
Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence</i>
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will correctly apply the law to determine eligibility for asylum in the United States.
Interim (Training) Performance Objectives	<ol style="list-style-type: none">1. Distinguish the applicant's burden of proof from the standards of proof necessary to establish eligibility for asylum.2. Identify the applicant's burden of proof to establish eligibility to apply for asylum.3. Identify applicant's burden of proof to establish eligibility for asylum.4. Identify types of evidence that may establish eligibility for asylum.5. Identify Service's burden of proof in asylum adjudication.
Student References	Participant Workbook
Background Reading	

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

This lesson plan provides guidance on an asylum applicant's burden of proof, the Service's burden of proof, and evidence that may be considered in evaluating eligibility for asylum. This lesson plan also discusses the various standards of proof asylum officers apply in adjudicating asylum requests and compares those standards with standards of proof involved in other adjudications asylum officers make.

OH #1; #2: Objectives

II. BURDEN OF PROOF**A. Definition**

"Burden of proof" has been defined as "the necessity or duty of affirmatively proving a fact or facts in dispute in an issue raised between the parties in a cause."

OH #3: Burden of Proof – Definition

Black's Law Dictionary, 178 (5th ed. 1979)

In the asylum context, the "dispute" in issue is whether the applicant is eligible for asylum. The "parties" are the applicant and the Service. The applicant has the obligation to provide enough evidence to establish eligibility for asylum. The asylum officer is in the unique position of being both a representative of one of the parties (the Service) and the adjudicator. How this plays out in the affirmative asylum process is discussed further below.

B. Applicant's Burden

OH #4: Burden of Proof

1. The burden of proof is on the applicant to establish that he or she is eligible to apply for asylum.
2. The burden of proof is on the applicant to establish that he or she is a refugee and that discretion should be exercised favorably to grant asylum.

[INA § 208\(a\)\(2\)](#)

[8 C.F.R. § 208.13\(a\)](#)

If the applicant establishes that he or she suffered past persecution on account of a protected characteristic, the applicant has met the burden of establishing that he or she is a refugee.

[8 C.F.R. § 208.13\(b\)\(1\)](#)

If the applicant has not established past persecution, the applicant must establish a well-founded fear of future persecution to meet the burden of establishing that he or

[8 C.F.R. §§ 208.13\(b\)\(2\)\(ii\); 208.13\(b\)\(3\)\(i\)](#)

The standard of proof for well-founded fear is

she is a refugee. This burden includes establishing that it would not be reasonable to expect the applicant to relocate within the country of feared persecution to avoid future persecution, unless the persecution is by a government or is government sponsored (See section C.2 below).

discussed in lesson, [Asylum Eligibility Part II, Well-Founded Fear](#) and in Section [III.B., Well-Founded Fear and Reasonable Fear](#), below.

3. If the evidence indicates that a ground for mandatory denial (bar) applies, then the applicant must establish by a preponderance of the evidence that the ground for mandatory denial (bar) does not apply.

[8 C.F.R. § 208.13\(c\)](#)

The standard of proof for preponderance of the evidence is discussed in [Section III.A., Preponderance of the Evidence](#), below.

For example, if there is evidence that the applicant committed a terrorist act, the asylum officer would not have to establish that the applicant committed the act. Instead, the applicant would have to show, by a preponderance of the evidence, that he or she did not commit that act.

Mandatory grounds for denial are discussed in lesson, [Mandatory Bars to Asylum and Discretion](#).

C. Service's Burden

1. Past persecution established

If an applicant establishes past persecution, the burden of proof shifts to the Service to show, by a preponderance of the evidence either that

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

This is also discussed in lesson, [Asylum Eligibility Part II, Well-Founded Fear](#).

- a. there has been a fundamental change in circumstances to such an extent that the applicant's fear of future persecution is no longer well founded, or
- b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable for the applicant to do so.

[8 C.F.R. § 208.13\(b\)\(1\)\(i\)\(A\)](#)

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

Therefore, an applicant who establishes that he or she suffered past persecution and is a refugee:

- a. does not have the burden of establishing a well-founded fear of future persecution on the basis of the initial claim; and
- b. does not have the burden of establishing that it would be unreasonable to relocate within his or her country to avoid future persecution.

2. Internal Relocation

The Service bears the burden of establishing by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate within his or her country to avoid future persecution if

[8 C.F.R. § 208.13\(b\)\(3\)\(ii\)](#)

- a. the persecutor is a government or is government sponsored or
- b. the applicant has established past persecution (regardless of whether the government is the persecutor).

3. Burden shifting

In the circumstances described in paragraphs 1 and 2 above, the burden of proof, which generally is the responsibility of the applicant, shifts to the Service.

- a. In the defensive process, this means that the INS Trial Attorney must convince the Immigration Judge, by a preponderance of the evidence, that there is no reasonable possibility the applicant would be persecuted if returned to the country of claimed persecution.
- b. In the affirmative process, the asylum officer must both “present” the evidence and evaluate it. The asylum officer must consider available information, including country conditions information and testimony. After doing so, the asylum officer determines whether a preponderance of the evidence establishes that there is no reasonable possibility the applicant would be persecuted if:

The factors to consider will be discussed in lesson, [Asylum Eligibility Part II, Well-Founded Fear.](#)

Instructor Note #1

- (i) he or she is returned to the country of feared persecution, due to a fundamental change in circumstances,
- (ii) he or she is internally relocated to another part of his or her country and under all the circumstances it is reasonable for the applicant to do so.

D. Special Consideration for Burden of Proof Requirements in the Asylum Context

The BIA has recognized that, although the burden of proof is on the applicant, a “cooperative approach” is required in adjudicating asylum requests. The BIA explained that this is because the BIA, IJ’s, and the INS “all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant’s claim.”

[Matter of S-M-J-](#), 21 I&N Dec. 722 (BIA 1997)

Although the applicant bears the burden of proof to establish eligibility for asylum, the asylum officer has an affirmative duty to elicit sufficient information and to research country conditions information to properly evaluate whether the applicant is eligible for protection.

[Matter of S-M-J-](#), 21 I&N Dec. 722 (BIA 1997); [UNHCR Handbook, paras. 196; 205\(b\)\(i\)](#); See also lessons, [Interviewing Part III, Eliciting Testimony](#); and [Country Conditions Research and the Resource Information Center \(RIC\)](#).

III. STANDARDS OF PROOF – COMPARISON

Asylum officers must evaluate information according to several standards of proof. Asylum Officers must distinguish between different standards of proof and know when each applies. It is important to understand that the standard of proof required to establish testimony or other evidence constitutes a fact[s] (for purposes of the adjudication) should be distinguished from the standard of proof required to demonstrate eligibility. The eligibility standards compared here are discussed in more detail in other lesson plans.

OH #5: Standards of Proof – Chart

A. Preponderance of the Evidence

1. Standard

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 a more than 50% chance that the fact is true). This is the standard of proof used in civil cases. It is a lower standard of proof than that used in criminal trials, "beyond a reasonable doubt."

2. Quantity and quality of evidence

Determination of whether a fact has been established "by a

preponderance of the evidence" should not be based solely on the quantity of evidence presented. Rather, the quality of the evidence must be considered.

Example: There may be several documents submitted to establish that an individual is a judge. However, if there is one reliable document showing that the other documents are false and that the individual was expelled from law school, then it may be found by a preponderance of the evidence that the individual is not a judge.

In evaluating whether an applicant had met his burden of establishing the facts underlying his request for asylum, the BIA explained, "When considering a quantum of proof, generalized information is insufficient. Specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum. We recognize that a case may arise in which there is some *ambiguity* regarding an aspect of an alien's claim, at which time we might consider giving the alien the 'benefit of the doubt.'"

[Matter of Y-B-](#), 21 I&N Dec. 1136 (BIA 1998)

B. Well-Founded Fear (Asylum) and Reasonable Fear (Screening for Withholding of Removal Eligibility)

A well-founded fear is established if a preponderance of the evidence demonstrates that there is a *reasonable possibility* that the applicant would be persecuted.

See lesson, [Asylum Eligibility Part II, Well-Founded Fear](#); See, [8 C.F.R. § 208.13\(b\)\(2\)](#)

The US Supreme Court decision in *Cardoza-Fonseca* emphasized that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place." The Court went on to favorably cite a leading authority:

[INS v. Cardoza-Fonseca](#), 480 U.S. 421, 107 S. Ct. 1207 (1987); citing A. Grahl-Madsen, *The Status of Refugees in International Law* 180 (1966).

"Let us ... presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp.... In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return."

The asylum officer should consider whether a reasonable person in the applicant's circumstances would fear persecution. To show that the fear is reasonable, the applicant must show by a

Remember that if past persecution is established, the applicant has met his or her burden of establishing

preponderance of evidence that certain events occurred (those that gave rise to the fear).

Example: Applicant testifies that she was threatened because she participated in a cooperative that the government viewed as subversive. The applicant would have to establish by a preponderance of the evidence (*that it is more likely than not*) that she was in a cooperative, that she was threatened because she was in the cooperative, and that the government viewed the cooperative as subversive. The asylum officer would then determine whether there is *a reasonable possibility* that the applicant would be persecuted.

This is the same standard the asylum officer should apply when evaluating whether an applicant has established a reasonable fear of persecution or torture, when conducting “reasonable fear screenings,” to determine whether an applicant should be referred to an immigration judge to apply for withholding of removal.

C. Likelihood of Persecution (Withholding of Removal)

To establish eligibility for withholding of removal, the applicant must establish by a preponderance of evidence that he or she **would be persecuted** in the country of feared persecution. The Supreme Court has held that this means the applicant must establish that it is **more likely than not** (a more than 50% chance or greater) that he or she would be persecuted.

D. Credible Fear (Expedited Removal)

Credible Fear is defined as a **significant possibility** that the applicant could establish eligibility for asylum or for withholding of removal or deferral of removal under the *Convention against Torture*. This is a substantially lower standard than the well-founded fear standard.

that the fear is well-founded. The Service must then consider whether a preponderance of the evidence establishes that the fear is not well-founded.

Note that country conditions information available to the asylum officer may establish that the applicant’s government views members of cooperatives as subversive. Information found by the asylum officer thus would meet the applicant’s burden of proof on that issue. This illustrates the cooperative approach involved in the affirmative asylum process.

Instructor Note #2

[8 C.F.R. § 208.31](#); lesson, *Reasonable Fear of Persecution and Torture Determinations*

See lesson, *Withholding of Removal*; [8 C.F.R. § 208.16\(b\)\(1\)](#); *INS v. Stevic*, 467 U.S. 407, 104 S. Ct. 2489 (1984)

Note that, if the applicant establishes past persecution, the burden of proof shifts to the Service to establish that it is not more likely than not that the applicant would be persecuted. 8 C.F.R. § 208.16(b)(1)

See lesson, *Credible Fear Standard*; [INA § 235\(b\)\(1\)\(B\)\(v\)](#); 64 Federal Register 8478, 8484

Instructor Note #3

To establish a credible fear of persecution, the applicant must demonstrate that there is a *significant possibility* the applicant will be able to establish in an INA Section 240 hearing, either

- 1) that he or she was persecuted in the past on account of a protected ground or
- 2) that his or her fear of future persecution on account of a protected ground is reasonable.

The asylum officer should find a significant possibility that the applicant is eligible for withholding of removal or deferral of removal under the *Convention against Torture* if

- 1) there is a significant possibility the applicant's claim is credible and
- 2) the applicant fears that he or she would be intentionally subjected to serious physical or mental harm in a country to which the applicant may be removed

E. Clear and Convincing Evidence (Filed Within One-Year Period)

An 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, unless the applicant establishes to the satisfaction of the asylum officer that an exception applies.

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

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 required in criminal cases.

See, *Black’s Law Dictionary*, 5th Ed., and lesson, [One-Year Filing Deadline](#)

F. “To the Satisfaction of the Attorney General” (Exceptions to Certain Filing Requirements)

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 Attorney General* changed circumstances that materially affect asylum eligibility. Similarly, an asylum seeker cannot apply for asylum more than one year after the date of arrival in the United States, unless the applicant demonstrates *to the satisfaction of the Attorney*

See lessons, [Mandatory Bars to Asylum and Discretion](#) and [One-Year Filing Deadline](#)

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

General changed circumstances that materially affect eligibility, or extraordinary circumstances relating to the delay in filing the application within the required time period.

The standard “to the satisfaction of the Attorney General” places the burden on the applicant to demonstrate that an exception applies. The applicant is not required to establish “beyond a reasonable doubt” or by “clear and convincing evidence” that the standard applies. Rather, the applicant must demonstrate that it is *reasonable* for the asylum officer to conclude that the exception applies under the circumstances.

IV. EVIDENCE

OH #6: Types of Evidence

A. Applicant's Testimony

An applicant’s testimony is evidence. Regulations provide that “[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”

[8 C.F.R. § 208.13\(a\)](#);
Bolanos-Hernandez v. INS,
767 F.2d 1277, 1285 (9th
Cir. 1993)

The BIA has held that testimony alone is sufficient to meet the burden of proof, if it is “believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis” for the alleged fear. The BIA has also held that there may be some circumstances in which corroborating evidence, if available, should be provided. There is some ambiguity in circuit court decisions on this issue.

[Matter of Dass](#), 20 I & N
Dec. 120 (BIA 1989);
[Matter of S-M-J-](#), 21 I&N
Dec. 722 (BIA 1997);
Matter of B-B-, Int. Dec.
3367 (BIA 1998)

This is discussed in [Section V.](#), *Corroboration*, below.

B. Testimony of Witnesses

An asylum applicant may present witnesses at the asylum interview. The testimony of the witnesses is evidence to be considered and weighed along with all the other evidence presented in the case. The asylum officer has the authority to question any witnesses presented by the applicant.

[8 C.F.R. § 208.9\(b\)](#);
[8 C.F.R. § 208.9\(c\)](#)

Note that the interpreter cannot serve as a witness. [8 C.F.R. § 208.9\(g\)](#)

C. Testimony of Other Asylum Applicants

The testimony given by one asylum applicant in support of his or her claim is not evidence to be considered in evaluating the request for asylum of another asylum applicant. However, the testimony of an asylum applicant appearing as a witness for another asylum applicant would be evidence to consider.

This prohibition includes the testimony of family members, even if the testimony may be conflicting. One of the reasons the information cannot be used is based on the confidentiality of each asylum applicant’s application and testimony. If questions arise in such cases, the supervisory asylum officer should contact

Headquarters.

D. Documentary Evidence

OH #7: Sources of Documentary Evidence

1. Sources

a. country conditions information

This is discussed in greater detail in lesson, [Country Conditions Research and the Resource Information Center \(RIC\)](#).

The asylum officer is required to evaluate the applicant's claim in light of country conditions. This means that the asylum officer must conduct research and consider available country conditions information.

In addition to information submitted by the applicant, the asylum officer may consider information obtained from:

[8 C.F.R. § 208.12](#)

- (i) the Department of State
- (ii) the INS Headquarters Resource Information Center (RIC) of the Office of International Affairs
- (iii) the INS District Director for the district in which the applicant lives or seeks admission to the U.S.
- (iv) international organizations
- (v) private voluntary agencies
- (vi) academic institutions
- (vii) any other credible source

This may include reputable newspapers and magazines.

b. evidence submitted by the applicant

The applicant may submit country conditions information and may also submit a variety of other documentation specific to his or her claim.

The types of documentary evidence asylum applicants might submit include, but are not limited to, death certificates; baptismal certificates; prison records; arrest warrants; affidavits of or letters from government officials, friends or family members; union membership cards; and political party cards.

The asylum officer should review the documents submitted by the applicant for authenticity and reliability. At the same time, the asylum officer should bear in mind that documents created in some developing countries may not look as polished as documents created in more developed countries.

If the authenticity of a document is in question and raises questions about the credibility of the claim, the asylum officer may send the document to the INS Forensics Document Laboratory for an opinion (*see, Affirmative Asylum Procedures Manual*).

Basic elements to consider in reviewing documents for authenticity will be discussed further in a separate session. For considerations regarding reliability of sources, see lesson, *Country Conditions Research and the Resource Information Center (RIC)*.

c. Comments from the Department of State

At its option, the Department of State (Bureau of Democracy, Human Rights, and Labor) may provide detailed country conditions information and may also comment on particular asylum applications. Asylum officers may also request specific information from the Department of State.

[8 C.F.R. § 208.11](#)

Asylum officers are not bound by any opinions issued by the Department of State. Rather, the opinions are a source of information to be considered along with credible testimony and other evidence available to the asylum officer.

2. Availability

Because of the circumstances that give rise to flight, refugees often will not be able to provide documentary evidence.

Instructor Note #4

Generally, persecutors do not provide evidence of their persecution or intentions. Additionally, the applicant may have been forced to flee without an opportunity to gather documents, or it may have been dangerous for the applicant to carry certain documents, such as a written threat or identification documents.

See e.g., Aguilera-Cota v. INS, 914 F.2d 1375 (9th Cir. 1990) ("The last thing a victim may want to do is carry around a threatening note with him.")

Human rights monitors and reporters may have difficulty documenting abuses in some refugee-producing countries that do not allow human rights monitors access to the country and maintain firm control over the press.

This is discussed in greater detail in lesson, [Country Conditions Research and the Resource Information Center \(RIC\)](#).

When applicants do provide documents, they may not be

See, Zavala-Bonilla v. INS,

able to establish the authenticity of the documents. If the asylum officer is satisfied that the documents are genuine, the evidentiary value should not be discounted merely because the documents are not certified.

730 F.2d 562 (9th Cir. 1984)

E. Administrative Notice

1. Definition of administrative notice

Administrative notice is the recognition of the existence and truth of certain facts, without the production of evidence. Administrative notice can only be taken regarding facts that are generally accepted as true; that is, facts that reasonable people will not dispute.

Instructor's Note #5

2. Example

It is an objective fact that elections occurred in Nicaragua. However, it is not an objective fact that the Sandinistas are no longer in power -- reasonable people may still dispute the extent of the Sandinistas' authority in Nicaragua.

3. Use of administrative notice

Because asylum officers have access to reliable country conditions information that can be cited, it is not necessary for asylum officers to take administrative notice. If circumstances arise in which an asylum officer feels it necessary to take administrative notice, the decision to take administrative notice would require Headquarters approval.

F. Asylum Officer's Personal Opinions

An asylum officer's personal opinions and views of a country or situation are *not* objective evidence to be considered. An asylum officer may have lived or traveled in another country, or have formed opinions about a country based on the experiences of friends or associates. Although knowledge gained from such experiences or contacts may be useful in developing lines of questioning during the interview, such knowledge is not evidence. The asylum decision cannot be based, in any way, on such personal opinions and views.

Instructor Note #6

V. CORROBORATION

An applicant's credible testimony may establish eligibility for asylum without corroborating documentation. This is because the nature of a

8 C.F.R. § 208.13(a); [Matter of Dass](#), 20 I&N Dec. 120

refugee's circumstances generally makes it difficult, often impossible, for a refugee to provide corroboration of his or her claim. However, there may be some circumstances in which either corroboration or an explanation as to why corroborating evidence is unavailable may be required. The BIA has held that "the weaker an alien's testimony, the greater the need for corroborative evidence." (*Matter of Y-B-*)

(BIA 1989); [Matter of S-M-J](#), 21 I&N Dec. 722 (BIA 1997); [Matter of Y-B-](#), 21 I&N Dec. 1136 (BIA 1998)

Corroborating evidence may be broken into two categories:

- 1) background country conditions information; and
- 2) evidence that is specific to a particular applicant (either documentary or testimony of a witness)

A. Background Country Conditions Information

[Matter of S-M-J](#), 21 I&N Dec. 722 (BIA 1997)

The BIA has recognized that general background information about a country, where available, must be included in the record as a foundation for an applicant's claim. In the affirmative asylum process, the asylum officer may be in a better position than the applicant to provide background country conditions information through sources such as *Refworld*, the INS intranet, and others that are more accessible to the asylum officer than the applicant.

This is discussed in detail in lesson, [Country Conditions Research and the Resource Information Center \(RIC\)](#).

Instructor Note #7

B. Documentary Evidence Specific to the Applicant

1. General Rule

If an applicant's claim is based primarily on personal experiences not reasonably subject to verification, corroborating evidence of the applicant's particular experience is not required. However, *where it is reasonable to expect corroborating evidence for alleged facts material to the applicant's claim, the applicant should present such evidence or an explanation as to why such evidence is not presented. The absence of such corroborating evidence may in some cases lead to a finding that an applicant failed to meet the requisite burden of proof.*

[Matter of S-M-J](#), 21 I&N Dec. 722 (BIA 1997). See also, [UNHCR Handbook, para. 205\(a\)\(ii\)](#)

Caution is advised. In most adjudications, eligibility for asylum does not rest on the applicant's ability or failure to produce corroborating evidence. In a non-adversarial interview, asylum officers have a unique opportunity to elicit relevant testimony. If an applicant provides sufficient, detailed, consistent testimony that demonstrates he or she

meets asylum eligibility requirements, there is no need for corroboration.

2. BIA

In *Matter of S-M-J-*, the BIA provided an example of a situation in which an applicant may be expected to provide documentation: If an applicant claims persecution based on activities as a vice-president of a union for 2 years, the applicant should provide corroborating evidence that she held the office of vice-president, or an explanation as to why she did not provide such corroboration.

[*Matter of S-M-J-*](#), 21 I&N Dec. 722 (BIA 1997)

Instructor Note #8

In *Matter of Y-B-*, the BIA upheld an IJ's finding that an applicant from Mauritania failed to meet his burden of proof because his testimony was vague regarding key elements of his claim and because he failed to produce corroborative evidence to buttress the claim. The BIA found that the applicant did not provide specific detail with regard to his arrest, the arrest of his father and uncle, the death of his cousin, the conditions of his detention, the circumstances of his release, the manner of his crossing into Senegal and conditions in the refugee camp he stayed at in Senegal. He presented no corroborating evidence to support his claim despite being allowed two continuances by the Immigration Judge. There was no finding that the applicant was not credible, but the Board upheld the Immigration Judge's determination that the applicant failed to meet his burden of proof.

[*Matter of Y-B-*](#), 21 I&N Dec. 1136 (BIA 1998)

3. US Courts of Appeals

Second Circuit

In two cases, the Second Circuit found that the BIA incorrectly applied its reasonability rule on corroborating evidence while affirming the validity of the rule.

a. Diallo

In *Diallo*, the Second Circuit vacated the BIA decision in *Matter of M-D-*. The Second Circuit found that the BIA had misapplied its own reasonability rule regarding corroborating documents. The court stated that the BIA failed to make an explicit credibility finding, failed to explain why it was reasonable to expect additional corroboration, and failed to assess

Diallo v. INS, 232 F.3d 279 (2nd Cir. 2000) ; [*Matter of M-D-*](#), 21 I&N Dec. 1180 (BIA 1998) (vacated by *Diallo*)

the sufficiency of the applicant's explanation as to why he failed to produce corroboration.

The Second Circuit ruled that the Board's reasonability rule was consistent with regulation, international standards and Second Circuit precedent.

However, it disagreed with the finding that the applicant had not offered specific credible detail about his experiences. The Second Circuit also found that it was inappropriate to base a negative credibility determination *solely* on the failure to provide corroborating evidence.

In *Diallo*, the applicant produced numerous articles and reports and his testimony closely paralleled the patterns of persecution described in those reports, causing the Second Circuit to question why additional corroboration was necessary.

The BIA opinion stated that the applicant should have provided documentary proof of citizenship, letters or affidavits from the applicant's sister who lives in Senegal, letters from other family members to corroborate his claim that he was arrested and confirmation of his family's presence at the refugee camp. The Second Circuit found that such documents were not easily accessible given Diallo's functional illiteracy and the circumstances of his departure. It also found that Diallo's explanations (identity documents destroyed after he was arrested, he communicated with his sister only by telephone, he had not been able to communicate with other family members since he left Senegal and he lost his refugee camp identity card) were reasonable.

b. Alvarado-Carillo

The Second Circuit again ruled that the BIA had misapplied its reasonability rule in *Alvarado-Carillo*. The court found that the BIA downplayed the country conditions evidence the applicant provided, and that it did not identify the documents it believed were missing or why it was reasonable to expect such additional documentation. Additionally, the applicant was not given a chance to explain why such evidence was not presented.

Alvarado-Carillo v. INS,
2001 WL 487151 (2nd Cir.
2001)

Third Circuit

In a decision that relied on *Diallo*, the Third Circuit in *Abdulai* affirmed the validity of the BIA reasonableness rule while finding that it misapplied the rule and vacating its decision. The BIA failed to identify which aspects of the applicant's claim would have been reasonable to corroborate and therefore the court could not analyze whether it was reasonable to require such corroboration.

Abdulai v. Ashcroft, 239 F.3d 542 (3rd Cir. 2001)

Seventh Circuit

The Seventh Circuit affirmed a BIA decision to deny asylum, where an applicant failed to produce reasonably available corroborating evidence or provide an explanation as to why such evidence was not forthcoming. Among other flaws found in the applicant's case, he failed to produce evidence of medical records to confirm injuries that he testified he had suffered.

Meghani v. INS, 236 F.3d 843 (7th Cir. 2001) (Note that the Seventh Circuit did not address the soundness of the Board's rule on corroborating evidence as the issue was not before the court)

Ninth Circuit

a. The Ninth Circuit has taken a different approach than the other circuits on corroborating evidence. The Ninth Circuit has found that when an alien credibly testifies to material facts, those facts are deemed true and no further corroboration is required. In *Ladha*, the Ninth Circuit states that, "[t]o the extent that decisions such as *Matter of S-M-J-* and *Matter of M-D-* establish a corroboration requirement for credible testimony, they are disapproved."

Salaam v. INS, 229 F.3d 1234, (9th Cir. 2000); *Ladha v. INS*, 215 F.3d 889 (9th Cir.2000); *Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000), *Cordon-Garcia v. INS*, 204 F.3d 985 (9th Cir. 2000)

b. In *Sidhu*, the Ninth Circuit indicated that corroborating evidence could be required in some instances, stating that if the immigration judge

Sidhu v. INS, 220 F.3d 1085, 1091 (9th Cir. 2000)

"has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review."

4. Considerations

An applicant may not understand which documents are

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relevant to his or her claim and may not have made efforts to obtain them. The asylum officer should ask the applicant if he or she has any relevant documents in his or her possession.

In the context of asylum reform, there generally is insufficient time for an applicant to provide any additional documentation that may take time to access (e.g., writing back to his or her country for evidence). Therefore, an asylum officer should request additional documentation not in the applicant's possession only if the asylum officer determines that the documentation is necessary to properly adjudicate the request for asylum. If the applicant's testimony is sufficiently detailed and consistent to be found credible, then corroborating documents specific to the applicant's claim are probably unnecessary to establish eligibility.

VI. SUMMARY

OH #8: Summary A

A. Burden of Proof

1. The burden of proof is on the applicant to establish that he or she is eligible to apply for asylum, is a refugee, and discretion should be excised favorably to grant asylum.
2. If the applicant establishes past persecution on account of a protected characteristic, then he or she has met the burden of proof to establish that he or she is a refugee and also that any fear of future persecution based on the original claim is well-founded. The burden of proof then shifts to the Service to show, by a preponderance of the evidence, that the applicant's fear is no longer well-founded. This burden includes the burden of showing that it would be reasonable to expect the applicant to relocate to avoid future persecution.
3. If the applicant fears persecution by the government or that is government-sponsored, the Service bears the burden of proof in showing, by a preponderance of the evidence, that internal relocation to avoid future persecution is reasonable.
4. If there is evidence that a mandatory bar applies, the applicant must establish by a preponderance of the evidence that the bar does not apply.
5. The asylum officer has the affirmative duty to elicit

information and to research country conditions to ensure that all available evidence is considered, in order to properly adjudicate the asylum request.

B. Standards of Proof

OH #9, #10: Summary B

1. A fact is established by a preponderance of the evidence if it is more likely than not that the fact is true (a more than 50% chance that the fact is true). The quality of the evidence, not the quantity of the evidence must be considered.
2. The well-founded fear standard used in asylum adjudication is established if a preponderance of the evidence shows that there is a reasonable possibility the applicant would be persecuted. A reasonable possibility may be found if there is as little as a one in ten chance of persecution. The asylum officer should make this determination based on whether a reasonable person in the applicant's circumstances would fear persecution.

The same standard should be applied in evaluating whether an applicant has established a reasonable fear of persecution or torture, for purposes of evaluating whether the case should be referred to the immigration judge for a withholding of removal determination.

3. The standard of proof to establish eligibility for withholding of removal it is clear probability or more likely than not. The applicant must establish that there is a more than 50% chance that he or she would be persecuted in the country of feared persecution.
4. The credible fear standard of proof used in expedited removal is a significant possibility that the applicant could establish eligibility for asylum or eligibility for withholding of removal or deferral of removal under the *Convention against Torture*. This is substantially lower than the standard of proof required for asylum.
5. An applicant must establish by clear and convincing evidence that he or she applied for asylum within 1 year after the date he or she arrived in the United States, unless an exception applies. This is a degree of proof that will produce "a firm belief or conviction as to allegations sought to be established," and is higher than the preponderance of the evidence standard and lower than the "beyond a

reasonable doubt standard.”

6. If the applicant applied for asylum more than one year after arriving in the United States or previously was denied asylum by an immigration judge or the BIA, the applicant must demonstrate to the satisfaction of the Attorney General, that an exception to the bar to applying for asylum exists in his or her case. This means that it must be reasonable for the asylum officer to conclude that the exception applies.

C. Evidence

OH #11: Summary C

The applicant's testimony, if credible, may be enough to establish eligibility for asylum without corroborating evidence. In some cases, an applicant may be required to provide corroborating evidence to support his or her testimony, or an explanation as to why such evidence is not available.

Corroborating evidence will almost always include country conditions reports. Other evidence to consider may include affidavits, letters, official documents, opinions from the Department of State, and any other relevant documentation. The value of the documentation is to be weighed by the asylum officer.