

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>Mandatory Bars to Asylum and Discretion</i>
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to correctly determine when an applicant is ineligible to apply for asylum, when a refugee is ineligible for a grant of asylum, and when a discretionary denial or referral is warranted.
Interim (Training) Performance Objectives	<ol style="list-style-type: none"> 1. Locate the sections of the INA and regulations that apply to grounds for mandatory denials of asylum. 2. Identify the grounds of ineligibility to apply for asylum, and the exceptions to those grounds. 3. Identify who is subject to a mandatory denial or referral of asylum. 4. Identify the factors to consider in determining whether an individual is firmly resettled. 5. Identify the factors to consider in determining whether a discretionary denial or referral of asylum is warranted.
Student Materials/References	Participant Workbooks; INA; 8 C.F.R. §208
Background Reading	<ol style="list-style-type: none"> 1. Chris Sale. Office of the Deputy Commissioner. <i>AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief</i>, Memorandum to Management Team (Washington, DC: 6 August 1996), 9 p. plus attachments (attached) 2. Weiss, Jeffrey. Office of International Affairs. <i>Processing Claims Filed By Terrorists Or Possible Terrorists</i>, Memorandum to Asylum Office Directors, HQASM Staff (Washington, DC: 1 October 1997), 2 p. (attached)

3. Langlois, Joseph E. Asylum Division, Office of International Affairs. *Known or Suspected Human Rights Abusers*, Memorandum to Asylum Office Directors, et al. (Washington, DC: Sept. 11, 2000), 5p. (attached)
4. Cadman, Walter D. Investigations Branch, Office of Field Operations. *Investigative Referral of Suspected Human Rights Abusers*, Memorandum to District Directors, et al. (Washington, DC: Sept. 28, 2000), 2p. (attached)
5. Pearson, Michael A. Office of Field Operations. *Human Rights Abuse Memorandum of Understanding*, Memorandum to Regional Directors, et al. (Washington, DC: Sept. 29, 2000), 2p. plus attachments (attached)
6. United States Department of State. Office of the Coordinator of Counterterrorism. *Foreign Terrorist Organizations* (Washington, DC: 8 October 1999), 6 p. (attached)
7. United States Department of State. Office of the Coordinator of Counterterrorism. *Background on Foreign Terrorist Organizations* (Washington, DC: 8 October 1999), 19 p. (attached)

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Presentation**References****I. INTRODUCTION**

This lesson describes prohibitions on applying for asylum, exceptions to those prohibitions, and the circumstances that require denial or referral of an asylum application, even when an applicant establishes that he or she is a refugee. This lesson also describes the circumstances under which it is appropriate to use discretion to refer or deny a request for asylum.

**OH #1, #2
Objectives**

The students are not required to memorize all the specific crimes listed as bars to asylum. Rather, the students should become familiar with the broad category of crimes that preclude a grant of asylum, and the issues that must be considered when adjudicating the claim of an applicant who has committed a crime.

II. OVERVIEW OF BARS

**OH #3
Background**

The *1951 Convention relating to the Status of Refugees* gives State signatories the authority to deny protection to certain refugees who are considered “persons who are not considered to be deserving of international protection.” Specifically, the Convention does not apply to any person with respect to whom there are serious reasons for considering that he or she committed certain crimes (crime against peace, war crime, crime against humanity, or serious nonpolitical crime outside the country of refuge), or has been guilty of acts contrary to the purposes and principles of the United Nations.

[1951 Convention relating to the Status of Refugees, Art. 1.F; UNHCR Handbook, para. 140 and paras. 147-63](#)

In accordance with these provisions, United States law contains provisions that prohibit the granting of asylum (and/or withholding of removal) to certain individuals based on criminal activities and national security reasons. With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, Congress significantly revised the law relating to eligibility to apply for and to be granted asylum. Prior to the IIRIRA, the only bar to *applying* for asylum was conviction of an aggravated felony. A change occurred with enactment of IIRIRA so that a conviction of an aggravated felony is a bar to being *granted* asylum. Other circumstances discussed below are bars to *applying* for asylum. Consequently, an asylum applicant who applies for asylum on or after April 1, 1997, must first demonstrate eligibility to apply for asylum before the merits of the claim will be adjudicated.

[INA § 208\(b\)\(2\)\(B\)\(i\)](#). This is discussed in [section IV.B](#) below.

In addition, Congress identified new mandatory bars to eligibility for asylum and codified in statute grounds for ineligibility that previously were found only in regulation.

Because the IIRIRA amendments to section 208 of the INA apply only to asylum applications filed on or after April 1, 1997, three new prohibitions on applying for asylum and the new substantive ineligibility grounds apply only to applications filed on or after April 1, 1997.

A. Overview of Bars to Applying for Asylum

OH #4
Bars to Applying for Asylum

Pursuant to regulation, only an immigration judge or asylum officer may make the determination as to whether an applicant is prohibited from applying for asylum. Therefore, the Service Centers will continue to accept asylum applications in affirmative cases, regardless of whether it appears that an applicant is barred from applying. The applicant will be scheduled for an asylum interview, and an asylum officer will interview the applicant to determine whether a prohibition on filing is applicable, and if so, whether an exception exists.

[8 C.F.R. § 208.4\(a\)\(1\)](#)

An asylum seeker cannot apply for asylum on or after April 1, 1997, if any of the following three circumstances apply:

[INA § 208\(a\)\(2\); 8 C.F.R. § 208.4\(a\)](#)

- The asylum seeker could be returned to a “safe” third country, pursuant to a bilateral or multilateral agreement.
- The asylum seeker submitted an application more than one year after arrival in the United States or after April 1, 1998, whichever is later.
- The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

As will be discussed below, the first reason is not in effect, and there are exceptions for the second and third reasons.

Conviction of an aggravated felony is a prohibition on filing for asylum applications submitted prior to April 1, 1997.

B. Overview of Mandatory Bars to a Grant of Asylum

**OH #5
Bars to Eligibility for
Asylum**

There are six statutory grounds (mandatory bars) that render an applicant ineligible for asylum, even if the applicant may be a refugee. Each bar will be discussed in more detail below.

[INA §§ 208\(b\)\(2\)\(A\) and \(B\)](#)

- Persecution of others on account of one of the protected characteristics in the refugee definition
- Conviction of a particularly serious crime, including an aggravated felony
- Commission of a serious nonpolitical crime outside the United States

Note that the statute provides that the Attorney General may establish by regulation additional limitations on a grant of asylum. [INA § 208\(b\)\(2\)\(C\)](#)

- Reasonable grounds exist for regarding the applicant a danger to the security of the United States
- Participation in terrorist activities or status as a representative of certain terrorist organizations
- Firm resettlement

III. INELIGIBILITY TO APPLY FOR ASYLUM

Only applicants who submit applications for asylum on or after April 1, 1997, are subject to the following bars to applying for asylum.

A. Safe Third Country

OH #6
Safe Third Country

If it is determined that the asylum seeker can be removed to a “safe third country,” he or she cannot apply for asylum, unless the Attorney General finds it in the public interest for the applicant to remain in the United States.

[INA § 208\(a\)\(2\)\(A\)](#)

Each of the following requirements must be met before this bar can be applied:

1. There must be a bilateral or multilateral agreement for removal with the third country;
2. It must be determined that, in the third country, the applicant’s life or freedom would not be threatened on account of a protected ground; and
3. The applicant must have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection in the third country.

The United States has not yet entered into any bilateral or multilateral agreement for removal. Therefore, asylum officers may not consider this bar in adjudicating asylum requests.

B. One-Year Filing Deadline

An asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States. The one-year period is calculated from the date of the applicant's last arrival in the United States or April 1, 1997, whichever is later. Please refer to: Lesson, *One-Year Filing Deadline*, for discussion of the applicability and exceptions related to this bar to filing for asylum.

[INA § 208\(a\)\(2\)\(B\); 8 C.F.R. § 208.4\(a\)\(2\)\(ii\)](#) The Asylum Division gives a 2-week grace period, and does not reject as untimely any I-589 applications filed before April 16, 1998

C. Previous Denial of Asylum

An asylum seeker cannot apply for asylum if he or she has previously applied for and been denied asylum by an immigration judge or the BIA, unless the asylum seeker demonstrates to the satisfaction of the adjudicator changed circumstances that materially affect asylum eligibility. A previous denial of asylum *by an asylum officer* is not a bar to applying for asylum.

OH #9
Previous Denial of Asylum

[INA § 208\(a\)\(2\)\(C\) and \(D\); 8 C.F.R. § 208.4\(a\)\(3\)](#)

The definition of “changed circumstances” as applied to this provision is identical to the definition applied to the provision regarding the one-year filing deadline. Changed circumstances may include changes in the country of persecution or changes relating to the applicant in the United States, including changes in U.S. law.

See, lesson, One-Year Filing Deadline

The standard of proof for demonstrating this exception is “to the satisfaction of” the adjudicator.

See, lesson, [Eligibility Part IV, Burden of Proof, Standards of Proof, and Evidence](#)

IV. BARS TO ELIGIBILITY FOR ASYLUM

A. Persecution of Others

OH #10 Persecution of Others

"The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." In addition, the statute specifically bars the Attorney General from granting asylum to such a person.

[INA § 101\(a\)\(42\);
§ 208\(b\)\(2\)\(A\)\(i\)](#)

1. Filing date

This bar applies regardless of the filing date of the asylum application.

2. Connection to a protected ground required

Note that the persecution in which the individual participated must have been on account of race, religion, nationality, membership in a particular social group, or political opinion.

3. Degree of participation

OH #11 Degree of Participation

a. This mandatory bar applies even if the individual did not personally commit the persecutory act, so long as he or she "ordered, incited, assisted, or otherwise participated in the persecution."

[8 C.F.R. § 208.13\(c\)](#)

b. Assisting in persecution includes arresting persons the applicant believes would be persecuted on account of a protected ground.

Ofosu v. McElroy, 933 F.Supp. 237 (S.D. N.Y. 1995)

- c. Assisting in persecution may also include reporting dissident activities, if the reporting leads to the persecution of others on account of a protected ground. *Ofosu v. McElroy*, 933 F.Supp. 237 (S.D. N.Y. 1995)
- d. Mere membership in an organization that engages in persecution is not sufficient to bar an individual from a grant of asylum. The claim must be denied only if the individual's action or inaction furthered the persecution in some way. [Matter of Rodriguez-Majano, 19 I&N Dec. 811, 814-15 \(BIA 1988\)](#)

However, if the applicant belongs to an organization that engages in the persecution of others, the asylum officer must carefully question the applicant regarding his or her duties or activities within the organization, as well as the duties and activities of any subordinates. The asylum officer must ascertain whether the applicant's actions or inaction within the organization assisted in the persecution of others.

4. Involuntary participation

An asylum applicant is barred from asylum even if his or her participation in the persecution of another was involuntary.

[Matter of Rodriguez-Majano, 19 I&N Dec. 811, 814-15 \(BIA 1988\)](#)

5. Engaging in warfare

In open combat, acts of warfare taken in furtherance of political goals are not necessarily persecutory acts. Reference to international laws governing warfare may be useful in determining whether actions taken in the context of warfare constitute persecution or are "legitimate" acts of war.

[Matter of Rodriguez-Majano, 19 I&N Dec. 811, 814 \(BIA 1988\)](#) (Individual forced to assist guerrillas fighting in El Salvador did not participate in persecution when he covered guerrillas with weapons while they burned cars and drove supplies for battles.) See, lesson, [International Human Rights Law](#)

6. Death squads

Violence perpetrated by death squads may constitute persecution. When interviewing an applicant claiming to be a member of a death squad (or other organization that the asylum officer has reason to believe is associated with a death squad) the asylum officer must elicit information regarding the applicant's activities and consider whether the applicant is barred as a persecutor.

See e.g., Matter of Villalta, 20 I&N Dec. 142 (BIA 1990) (Well-founded fear of persecution by death squad provided a basis for a grant of asylum.)

7. Dependents

The persecutor bar also applies independently to any spouse or child who is included in an asylum applicant's request for asylum and who is found to be a persecutor. In some instances, a principal applicant may be granted asylum and a dependent denied or referred because he or she is subject to a mandatory bar.

[8 C.F.R. § 208.21\(a\)](#)

B. Conviction of Particularly Serious Crime

Asylum may not be granted to an applicant who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.

OH #12
Particularly Serious Crime
– **Filing Date**
[INA § 208\(b\)\(2\)\(A\)\(ii\)](#)

1. Filing date

This bar applies regardless of the filing date of the asylum application; however, the filing date determines the type of crimes included in this category.

[8 C.F.R. §§ 208.13\(c\)\(1\) and \(2\)\(A\)](#)

If the application was filed before 11/29/90, then an aggravated felony is not automatically considered a particularly serious crime.

See [section 6](#) below regarding aggravated felonies

If the application was filed before April 1, 1997, then the conviction must have occurred in the United States. If the application was filed on or after April 1, 1997, then the conviction may have occurred either inside or outside of the United States.

2. Basic elements
 - a. convicted by a final judgment
 - b. crime is "particularly serious"
 - c. the applicant constitutes a danger to the community

3. Definition of "conviction"

For immigration purposes, a conviction exists if each of the following requirements are met:

- a. a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt; and
- b. the court has ordered some form of punishment, penalty, or restraint on a person's liberty; and

OH #13
Particularly Serious Crime –
Final Conviction
[INA § 101\(a\)\(48\)\(A\)](#)

4. Conviction must be final

A conviction is final for immigration purposes if direct appellate review has either been waived or exhausted.

Matter of Polanco, 20 I&N
 Dec. 894 (BIA 1994)

If in doubt about the finality of a conviction, a Supervisory Asylum Officer should contact District Counsel.

5. Juvenile convictions

Conviction as a juvenile will not constitute a conviction for a particularly serious crime under the INA, if the applicant is under 16 years of age or was tried as a juvenile (may be 16-18). However, commission of the crime may be a basis to exercise discretion to deny or refer the asylum request.

Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981)

6. What constitutes a particularly serious crime

a. aggravated felonies

By statute, all aggravated felonies are considered particularly serious crimes for purposes of evaluating asylum eligibility.

The list of crimes designated as aggravated felonies is contained in section 101(a)(43) of the INA. Some are specific crimes, while others are more general (e.g., murder vs. crime of violence). Some crimes are not aggravated felonies unless a sentence of particular length or a certain amount of money is involved. Therefore, it is critical to consider the sentence in such cases.

A term of imprisonment for purposes of the INA is defined as including “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

OH #14**Aggravated Felonies**

[INA § 208\(b\)\(2\)\(B\)\(i\)](#)

Instructor Note #1

Prior the IIRIRA, the commission and conviction dates of the crime determined which definition of aggravated felony applied. As a result of IIRIRA, the current definition of aggravated felony [at INA § 101\(a\)\(43\)](#) applies regardless of commission or conviction date.

[INA § 101\(a\)\(48\)\(B\)](#)

This means that someone who has been sentenced to a term of imprisonment for a certain term, but whose sentence is deferred if a period of probation is successfully completed, is still considered “sentenced” to that term of imprisonment.

The aggravated felony definition applies to convictions for violations of either state or federal law. It also applies to convictions in violation of a foreign law, so long as the term of imprisonment was completed within the previous 15 years.

[INA § 101\(a\)\(43\)](#)

EXCEPTION: If an application was filed prior to November 29, 1990, the conviction of an aggravated felony does not constitute a mandatory bar to asylum. Consequently, the asylum officer must analyze the circumstances of the conviction in such cases to determine whether it constitutes a particularly serious crime.

Matter of A-A-, 20 I&N Dec. 492 (BIA 1992)

b. other crimes -- general

The determination as to whether a crime (other than an aggravated felony) is "particularly serious" is most often made on a case-by-case basis. The factors to consider are the following:

OH #15
Particularly Serious Crime – General Factors
Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982); [Matter of B-](#), 20 I&N Dec. 427, 430 (BIA 1991); *Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997)

- (i) the nature of the conviction;
- (ii) the sentence imposed;
- (iii) the circumstances and underlying facts of the conviction; and

- (iv) whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

See [section 7](#) below and note that this element involves somewhat circular reasoning, since conviction of a PSC necessarily leads to a finding that the alien is a danger to the community.

A single conviction of a **misdemeanor** normally is not a particularly serious crime.

Matter of Juarez, 19 I&N Dec. 664 (BIA 1988)

Crimes of violence are normally particularly serious crimes. A crime of violence causes harm or has reasonable chance of causing harm to people or property.

[18 U.S.C. § 16 \(definition\)](#)

Note that a crime does not have to be a crime of violence to constitute a particularly serious crime.

7. Danger to the community

As a matter of law, an individual who has been convicted in the United States of a particularly serious crime constitutes a danger to the community.

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991)(affirmed, *Urbina-Mauricio v. INS*, 989 F.2d 1085 (9th Cir. 1993)); *Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997)

8. Examples

- a. assault with a dangerous weapon

Note, however, that assault with a deadly weapon was found not to be a particularly serious crime in a case involving a single, misdemeanor offense.

OH #16
Particularly Serious Crimes
-- Examples
Matter of D-, 20 I&N Dec. 827 (BIA 1994); *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988)

- b. drug trafficking

Trafficking in drugs is inherently a particularly serious crime.

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991)

- c. battery with a dangerous weapon, or aggravated battery

Matter of D-, 20 I&N Dec. 827 (BIA 1994); *Matter of B-*, 20 I&N Dec. 427 (BIA 1991)

- d. rape

[Matter of B-](#), 20 I&N Dec. 427 (BIA 1991)

- | | | |
|----|--|--|
| e. | sexual abuse of a child (attempt) | <i>U.S. v. Reyes-Castro</i> , 13 F.3d 377 (10th Cir. 1993) |
| f. | armed robbery | <i>Matter of D-</i> , 20 I&N Dec. 827 (BIA 1994); <i>Matter of L-S-J-</i> , 21 I&N Dec. 973 (BIA 1997) |
| g. | burglary in some cases, but not in others

The determination may depend on whether the crime involved a threat to an individual. | <i>Matter of Garcia-Garrocho</i> , 19 I&N Dec. 423 (BIA 1986); <i>Matter of Frentescu</i> , 18 I&N Dec. 244; Matter of Toboso-Alfonso , 20 I&N Dec. 819 (BIA 1990) |
| h. | kidnapping (aggravated) | <i>Groza v. INS</i> , 30 F.3d 814 (7th Cir. 1994) |
| i. | manslaughter (including involuntary) and murder | <i>Dor v. Dist.Dir., INS</i> , 697 F.Supp. 694 (S.D.N.Y. 1988); <i>Matter of C-</i> , 20 I&N Dec. 529 (BIA 1992); <i>Matter of Alcantar</i> , 20 I&N Dec. 801 (BIA 1994); <i>Ahmetovic v. INS</i> , 62 F.3d 48 (2 nd Cir. 1995) |
9. Dependents
- This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who was convicted of a particularly serious crime. In some cases, a principal applicant may be granted asylum, and a dependent referred or denied because he or she was convicted of a particularly serious crime.

[8 C.F.R. § 208.21\(a\)](#)

C. Commission of Serious Nonpolitical Crime

[INA § 208\(b\)\(2\)\(A\)\(iii\)](#)

Asylum may not be granted if there are serious reasons to believe that the applicant committed a serious nonpolitical crime outside the United States before arriving in the United States.

1. Filing Date

This mandatory bar to asylum was added by the IIRIRA and therefore applies only to applications filed on or after April 1, 1997. However, commission of a serious nonpolitical crime may be considered as a serious adverse factor in the exercise of discretion, when adjudicating a request for asylum filed before April 1, 1997.

OH #17**Serious Nonpolitical Crime – Filing Date**

Previously, this was a mandatory bar to withholding of deportation, but not asylum.

See [section VII](#) below on discretion.

2. Definition

a. A "serious nonpolitical crime" has been defined as a crime that

OH #18**Serious Nonpolitical Crime – Definition**

McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986), citing Guy Goodwin-Gill, *The Refugee in International Law*, 60-61 (1983)

(i) was not committed out of genuine political motives,

(ii) was not directed toward the modification of the political organization or structure of the state, and

(iii) in which there is no direct, causal link between the crime committed and its alleged political purposes and object.

b. A "serious nonpolitical crime" is less serious than a "particularly serious crime."

Matter of Frentescu, 18 I&N Dec. 244, 247 (BIA 1982)

c. Even if the crime was committed out of genuine political motives, it should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or if it is of an atrocious or barbarous nature.

McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986); and *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439 (1999)

3. Requirements

- a. There is no requirement that the serious nonpolitical crime resulted in a conviction. However, the adjudicator needs to find *probable cause* to believe that the crime was committed.

OH #19**Serious Nonpolitical Crime – Requirements**

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986)

Probable cause means that there is a reasonable basis to believe that the crime was committed.

See, Black's Law Dictionary

- b. The crime must have been committed outside the United States.
- c. The applicant need not have personally carried out the act of harm ("pulled the trigger"). For example, providing logistical and physical support that enables others to carry out terrorist acts against ordinary citizens suffices.

McMullen v. INS, 788 F.2d 591, 599 (9th Cir. 1986)

4. Dependents

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who has committed a serious nonpolitical crime outside the United States before arriving in the United States. In some cases, a principal applicant may be granted asylum, while his or her dependent (who committed a serious nonpolitical crime) is denied or referred because he or she is subject to a mandatory bar.

[8 C.F.R. § 208.21\(a\)](#)

D. Security Risk

Asylum may not be granted if there are reasonable grounds to believe that the applicant is a danger to the security of the United States.

OH #20**Security Risk**

[INA § 208\(b\)\(2\)\(A\)\(iv\)](#)

Any asylum decision (whether a grant, referral, or denial) involving an applicant who appears to be a security risk, including cases that fall within the criteria for terrorists discussed in the next section, must be reviewed by the INS Asylum Division Quality Assurance Branch in Washington, D.C., before becoming final.

See, [Jeffery Weiss, Asylum Division. Processing Claims Filed by Terrorists or Possible Terrorists, Memorandum to Asylum Office Directors \(Washington, DC: 1 October 1997\), 2 p.](#)

1. Filing date

This bar applies regardless of the filing date of the asylum application.

2. Terrorists

Applicants who fall within certain provisions of the INA relating to terrorism constitute security risks to the United States. The filing date of the application determines which provisions to apply.

See [section E](#) below on terrorists.

3. Other example

There is very little caselaw on this issue. However, one example of an individual found to constitute a risk to the security of the United States is the well-known Egyptian cleric, Oman Ahmed Abdel Rahman, who was found to be a security risk because he is the spiritual guide and founder of an extremist group that has carried out numerous terrorist acts.

Ali v. Reno, 829 F. Supp. 1415 (S.D.N.Y. 1993), *affirmed* 22 F.3d 422 (2nd Cir. 1994)

4. Dependents

This bar also applies independently to any spouse or child who is included in an asylum applicant's request for asylum, if there are reasonable grounds to believe the spouse or child is a danger to the security of the United States. In some instances a principal applicant may be granted and his or her dependent denied or referred because the dependent is subject to a bar as a security risk.

[8 C.F.R. § 208.21\(a\)](#)

E. Terrorists

1. Background on terrorist legislation, as applied to asylum adjudication

The Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), which came into effect on April 24, 1996, provided that any individual who falls within certain terrorist provisions in the INA is ineligible for asylum, unless it is determined that there are not reasonable grounds to believe that the individual is a danger to the security of the United States. These provisions were the subclauses (I), (II), and (III) of INA section 212(a)(3)(B)(i), before expanded by the IIRIRA.

See, Jeffery Weiss, [Asylum Division. Processing Claims Filed by Terrorists or Possible Terrorists. Memorandum to Asylum Office Directors](#) (Washington, DC: 1 October 1997), 2 p.

See also, Department of State, Office of the Coordinator of Counterterrorism, [Foreign Terrorist Organizations, 6p](#) and [Background on Foreign Terrorist Organizations](#), 19 p. (Washington, DC: 8 October 1999) (Memos binder)

See, [Chris Sale. Office of the Deputy Commissioner. AEDPA Implementation Instruction #3: The Effects of AEDPA on Various Forms of Immigration Relief. Memorandum to Management Team](#) (Washington, DC: 6 August 1996), 13 p.

The IIRIRA redesignated the subclauses of INA section 212(a)(3)(B) and expanded the terrorist grounds for ineligibility for asylum. Under the IIRIRA, aliens who fall within the amended subclauses (I), (II), (III) and (IV) of 212(a)(3)(B)(i) are ineligible for asylum. However, individuals who fall within subclause (IV) of section 212(a)(3)(B)(i) (representative of a designated foreign terrorist organization), may still be eligible for asylum if it is determined that there are not reasonable grounds to believe that individual is a danger to the security of the United States.

2. Filing date

Although the mandatory bar regarding terrorist activities applies to all applications, the timing of the application determines the particular provisions of the laws that must be applied. Applications filed before April 1, 1997, are governed by the AEDPA. Applications filed on or after April 1, 1997, are governed by the INA as amended by the IIRIRA. The differences are discussed below.

OH #21
Terrorists – Filing Date

3. Applications filed prior to April 1, 1997

If the asylum application was filed prior to April 1, 1997, then the adjudication is governed by the INA, as amended by the AEDPA, but prior to being amended by the IIRIRA.

OH #22
AEDPA Provisions

a. grounds for ineligibility

Section 208 of the INA, as amended by the AEDPA, prohibited the granting of asylum to anyone who

- (i) has engaged in a terrorist activity;

[INA § 212\(a\)\(3\)\(B\)\(i\)\(I\)](#) as amended by the AEDPA, before the IIRIRA amendments

(ii) a consular officer or the Attorney General knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity (an alien who is an officer, official representative, or spokesman of the Palestine Liberation Organization is considered to be engaged in a terrorist activity);

[INA § 212\(a\)\(3\)\(B\)\(i\)\(II\)](#) as amended by the AEDPA, before the IIRIRA amendments

Note that the provision regarding the Palestine Liberation Organization was dropped when the IIRIRA amended the INA, and therefore does not apply to applications filed on or after April 1, 1997.

(iii) is a representative of a foreign terrorist organization, as designated by the Secretary of State under section 219 of the INA.

[INA § 212\(a\)\(3\)\(B\)\(i\)\(III\)](#), as amended by the AEDPA, before the IIRIRA amendments

b. exception

[INA § 208\(a\)](#), as amended by the AEDPA, before the IIRIRA amendments

An asylum seeker who falls within any of the categories above may nonetheless be granted asylum if the Attorney General determines, in the discretion of the Attorney General, that there are not reasonable grounds for regarding the individual as a danger to the security of the United States.

Note, under the IIRIRA, this exception applies only to individuals who are representatives of designated terrorist organizations.

The exception might apply in narrow circumstances involving, for example, an applicant whose involvement with terrorist activities has ended and who is clearly unlikely to engage in further terrorist activity.

4. Applications filed on or after April 1, 1997

If the asylum application was filed on or after April 1, 1997, then the applicant cannot be granted asylum if he or she falls within certain terrorist provisions of the INA as amended by the IIRIRA.

OH #23,24
Current Provisions;
Comparison of AEDPA and
IIRIRA Provisions

a. grounds for ineligibility

[INA § 208\(b\)\(2\)\(A\)\(v\)](#)

Section 208(b) of the INA, as amended by the IIRIRA, prohibits the granting of asylum to anyone who

(i) has engaged in terrorist activity;

[INA § 212\(a\)\(3\)\(B\)\(i\)\(I\)](#)

(ii) a consular officer or the Attorney General knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity;

[INA § 212\(a\)\(3\)\(B\)\(i\)\(II\)](#)

(iii) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

[INA § 212\(a\)\(3\)\(B\)\(i\)\(III\)](#)

Note that this is not listed as a bar for applications filed prior to April 1, 1997.

(iv) is a representative of a foreign terrorist organization, as designated by the Secretary of State under section 219 of the INA.

[INA § 212\(a\)\(3\)\(B\)\(i\)\(IV\)](#)

b. exception [INA § 208\(b\)\(2\)\(A\)\(v\)](#)

An asylum seeker who falls within category (iv) above, representative of a foreign terrorist organization, may be granted asylum if the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.

Compare this with the exception governing applications filed before April 1, 1997, which applies to all terrorist bar categories.

There are no exceptions to the applicability of the bar to applicants who fall within categories (i), (ii), and (iii), above.

5. "Terrorist activity" defined

Terrorist activity is defined in the INA as any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

OH #25
Terrorist Activity

[INA § 212 \(a\)\(3\)\(B\)\(ii\)](#)

- a. the hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle);
- b. kidnapping -- the seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained
- c. a violent attack on an internationally protected person or upon the liberty of such person

An "internationally protected person" is defined in [18 U.S.C. § 1116\(b\)\(4\)](#).

- d. an assassination
- e. the use of any
 - (i) biological, chemical, or nuclear weapons; or
 - (ii) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- f. a threat or conspiracy to do any of the above.

6. “Engage in terrorist activity” defined

Engaging in terrorist activity means to commit an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity, including any of the following:

- a. the preparation or planning of a terrorist activity;
- b. the gathering of information on potential targets for terrorist activity;
- c. providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity;

OH #26

Engage in Terrorist Activity

[INA § 212 \(a\)\(3\)\(B\)\(iii\)](#)

- d. the soliciting of funds or other things of value for terrorist activity or for any terrorist organization;
- e. the solicitation of any individual for membership in a terrorist organization or terrorist government, or to engage in terrorist activity.

7. "Provides material support" [INA § 212 \(a\)\(3\)\(B\)\(iii\)](#)

The INA does not define the meaning of "provides material support" and there is no caselaw on point. There is no exception to the rule that individuals who have provided material support to a terrorist organization are barred from asylum. The Office of General Counsel is in the process of preparing a memorandum of law providing guidance on the meaning of "provides material support." That memorandum will be distributed to asylum officers as soon as it becomes available.

8. "Representative" defined **OH #27 Representative** [INA § 212 \(a\)\(3\)\(B\)\(iv\)](#)
- For purposes of the terrorist provisions in the INA, "representative" is defined as "an officer, official or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity."

9. Foreign terrorist organizations designated by the Secretary of State

**OH #28
Terrorist Organization**

a. authority

Under section 219 of the INA, the Secretary of State is authorized to designate an organization as a terrorist organization. There are several steps the Secretary must first take, including notifying certain members of the House and the Senate, and publishing notice in the Federal Register.

[INA § 219 \(a\)](#)

b. consequences of designation

Many consequences result from the designation of an organization. However, for purposes of asylum adjudication, the relevant consequence is that a representative of any organization designated by the Secretary of State as a terrorist organization is barred from asylum. An exception may be invoked if there are not reasonable grounds for regarding the individual as a danger to the security of the United States.

[INA § 208\(b\)\(2\)\(v\)](#)

c. period of designation

A designation is effective for 2 years after publication of the notice in the Federal Register, unless it is revoked by an act of Congress or by the Secretary of State.

[INA §§ 219\(a\)\(4\) and \(5\)](#)

- d. organizations currently designated as terrorist organizations

On October 8, 1997, the Secretary of State published in the Federal Register the first list of organizations designated as terrorist organizations under section 219 of the INA. This list was updated on October 8, 1999.

See, Department of State, Office of the Coordinator of Counterterrorism, [Foreign Terrorist Organizations](#), 6p and [Background on Foreign Terrorist Organizations](#), 19 p. (Washington, DC: 8 October 1999) (Memos binder)

10. Dependents

This bar also applies independently to a spouse or child who is included in an asylum applicant's request for asylum and who falls within the terrorist provisions discussed below.

[8 C.F.R. § 208.21\(a\)](#)

F. Firm Resettlement

An applicant who was firmly resettled in another country prior to arriving in the United States may not be granted asylum.

[INA § 208\(b\)\(2\)\(A\)\(vi\)](#)

Note: This bar does not apply to derivatives. See [8 C.F.R. § 208.21\(a\)](#).

1. Definition

An applicant is firmly resettled if, “prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”

**OH #29
Firm Resettlement –
Definition**

[8 C.F.R. § 208.15](#)

2. When an applicant is *not* firmly resettled

[8 C.F.R. § 208.15\(a\)](#)

Regulations provide that an applicant is not firmly resettled if

- a. entry into the third country was a necessary consequence of flight from persecution; and

the applicant remained only as long as necessary to arrange onward travel; and

the applicant did not establish significant ties in that country;

or

- b. the conditions of residence were so substantially and consciously restricted by the authority of the country of refuge, that the applicant cannot be considered to have been resettled there.

[8 C.F.R. § 208.15\(b\)](#)

3. Considerations

To determine whether an applicant was firmly resettled, the asylum officer must consider the following factors:

OH #30
Firm Resettlement –
Considerations
[8 C.F.R. § 208.15\(b\)](#)

- a. conditions under which other residents of the country live;
- b. the type of housing made available to the applicant, whether permanent or temporary;
- c. the types and extent of employment available to the applicant; and
- d. the extent to which the applicant received permission to enjoy other rights and privileges ordinarily available to others residing in the country, such as
 - (i) the right to hold property;

- (ii) the right to travel documentation, including the right of entry and/or reentry;
- (iii) the right to education;
- (iv) the right to public relief;
- (v) the right to naturalization.

4. The prime factor in determining if an applicant was firmly resettled is whether an offer of *permanent* resident status, citizenship or some other type of permanent resettlement was made.

Abdille v. Ashcroft, 2001 WL 226862 (3rd Cir. 2001)

For Example: The third circuit found that documentary evidence indicating that an applicant had been granted asylum in South Africa, where the document demonstrating that asylee status indicated that the asylee was required to apply for renewal every two years, was prima facie evidence that the applicant had not been offered **permanent** resettlement. Therefore, unless the INS could demonstrate that asylum in South Africa was permanent, the applicant was not firmly resettled.

Abdille v. Ashcroft, 2001 WL 226862 (3rd Cir. 2001)

5. Length of time spent in the third country

The length of time an applicant spends in a third country does not by itself establish firm resettlement. Firm resettlement occurs only after the applicant has been offered some some form of enduring lawful status in that country. However, length of time is a factor to consider, particularly in determining whether the applicant cannot be considered firmly resettled because entry into the third country was a necessary consequence of flight. Refer to section 2.a above.

Matter of Soleimani, 20 I&N Dec. 99 (BIA 1989); *Matter of Portales*, 18 I&N Dec. 239 (BIA 1982); *Cheo v. INS*, 162 F.3d 1227 (9th Cir. 1998) (“[W]here the *duration* and *circumstances* indicate that the asylum seeker may remain in the third country, then it is incumbent upon him to show the contrary.” emphasis added)

6. Entry into the third country

The applicant must have received or been offered some form of permanent resident status in a third country *when the applicant entered or was in* the country. This means that an applicant cannot be considered firmly resettled in a country the applicant never entered.

7. Offer may suffice

The regulations indicate that the existence of an *offer* of permanent residence status may establish that an applicant was firmly resettled, even if the applicant never actually accepted the offer. However, the asylum officer must still consider the factors noted above regarding the circumstances of the applicant's stay in the country, because an applicant is not considered firmly resettled if entry into the country was a necessary consequence of flight and the applicant established no ties or was subject to substantial living restrictions. Refer to discussion in section 2 above.

8. Loss of residence rights

An applicant's loss of the right to return to a country in which he or she was firmly resettled does not necessarily remove the bar of firm resettlement. For example, an applicant who was firmly resettled in country X, but lost the right to return to country X because the applicant allowed a travel document to expire or remained outside of the country longer than permitted, would still be barred from a grant of asylum.

Vang v. INS, 146 F.3d 1114 (9th Cir. 1998); *See also Abdalla v. INS*, 43 F.3d 1397, 1400 (10th Cir.1994) (determining that expiration of petitioner's UAE residence permit after entry into United States did not affect finding that petitioner had firmly resettled in UAE).

9. Minors

One court has held that, to determine whether a minor has firmly resettled in another country, the adjudicator should consider whether the minor's parents have firmly resettled in that country before coming to the United States, and then attribute the parents' status to the minor.

Vang v. INS, 146 F.3d 1114
(9th Cir. 1998)

In *Vang v. INS*, the applicant fled Laos with his family when he was 4 years old, and his family resettled in France. At the age of 16, the applicant came to the United States as a tourist. When he was 19, he applied for asylum. To determine whether the applicant was firmly resettled in France, the Court looked to the status of the applicant's parents when they lived in France.

10. Firm resettlement is not dual nationality

Firm resettlement is often confused with the issue of dual nationality because both situations involve the alien finding protection in a third country. Usually they can be easily distinguished because firm resettlement always requires that the alien will have entered into the third country and been given an offer of some kind of status, not necessarily citizenship. In dual nationality there are no requirements of presence or an offer and the status must always be citizenship.

Practical Exercise - 1: Applicant is a 19-year-old Ethiopian male whose mother is a dual national of Ethiopia and Italy. According to Italian law all persons with a parent who is a citizen of Italy are citizens of Italy at birth. The applicant has never been to Italy. Is the applicant firmly resettled in Italy? Is the applicant a dual national of Italy?

Instructor Note #2

Practical Exercise - 2: Applicant is a citizen of Ethiopia who married a Swedish national and was granted lawful permanent resident status by the Swedish Embassy in Addis Ababa. Before she and her husband could leave for Sweden, he disappeared. Applicant had a visitor's visa for the United States, so she came to the United States and applied for asylum. Is she firmly resettled in Sweden? Is she a dual national of Sweden?

V. BURDEN AND STANDARD OF PROOF

OH #31
Burden of Proof

A. Mandatory Bars to Applying for Asylum

1. One-year filing deadline

The applicant must demonstrate *by clear and convincing evidence* that the application has been filed within 1 year after the date the applicant arrived in the United States, or

demonstrate *to the satisfaction of the Attorney General* (the asylum officer or immigration judge) the existence of changed circumstances that affect eligibility for asylum or extraordinary circumstances that resulted in the delay.

2. Previous denials

If an applicant has previously been denied asylum by an IJ or the BIA, the applicant must demonstrate *to the satisfaction of the Attorney General* (asylum officer or immigration judge) the existence of changed circumstances that affect eligibility for asylum.

[INA §§ 208\(a\)\(2\)\(B\) and \(D\); 8 C.F.R. § 208.4\(a\)\(2\)\(i\)](#)

Reminder: The one-year filing period is calculated from 4/1/97 or arrival in U.S., whichever is later. See lesson, One-Year Filing Deadline.

[INA §§ 208\(a\)\(2\)\(D\); 8 C.F.R. § 208.4\(a\)](#)

3. Explanation

The “clear and convincing” standard has been defined as a degree of proof that will produce “a firm belief or conviction as to allegations sought to be established.” It is higher than the preponderance standard used in civil cases, but lower than the “beyond a reasonable doubt” standard in criminal cases.

See, Black’s Law Dictionary, 5th Ed.; lesson, [Burden of Proof, Standards of Proof, and Evidence](#)

To demonstrate “to the satisfaction of the Attorney General” that an exception applies, means that it must be reasonable for the asylum officer to conclude that the exception applies.

B. Mandatory Bars to Asylum

If the evidence indicates that a ground for mandatory denial or referral exists, then the applicant has the burden of proving by a *preponderance of the evidence* that the ground does not apply.

[8 C.F.R. § 208.13\(c\)](#); *See also, Cheo v. INS*, 162 F.3d 1227 (9th Cir. 1998) (where evidence indicates applicant was firmly resettled, burden is on applicant to establish the contrary)

A fact is established by a preponderance of the evidence, if the adjudicator finds, upon consideration of all the evidence, that it is more likely than not that the fact is true (in other words, there is more than a 50% chance that the fact is true).

See, lesson, [Burden of Proof, Standards of Proof, and Evidence](#)

VI. MANDATORY NATURE OF BARS

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible. As the term itself indicates, denial in such cases is mandatory. Therefore, the asylum request must be referred, or if appropriate, denied.

VII. DISCRETION

Every grant of asylum to an individual who establishes refugee status is discretionary. Therefore, every grant of asylum involves two steps: 1) determination of whether the applicant is a refugee eligible for asylum and 2) determination of whether the applicant merits a favorable exercise of discretion. Generally, if it is determined that a refugee is eligible for asylum, discretion is exercised to grant asylum. However, there may be factors that fall short of a mandatory ground for denial that warrant the denial or referral of the asylum application, even if the applicant has established refugee status.

The converse is not true; the adjudicator can *not* exercise discretion to grant asylum to an applicant who fails to establish refugee status.

OH #32 Discretion

[8 C.F.R. §§ 208.14\(a\)](#) and (b)(1); [Matter of H-, 21 I&N Dec. 337 \(BIA 1996\)](#).

A. Application -- Balancing of Factors

The sound exercise of discretion requires a balancing of the fact that the applicant qualifies as a refugee, along with any other positive factors, against any negative factors presented in the case.

1. Lack of adverse factors

In the absence of adverse factors, discretion should be exercised to grant asylum to eligible applicants.

OH #33
Discretion -- Application
Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987);
[Matter of H-, 21 I&N Dec. 337 \(BIA 1996\)](#)

[Matter of Pula, 19 I&N Dec. 467, 474 \(BIA 1987\)](#)

2. Likelihood of future persecution

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

[Matter of Pula, 19 I&N Dec. 467, 474 \(BIA 1987\)](#); [Matter of Kasinga, 21 I&N Dec. 357 \(BIA 1996\)](#)

A finding that there is no reasonable possibility of future persecution (no well-founded fear) is a heavy adverse factor that must lead to an adverse exercise of discretion, unless

[8 C.F.R. § 208.13\(b\)\(1\)\(ii\)](#); [Matter of Chen, 20 I&N Dec. 16 \(BIA 1989\)](#); *Matter of N-M-A-*, Int. Dec. # 3368 (BIA 1998)

- a. there are compelling reasons the applicant is unwilling to return arising out of the severity of the past persecution, or
- b. a reasonable possibility of the applicant suffering other serious harm.

3. Severe past persecution

Discretion should generally be exercised to grant asylum to a refugee who no longer has a well-founded fear if the applicant suffered severe or atrocious persecution in the past.

[Matter of Chen, 20 I&N Dec. 16 \(BIA 1989\)](#); [8 C.F.R. § 208.13\(b\)\(1\)\(iii\)\(A\)](#)

4. Other serious harm

Discretion should generally be exercised to grant asylum to a refugee who no longer has a well-founded fear if there is a reasonable possibility that the applicant may suffer other serious harm upon removal to that country.

[8 C.F.R. § 208.13\(b\)\(1\)\(iii\)\(B\)](#)

By "other serious harm," the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution. Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as "other serious harm."

B. Examples

1. Criminal or terrorist conduct may be grounds for a discretionary denial or referral (note the conduct may or may not present a mandatory bar). *Dhine v. Slattery*, 3 F.3d 613 (2d Cir. 1993) (numerous small crimes in the United States warranted a discretionary denial); *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984)
2. Fraud in entering the United States is a factor to consider, but normally will not alone warrant a discretionary denial or referral of asylum, unless there are other significant negative factors. [Matter of Pula, 19 I&N Dec. 467 \(BIA 1987\)](#); *Matter of Soleimani*, 20 I&N Dec. 99 (BIA 1989)
3. Circumvention of established procedures for overseas refugee processing may constitute an adverse factor, but alone usually would not warrant a discretionary denial or referral. The entire circumstances must be considered. [Matter of Pula, 19 I&N Dec. 467 \(BIA 1987\)](#) (explicitly withdrawing from its position in prior cases)

C. Reconsideration of Adverse Exercise of Discretion, if Applicant Granted Withholding of Removal

If the applicant is denied asylum solely in the exercise of discretion, but is granted withholding of removal, precluding admission of the applicant's spouse or minor children, then the denial of asylum must be reconsidered.

Factors to consider include the reasons for the denial and reasonable alternatives available to the applicant, such as reunification of the family in a third country.

[8 C.F.R. § 208.16\(d\)](#)

Note: This issue will almost never arise in the affirmative asylum adjudication process, since asylum officers generally do not adjudicate requests for withholding of removal.

VIII. DEPENDENTS

[8 C.F.R. § 208.21\(a\)](#)

A spouse, or child, as defined in the Act, also may be granted asylum if accompanying, or following to join, the principal alien who was granted asylum, unless it is determined that the spouse or child is ineligible for asylum under section 208(b)(2)(A)(i), (ii), (iii), (iv) or (v) of the Act for applications filed on or after April 1, 1997, or under 8 C.F.R. § 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997.

In other words, all the bars that apply to principal applicants apply equally to dependents, with the exception of firm resettlement. For example, if a dependent was convicted of an aggravated felony, the dependent is barred from a grant of asylum, even if the principal is granted. However, if the dependent was firmly resettled in a third country, the dependent is not barred from receiving a derivative grant of asylum if the principal is granted.

IX. SUMMARY

A. Bars to Applying for Asylum

OH #34
Summary A

The following bars to applying for asylum are applicable only to applications filed on or after April 1, 1997. Only asylum officers, immigration judges, and the Board of Immigration Appeals can determine whether a prohibition on filing applies.

1. The asylum seeker could be returned to a “safe” third country.

Since there currently are no agreements between the United States and any “safe” country, this bar is not yet in effect.

2. The asylum seeker waited more than one year after arrival in the United States to apply.

The filing date is calculated from April 1, 1997 or the date of last arrival, whichever is later. This bar does not apply if the applicant establishes changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay.

3. The asylum seeker previously has been denied asylum by an immigration judge or the BIA.

This bar does not apply if the applicant demonstrates changed circumstances that materially affect asylum eligibility.

B. Mandatory Bars to a Grant of Asylum

**OH #35
Summary B; 1,2,3**

The following are mandatory bars to a grant of asylum:

1. Persecution of others on account of one of the protected characteristics in the refugee definition
2. Conviction of a particularly serious crime, including an aggravated felony

If the application was filed on or after April 1, 1997, the conviction may have occurred either inside or outside the United States.

3. Commission of a serious nonpolitical crime outside the United States

This bar does not apply to asylum applications filed prior to April 1, 1997, but may be a basis for a discretionary denial or referral.

4. Risk to the security of the United States

Any case in which the asylum officer believes the applicant may present a risk to the security of the United States must be sent to HQASY for review.

5. Engaging in terrorist activities or status as a representative of certain terrorist organizations

An applicant cannot be granted asylum if he or she has engaged, is engaging, or is likely to engage in terrorist activity; has incited terrorist activity (for applications filed on or after 4/1/97); or is a representative of a designated terrorist organization (or certain official of the PLO, if application was filed prior to 4/1/97).

If there are not reasonable grounds for believing the applicant is a danger to the security of the United States, an exception may apply (depending on when the asylum application was filed and the terrorist provision that applies).

6. Firm resettlement

**OH #37
Summary B, 6**

An applicant is considered firmly resettled if the applicant entered into another country with, or while there received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement when in that country.

An applicant was not firmly resettled if entry was necessary to flight, the applicant remained only to arrange onward travel, and the applicant developed no significant ties; or the conditions of residence were substantially restricted.

C. Burden of ProofOH #38
Summary C

1. Prohibition on Filing

The applicant must establish by clear and convincing evidence that he or she applied for asylum within one year after arrival in the U.S., unless an exception applies.

If a bar to filing applies, the applicant must demonstrate to the satisfaction of the adjudicator that an exception applies.

2. Bars to asylum

If the evidence indicates that a ground for mandatory denial of asylum applies, the applicant must prove by a *preponderance of the evidence* that a mandatory bar does not apply.

D. Mandatory Nature of BarsOH #39
Summary D, E

If it is determined that a mandatory bar applies, the asylum officer has no discretion to grant asylum to the applicant, even though the applicant may otherwise be eligible.

E. Dependents

The spouse or child of an asylum applicant cannot be granted derivative asylum status if a mandatory bar, other than firm resettlement, applies to the spouse or child.

F. Discretionary Denials/ReferralsOH #40
Summary F

1. Asylum may be denied in the exercise of discretion, even if the applicant is a refugee and no mandatory bar applies. In the absence of adverse factors, asylum should be granted in the exercise of discretion.

2. The sound exercise of discretion requires a balancing of all the positive factors against any negative factors; the danger of persecution generally outweighs all but the most egregious of adverse factors.