

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>Making An Asylum Decision</i>
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to consider appropriate factors to determine eligibility for asylum in the United States.
Interim (Training) Performance Objectives	<ol style="list-style-type: none">1. Identify the elements necessary to establish that an individual is a refugee.2. Identify eligibility issues raised by facts presented in an asylum case.3. Identify factors that should be considered in determining eligibility for asylum.4. Identify factors that are <i>not</i> appropriate to consider in determining eligibility for asylum.5. Apply the law to the facts to resolve eligibility issues presented in an asylum case.6. Conduct legal and country conditions research efficiently.
Student Materials/References	Participant Workbook

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Presentation

I. INTRODUCTION

This lesson provides guidance on how to reach an asylum decision. The lesson will address general considerations involved in decision-making in the asylum context, legal issues to consider, and how to apply the law to the facts in order to decide whether to grant, deny, or refer a request for asylum.

II. GENERAL CONSIDERATIONS

Each decision involves the life of an individual, whether eligible for asylum or not. Although the asylum officer may feel pressure to complete a decision within a limited amount of time, each asylum decision is an important decision that cannot be made lightly and must be given appropriate consideration.

A. Factors That Should be Considered

The determination of whether an individual is eligible for asylum is usually a complex decision that involves consideration of a variety of factors. Factors that may be involved in making the decision are listed below.

1. Credibility

Evaluation of credibility may require:

- a. identification of inconsistencies and consideration of explanations for them
- b. awareness of trauma related symptoms and their potential effect on testimony
- c. assessment of the applicant's ability to communicate in a second-language and of potential misunderstandings due to interpretation
- d. consideration of cross-cultural issues
- e. evaluation of testimony as it compares to known country conditions

References

Instructor Note 1

OH #1 & #2: Objectives

OH #3: Factors to Consider

- f. evaluation of the amount of detail an individual in the applicant's situation reasonably can be expected to provide

2. Country conditions

An understanding of country conditions may require an evaluation of several aspects of another country, sometimes when information is sparse or reports are conflicting. Some of the necessary information regarding the applicant's country includes:

- a. human rights abuses
- b. structure of the government and roles of the military and/or security forces
- c. identity of guerrilla forces, separatist groups, and terrorist organizations, and their activities and alliances
- d. structure and agendas of political organizations or parties
- e. laws and application of laws
- f. recent political events

3. U.S. asylum law

Application of asylum law requires knowledge and understanding of the following:

- a. statute and regulations
- b. precedent decisions and their interpretations
- c. general counsel opinions
- d. Asylum Division guidance

4. International human rights law

Application of international human rights law requires a knowledge of human rights protected by international

treaties and customary international law, as well as an understanding of the relation between international law and U.S. law.

B. Factors That May *Not* Be Considered

OH #4: Factors Not to Consider

1. Foreign policy considerations
2. The fact that the applicant is from a country whose government the United States supports or with which it has favorable relations
3. Whether or not the United States government (or the asylum officer) agrees with the political or ideological beliefs of the individual

C. Duty to Follow the Law

An asylum officer must apply the law as it is set forth by statute and interpreted by regulation and precedent decisions. The asylum officer cannot develop his or her own asylum standards on the basis of a personal opinion that the law is either "too strict" or "too lenient."

D. Case-By-Case Basis

1. There are no "magic formulas" to determine eligibility for asylum. Although many claims are similar, they are never identical, and each asylum applicant is unique. Therefore, each request must be evaluated on its own merit.
2. Asylum officers should be mindful to focus on the facts of each particular case without allowing previous cases to unduly influence the decision-making. For example, the fact that one applicant has suffered severe persecution should not prevent a finding that another applicant, who suffered less severe harm, also suffered persecution.
3. Although each decision must be made on a case-by-case basis, the asylum officer should strive for consistency in application of the law from one case to another.

Instructor Note 2

Instructor Note 3

III. LEGAL ISSUES TO RESOLVE

A. Overview

To determine whether an applicant is eligible for asylum, the following questions must be answered:

OH #5: Questions

Instructor Note 4

1. Who is the applicant?
2. Why did the applicant leave his or her country and why is the applicant afraid to return?
3. Is the applicant's claim credible in all material respects?
4. Is the applicant eligible to apply for asylum?
5. Is the applicant a refugee?
 - a. Did the applicant suffer past persecution on account of a protected ground?
 - b. Does the applicant have a well-founded fear of future persecution on account of a protected ground?
6. If refugee status is based on past persecution alone, are there compelling reasons due to the severity of the past persecution or other serious harm that the applicant may suffer to grant asylum in the absence of a well-founded fear?
7. Are there any mandatory bars or grounds for a discretionary denial/referral?

Instructor Note 5

Instructor Note 6

The responses to the first two questions should have been elicited during the interview, and those responses provide the facts that will be used to answer the last five questions. The last five questions require legal analysis; that is, an application of the law to the facts. The focus of this lesson is on how to answer the last five questions in order to reach an asylum decision.

Instructor Note 7

B. Credibility

Credibility is one of the most important and difficult determinations in the decision-making process. Therefore, an entire lesson is devoted to this issue. In this lesson, credibility is

See lesson, Credibility

covered only briefly.

1. Was the testimony internally consistent?
2. Was the testimony consistent with the written application?
3. Was the testimony consistent with country conditions?
4. Was the testimony sufficiently detailed?
5. If part of the testimony was not credible for any of the above reasons, is that part of the testimony material to the claim?

C. Eligibility to Apply

An asylum seeker cannot apply for asylum on or after April 1, 1997 if he or she submitted the application more than one year after arrival in the United States, or if he or she previously has been denied asylum by an immigration judge or the Board of Immigration Appeals (BIA).

Because these issues are covered in great depth in other lessons, they will be covered only briefly here.

Questions to consider follow:

1. Is the applicant subject to the bars to applying for asylum?
2. Did the applicant file his or her application within one year of arrival?
 - a. If the applicant did not file his or her application within one year of arrival, did the applicant establish the existence of either:
 - (i) a changed circumstance materially affecting his or her eligibility for asylum, or
 - (ii) an extraordinary circumstance related to the delay in filing?
 - b. If a changed or extraordinary circumstance exists, did the applicant file the application within a reasonable period of time given those circumstances?

See, lesson, Mandatory Bars to Asylum

OH#6 Eligibility to Apply

Because the United States has not yet entered into any bi- or multi-lateral agreements with any other countries for removal to a “safe third country,” that bar to applying for asylum is not in effect.

See, lesson, One-Year Filing Deadline, for more on this analysis

3. Has the applicant previously been denied asylum by an immigration judge or the BIA?

See, lesson, *Mandatory Bars to Asylum*, for more on this analysis

And if so, did the applicant establish the existence of a changed circumstance that materially affects his or her eligibility for asylum?

D. Past Persecution on Account of a Protected Ground

OH #7-#8: Past Persecution

An applicant can establish that he or she meets the definition of a refugee on the basis of *either* past persecution on account of a protected ground *or* a well-founded fear of future persecution on account of a protected ground.

See lessons, *Eligibility Part I, Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution; Eligibility Part Asylum Eligibility Part III: Nexus and the Five Protected Characteristics*

1. Past persecution on account of a protected ground

To determine whether past persecution on account of a protected ground has been established, the following two questions must be answered:

- a. Did the harm suffered, if any, constitute persecution?
- b. Was the harm connected to the applicant's race, religion, nationality, membership in a particular social group, or political opinion?

The order of the questions is not critical. If the answer to *either* of the questions is negative, then the applicant has not established refugee status based on past persecution.

If the applicant has NOT established past persecution, move to the analysis of well-founded fear. See, section III.E., *Well-Founded Fear on Account of a Protected Ground*, below.

In some cases, it may be clear that the harm the applicant suffered was not connected to a protected ground. In such a case, the asylum officer need not analyze whether the harm was serious enough to amount to persecution.

In other cases, it may be clear that the harm was not so serious as to amount to persecution. In such a case, the asylum officer need not determine whether the harm was connected to a protected ground.

2. Past persecution on account of protected ground established

If an applicant establishes past persecution on account of a protected ground, then the applicant meets the definition of refugee.

A finding of past persecution raises the presumption that the applicant has a well-founded fear of future persecution. However, this presumption can be overcome and does not necessarily mean that the applicant may be granted asylum.

See lessons, *Asylum Eligibility Part II: Well-Founded Fear*, Section XIII., *Presumption Raised by Past Persecution*

The following additional questions must be answered:

a. Does a preponderance of the evidence establish ***either***

(i) that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of future persecution,

or

(ii) that the applicant could avoid persecution by relocating and that it is reasonable to expect the applicant to do so?

When an applicant has established past persecution on account of a protected ground, the Service bears the burden to overcome the presumption of a well-founded fear of future persecution.

If the answer is YES to either question, then the presumption of well-founded fear is overcome, and the asylum officer must consider whether to exercise discretion to grant asylum in the absence of a well-founded fear (see question "b" below).

The decision to grant asylum to a refugee who no longer has a well-founded fear is discretionary, meaning that the Service is not obligated to grant asylum. However, the Service will grant asylum in certain situations when the past persecution suffered was particularly severe, and/or the applicant may suffer other serious harm (not on account of a protected ground) upon return to the country of nationality. See, section III.D.2.b., below.

If the answer is NO to both questions, then it is presumed that the applicant's fear of future persecution is well founded, and the only additional considerations are whether there are any mandatory or discretionary reasons to deny asylum.

See, section III.F., *Mandatory or Discretionary Grounds for Denial or Referral*, below

b. If a preponderance of the evidence establishes that the fear of future persecution is no longer well founded (little likelihood of future persecution), are there compelling reasons to grant asylum due to ***either***

(i) the severity of the past persecution ***or***

See, lesson *Asylum Eligibility Part I: Definition of Refugee;...Past Persecution*, section VII.B., *Exercise of Discretion to Grant Based on Past Persecution, No Well-Founded Fear*

- (ii) the possibility that the applicant may suffer other serious harm upon return?

If the answer is YES to either question, then the Service will grant asylum as a matter of discretion, provided that there are not any mandatory of discretionary reasons to deny asylum.

See, section III.F., Mandatory or Discretionary Grounds for Denial or Referral, below

If the answer is NO to both questions, then the applicant, though a refugee, is not eligible for asylum and the application will be denied or referred to an immigration Judge.

E. Well-Founded Fear on Account of a Protected Ground

OH #9: Well-Founded Fear

To determine whether an applicant has established a well-founded fear of future persecution on account of a protected ground, when he or she has not established past persecution, the following questions should be considered:

See lesson, *Eligibility Part II: Well-Founded Fear*

Note: These issues should also be analyzed when the presumption of well-founded fear raised by past persecution is overcome, but the applicant claims a fear of persecution on account of a separate ground.

1. Does the applicant have a subjective fear of persecution?
2. Is there a reasonable possibility the applicant will suffer persecution in the future?
 - a. Does the applicant possess a belief or characteristic the persecutor seeks to overcome (or does the persecutor believe that the applicant possesses such a characteristic?)
 - b. Is the persecutor aware, or could become aware, that the applicant possesses the belief or characteristic?
 - c. Does the persecutor have the ability to persecute the applicant?

And if the persecutor is a non-governmental entity, is the government able and willing to protect the applicant?
 - d. Does the persecutor have the inclination to persecute the applicant?

Sub-points a through d are the four prongs of the test for well-founded fear set out in *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

- e. If the applicant can not establish that he or she would be singled out individually, is there a pattern or practice of persecution of a group of persons similarly situated to the applicant, and can the applicant establish that he or she is included in that group?
3. Is the feared persecution on account of race, religion, nationality, membership in a particular social group, or political opinion?
4. Can the applicant avoid future persecution by relocating elsewhere in the country *and* is it reasonable to expect the applicant to do so?

If the persecutor is a **government entity**, there is a presumption that an applicant cannot avoid persecution through relocation. The burden is on the Service to overcome that presumption.

If the persecutor is a **non-governmental entity**, the burden falls on the applicant to establish that he or she cannot avoid persecution through relocation *or* that it is unreasonable to expect him or her to do so.

If the answers to questions 1-3 are **YES** and the answer to either prong of question 4 is **NO**, then the applicant has established a well-founded fear of future persecution and is a refugee. Asylum will be granted provided that there are not any mandatory or discretionary reasons to deny asylum.

See, section III.F., Mandatory or Discretionary Grounds for Denial or Referral, below

F. Mandatory or Discretionary Grounds for Denial or Referral

OH #10: Mandatory Bars & Discretionary Considerations

1. Did the applicant order, incite, assist, or otherwise participate in the persecution of another on account of a protected ground?
2. Was the applicant convicted by a final judgment of a particularly serious crime, thus constituting a danger to the community?
3. Are there serious reasons to believe that the applicant committed a serious nonpolitical crime outside the United States?
4. Does the applicant pose a security risk to the United States?

See lesson, Mandatory Bars to Asylum and Discretion

If application filed prior to 4/1/97, conviction must have been in U.S.

Applies only to applications filed on or after 4/1/97.

5. Is the applicant barred as a terrorist?
6. Has the applicant been firmly resettled in a third country?
7. Did the applicant participate in activities that are grounds for a discretionary denial/referral, and if so, were they so serious as to outweigh the risk of harm to the applicant and any other positive factors supporting a grant?

Note: The weighing of negative factors against the risk of harm to the applicant is NOT conducted when applying a mandatory bar to asylum (numbers one through six).

If the answer to any of the questions one through six is "yes," then a mandatory bar applies. If the answer to both parts of question seven is "yes," then a discretionary denial/referral is warranted.

IV. DETERMINING ELIGIBILITY

Identify and consider all the facts that may help answer the questions listed above. These are the material facts, because they have a direct bearing on the resolution of legal issues raised in the case. Particular facts should not be ignored simply because they make the decision more difficult to make or do not support the asylum officer's opinion of whether the applicant is or is not eligible for asylum.

Instructor Note 8

Apply the answers to the questions in the previous section to determine whether the applicant is eligible for asylum.

- A. Not credible in material respects:

- B. Past persecution and well-founded fear of future persecution on account of a protected ground established, no mandatory bars or discretionary grounds for denial/referral:

- C. Past persecution on account of a protected ground established, but a preponderance of the evidence establishes that the fear of future persecution is no longer well founded (little likelihood of future persecution), no mandatory bars or discretionary grounds for denial/referral:

- D. Well-founded fear of future persecution on account of protected ground established, no mandatory bars or discretionary grounds for denial/referral:

- E. No connection between harm suffered and/or harm feared and a protected ground in the refugee definition:

- F. Mandatory bar applies:

- G. Discretionary grounds for denial/referral raised by facts of the case, but otherwise eligible for asylum:

V. QUALITY WITHIN TIME CONSTRAINTS

A. Quality and Quantity

Both quality and quantity are priorities in the asylum office. It is sometimes difficult to balance quality against quantity when under pressure to complete a number of decisions within a limited amount of time. The asylum officer may not be able to research every detail of each case or read every available report about a particular country. Therefore, the asylum officer must develop skills to focus on the critical issues in order to make well-reasoned, supportable decisions.

B. Amount of Time Per Case

The target average time to reach a decision and write an assessment is one hour. Some cases may be simple and require little time. Other cases may be complex and require more extensive research and consultation with others.

C. Efficient Research

1. Identify critical issues and focus on those issues in

conducting research to reach a conclusion. Focus on pertinent issues when conducting research; avoid getting sidetracked by unrelated country conditions reports.

2. Use the *Asylum Officer Basic Training Materials* to research legal issues. The training materials contain summaries of asylum law, and you may find that the legal issue you are struggling with may already have been resolved by a court decision that you must follow, or that, if in another circuit, provides guidance. Asylum officers are also provided with legal opinions and General Counsel Opinions. Further legal research may be conducted through the Westlaw computer database.
3. Hone research skills to access information efficiently from the library and computer databases, especially REFWORLD. Remain familiar with the variety of resources in the library and available computer databases.
4. Keep current with political events in refugee producing countries.
5. Use other asylum officers as resources; each asylum officer does not have to "reinvent the wheel." One asylum officer may have already conducted research that another asylum officer is about to begin. Not only can sharing information save time, but it also increases consistency within an office.

(However, it is also important to respect on others' needs to get work done, so good judgment must be exercised in this matter.)

6. Keep a record of information found in past research so that, when similar issues arise, the information is readily accessible.

Instructor Note 9

Example: An asylum officer researches the date a particular political party came to power. If the officer keeps a record of this information in an organized manner, then the next time that information is needed, the asylum officer can quickly access it.

VI. SUMMARY

A. General Considerations

OH #11: Summary A

The asylum decision may have serious impact on another individual's life and must not be taken lightly. It is a complex decision that involves consideration of a wide variety of factors and extensive knowledge of country conditions and the law. The decision must be made on a case-by-case basis, it must be based on proper application of the law as set forth by regulation and precedent decisions, and it cannot be influenced by foreign policy or other political considerations.

B. Legal Issues

OH #12: Summary B

To reach a decision as to whether an applicant is eligible for asylum, the asylum officer must apply the law to the facts in order to resolve the following legal issues:

1. Whether the applicant was credible in material respects
2. Whether the applicant is eligible to apply for asylum
3. Whether the applicant is a refugee (suffered past persecution on account of a protected ground or a has a well-founded fear of future persecution on account of a protected ground)
4. If the refugee status is based on past persecution alone, whether there are compelling reasons due to the severity of the past persecution or the possibility of suffering other serious harm to grant asylum in the absence of a well-founded fear of future persecution
5. Whether there are any mandatory bars or discretionary grounds for denial/referral

C. Determining Eligibility

1. If the applicant does not meet the definition of a refugee, then the applicant is *not* eligible for asylum.
2. If the applicant meets the refugee definition based on past persecution alone (the Service overcame the presumption of well-founded fear), and there are no mandatory bars or

OH #13-14: Summary C

discretionary grounds for denial/referral, then asylum should be granted in the absence of a well-founded fear *if* there are compelling reasons due to *either* the severity of the past persecution *or* the possibility of suffering other serious harm to grant asylum

3. If the applicant establishes refugee status based on a well-founded fear of future persecution, and there are no mandatory bars or discretionary grounds for denial/referral, then asylum *must* be granted.
4. If a mandatory bar applies, then asylum *must* be denied or referred.
5. If there are discretionary grounds to deny the request for asylum, then asylum should be denied or referred only if the negative factors outweigh the positive factors, including the risk of harm should the applicant be returned to his or her country.

D. Time Constraints and Quality

The target average time for making an asylum decision and writing an assessment or NOID is one hour. This goal is based on an average. Some cases may be completed in less than an hour, others may take longer.

OH #15: Summary D

In order to meet this average goal without sacrificing quality, the asylum officer must be able to identify and focus on pertinent issues and hone his or her research skills. Asylum officers may save time by sharing information with one another and developing methods to save information gleaned from research in an easily accessible manner.

Instructor Guide

Instructional Methods Lecture, Practical Exercises

Training Aids Handouts (fact patterns), Overhead Transparencies

- 1-2. Objectives
3. Factors to Consider
4. Factors Not to Consider
5. Questions
6. Eligibility to Apply
- 7-8. Past Persecution
9. Well-Founded Fear
10. Mandatory Bars & Discretionary Considerations
11. Summary A
12. Summary B
- 13-14. Summary C
15. Summary D

Instructional Equipment Overhead or LCD Projector

- Instructor Notes**
1. If possible, this lesson should be taught immediately before lesson, *Decision Writing Part II: Legal Analysis*. The two lesson plans are similar in content and complement one another.
 2. Discuss with students ways to set aside one case to focus on the next (elicit ideas). May use for example: AO evaluates a case involving severe torture, then must evaluate a discrimination case.
 3. Discuss ways of maintaining individual consistency. Additionally, consider discussion of consistency within the office.
 4. These questions correspond with the assessment/NOID format.
 5. Ask students what the bars to applying are.
 6. Remind students that refugee status may be based on either past persecution or well-founded fear.
 7. **Practical Exercise #1** – Students are given a fact pattern that will be used for this and the following practical exercises. As the instructor covers each sub-section in this section of the lesson plan, the information should be applied to the fact pattern. In this manner the instructor will guide the students through the decision-making process, using the fact pattern to illustrate each point. The fact

pattern is found at the end of the lesson.

8. **Practical Exercise #2** – Students answers the questions in the spaces provided in the student workbook and provide the facts that support the answers. Instructor then leads a discussion on the responses.
- A. Not credible in material respects:

Asylum cannot be granted.
 - B. Past persecution and well-founded fear of future persecution on account of a protected ground established, no mandatory bars or discretionary grounds for denial/referral:

Asylum must be granted.
 - C. Past persecution on account of a protected ground established, but a preponderance of the evidence establishes that the fear of future persecution is no longer well founded (little likelihood of future persecution), no mandatory bars or discretionary grounds for denial/referral:

Asylum should not be granted, unless there are compelling reasons due to the severity of past persecution or other compelling humanitarian factors to exercise discretion to grant asylum in the absence of a well-founded fear.
 - D. Well-founded fear of future persecution on account of protected ground established, no mandatory bars or discretionary grounds for denial/referral:

Asylum must be granted.
 - E. No connection between harm suffered and/or harm feared and a protected ground in the refugee definition:

Asylum cannot be granted.
 - F. Mandatory bar applies:

Asylum cannot be granted.

- G. Discretionary grounds for denial/referral raised by facts of the case, but otherwise eligible for asylum:

Discretion may be exercised to deny/refer the case only if adverse factors outweigh positive factors.

Practical Exercise #3 – Using previous exercise, students review the fact pattern and determine which legal issues/scenarios apply and determine whether or not the applicant is eligible for asylum. Students should then be given a more complicated fact pattern, break into small groups for identification and resolution of legal issues raised by the case.

9. Share ideas with students about how to organize important information found from research. For example, some asylum officers keep computer word processing files on their computers for each relevant country. Each time they use additional information about a country, they save it in the appropriate word-perfect file.