the future on account of a protected ground. 8 C.F.R. § 208.16(b)(2);** *Ivanishvili v. U.S. Dep't of Justice*, **433 F.3d 332, 339 (2d Cir. 2006).**

See more at:

Withholding of Removal

Persecution

Proving Past Persecution

CONVENTION AGAINST TORTURE

The Convention Against Torture ("CAT") and its implementing regulations provide that no person shall be removed to a country where it is "more likely than not" that such person will be subject to torture. 8 C.F.R. § 1208.16(c)(2). Where an application for asylum is denied because the applicant failed to demonstrate the "slight, though discernible, chance of persecution" required for asylum, the applicant necessarily fails to meet the "more likely than not to be tortured" standard for CAT relief. *Lecaj v. Holder,* **616 F.3d 111, 119 (2d Cir. 2010). Eligibility for CAT relief cannot be established by stringing together a series of suppositions to show that torture is more likely than not to occur unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen.** *Matter of J-F-F-***, 23 I&N Dec. 912, 917-18 (A.G. 2006).**

"Torture" is "an extreme form of cruel and inhuman treatment," defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. §§ 1208.18(a)(1)(2); *see Pierre v. Gonzales,* **502 F.3d 109, 115 (2d Cir.**

2007). The definition of torture does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions, unless such sanctions defeat the object and purpose of the CAT. 8 C.F.R. § 1208.18(a)(3); see, e.g., *Pierre,* **502 F.3d at 121*; Matter of R-A-F- ,* 27 I&N Dec. 778 (A.G. 2020);** *Matter of J-R-G-P-***, 27 I&N Dec. 482 (BIA 2018); see also Gallina v. Wilkinson, 988 F.3d 137 (2d Cir. 2021) (finding no basis to overturn the BIA's finding that applicant's pain and suffering in Italian prison were "inherent in or incident to a lawful sanction and thus not intentionally inflicted"). "Torture" does not include "negligent acts" or harm stemming from a lack of resources.** *Matter of J-R-G-P-***, 27 I&N Dec. at 484. Instead, a torturous act must "be specifically intended to inflict severe physical or mental pain or suffering."** *Matter of R-A-F-***, 27 I&N Dec. at 778. The act must be motivated by "such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind."** *Id.*

Torturous conduct committed by a public official who is acting "in an official capacity," that is, "under color of law," is covered by the CAT. *Matter of O-F-A-S-,* **28 I&N Dec. 35 (A.G. 2020);** *see also Matter of J-G-R-,* **28 I&N Dec. 733 (BIA 2023); 8 C.F.R. § 1208.18(a)(1). The "under color of law" standard makes no categorical distinction between the acts of low and high level officials.** *Matter of O-F-A-S-,* **28 I&N Dec. at 40. A public official, regardless of rank, acts "under color of law" when he exercises power "possessed by virtue of . . . law and made possible only because [he was] clothed with the authority of . . . law."** *Id.* **The key consideration in determining if an official's tortuous conduct was undertaken "in an official capacity" is "whether the official was able to engage in the conduct because of his or her government position, or whether the official could have done so without connection to the government."**

Matter of J-G-R-, **28 I&N Dec. at 738. There is no distinct "rogue official" test for determining whether a public official or other person is acting "in an official capacity."** *Matter of O-F-A-S-*, **28 I&N Dec. at 41. Acquiescence of a public official requires that the official have awareness of or remain "willfully blind" to the activity constituting torture prior to its commission, and thereafter breach their legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7);** *Khouzam v. Ashcroft,* **361 F.3d 161, 171 (2d Cir. 2004).**

In assessing whether an applicant has satisfied their burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including evidence that the applicant has suffered torture in the past; evidence that the applicant could relocate to a part of the country of removal where they are not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant information on country conditions. 8 C.F.R. § 1208.16(c)(3); *see Ramsameachire*, **357 F.3d at 184. The regulations do not require the applicant to establish relocation is not possible.** *Manning v. Barr*, **954 F.3d 477, 488 (2d Cir. 2020) (holding the IJ erred in placing the burden on the applicant to demonstrate that it was not possible to relocate to a different area of the country to avoid torture). Rather, evidence that an applicant can relocate to another part of the country where they are "not likely to be tortured" is only one of a number of factors the IJ must consider. Id. Internal relocation is not satisfied "by assuming that a petitioner must essentially live incommunicado and isolated from loved ones." Id. at 488.**

Asylum Application Requirements

Matter of C-A-R-R-, 29 I&N Dec. 13 (BIA 2025)

Matter of C-A-R-R-, 29 I&N Dec. 13 (BIA 2025)

(1) An Immigration Judge is *not* required to consider an Application for Asylum and for Withholding of Removal (Form I-589) on the merits if it is incomplete, and *incomplete applications may be considered waived or abandoned*, particularly where an opportunity to cure has been offered.

(2) Because declarations are not a constituent part of an asylum application, a Form I-589 is *not incomplete*, and an Immigration Judge *may not* deem it abandoned, solely because the respondent did not submit a declaration. *Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010), reaffirmed.

In this decision, a pro se asylum applicant made three separate attempts to submit I-589 applications to the immigration court; all were rejected for failure to properly answer each of the questions on the form. On the fourth attempt, the I-589 was finally accepted by the IJ. However, the judge rejected the supporting declaration because it did not contain a proper certificate of translation or the original Spanish-language version of the document. The IJ further found that a supporting statement was a required

part of the I-589 and thus deemed the entire asylum application waived and abandoned.

The BIA reversed on appeal, finding that a supporting statement was not a "constituent part" of the I-589. The BIA noted that it is within the IJ's authority to set deadlines for the acceptance of evidence, and that the IJ was entitled to reject the supporting statement for failure to comply with the requirements of the immigration court practice manual. However, the IJ erred in finding that this meant that the entire I-589 was abandoned and waived. The IJ was entitled to consider the absence of supporting evidence when evaluating the *merits* **of the I-589, however, the IJ erred in finding that this necessarily meant that the chance to apply for relief had been abandoned and waived by the respondent.**

The BIA reiterated that, under 8 CFR § 1208.3(c)(3), a Form I-589 is considered incomplete if it (1) lacks a response to each question on the form, (2) is unsigned, or (3) is missing required materials. The BIA confirmed that "required materials" do *not* **include a declaration. For regulatory purposes, "a response to each of the questions" means that every question must be answered specifically and responsively, but not necessarily that every space on the form must be filled. In a footnote, the BIA clarified that blank spaces are permissible when it is not necessary to use every line to fully respond to a question. For example, an applicant who has no children may leave blank the sections requesting details about children. Conversely, applicants should use continuation pages where the space provided on the form is insufficient to provide a full response.** *See Form I-589, Supplements A and B* **(Mar. 1, 2023). Notably, the BIA went beyond the regulations to cite commentary regarding U.S. Citizenship and Immigration Service's justification for promulgating the I-589 and to stress the importance of the applicant's providing specific, legally relevant details to their claim.**

Pointers for Practitioners:

- The key takeaway from this case is the availability of continuances to correct defective I-589s. Note that while the respondent in *Matter of C-A-R-R-* was provided multiple opportunities to correct his I-589, [illegible] way. IJs will be under pressure by the Trump administration to move cases along their dockets, and it is highly unlikely that multiple opportunities for corrections will be provided.
- Practitioners should [illegible] that the I-589 must include a specific, responsive answer to each question on the form. While the BIA noted in a footnote that it may be acceptable to leave certain inapplicable spaces blank (e.g., the question on the form that asks about arrests in the United States), CLINIC advises practitioners to write "not applicable" or "n/a" instead of leaving any space empty. Practitioners should also avoid responding to narrative questions — such as those about harm in the home country — with "please see attached declaration." Instead, the practitioner should provide detailed answers to each question directly on the form. CLINIC will soon publish an annotated I-589 with examples of how questions can be answered in ways that are specific and responsive.
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EOIR

PM 25-28, issued on April 11, 2025. Under this policy, IJs are allowed to pretermit — or summarily dismiss — an asylum application as legally insufficient without a merits hearing, based solely on the I-589 application. EOIR claims that current regulations and BIA case law require a hearing only when there are disputed factual issues. IJs from across the country have already started to dismiss cases on these grounds according to a post from Catholic Legal Immigration Network.