

Behind the Bench: Breaking Down the Bars to Asylum

A quick-reference training guide for immigration attorneys, legal advocates, and asylum caseworkers covering all statutory bars, applicability, pretermission authority, and CAT protection safety valves.

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CLE TRAINING REFERENCE

ASYLUM & WITHHOLDING



Understanding the Bar Framework

Asylum bars fall into two tiers based on their scope of applicability. Some bars apply exclusively to asylum, while others extend to withholding of removal as well. Recognizing this distinction is essential to advising clients on available relief and anticipating DHS preemption motions.

Asylum-Only Bars

Apply solely to affirmative or defensive asylum claims. Withholding of removal and CAT protection remain potentially available even when these bars apply outside of ACA motions to pretermitt.

- Safe Third Country
- One-Year Filing Deadline
- Previous Asylum Denial
- Firm Resettlement
- Circumvention of Lawful Pathways

Asylum & Withholding Bars

Apply to both asylum and withholding of removal. CAT protection may still be available as a last resort safety valve for barred applicants facing torture.

- Terrorism / Threats to U.S. Security
- Persecutor of Others
- Particularly Serious Crime (PSC)
- Serious Nonpolitical Crime
- Danger to Security of the U.S.

Withholding-Only Bars

Apply exclusively to withholding of removal claims. Asylum may remain available absent other bars, though these bars typically arise in cases involving severe historical conduct.

- Participation in Nazi Persecution
- Participation in Genocide
- Committing Acts of Torture or Extrajudicial Killing

Asylum-Only Bars: Quick Reference

These four bars target the asylum application itself. DHS may move to prepermit on any of these grounds. Practitioners must be prepared to argue exceptions and changed circumstances.

Bar	Statutory Authority	Regulatory Authority	Practice Notes
Safe Third Country	INA §208(a)(2)(A)	8 C.F.R. § 1240.11(h) (2025)	DHS may prepermit under Safe Third Country or Asylum Cooperative Agreements (ACAs). If the motion relates to ACAs, 8 C.F.R. § 1240.11(h) (2025) also extends the bar to withholding and CAT.
One-Year Filing Deadline	INA §208(a)(2)(B)	8 C.F.R. §208.4(a)(2)	DHS may move to prepermit if application is untimely; argue extraordinary or changed circumstances
Previous Asylum Denial	INA §208(a)(2)(C)	8 C.F.R. §208.4(a)(4)	IJ may consider prepermission if applicant fails to show materially changed circumstances
Firm Resettlement	INA §208(b)(2)(A)(vi)	8 C.F.R. §208.15	DHS may prepermit if firmly resettled; exceptions: temporary transit, onward travel, or restricted living conditions
Circumvention of Lawful Pathways Rule	INA § 208(b)(2)(C)	8 CFR §1208.33; 88 Fed. Reg. at 31314.	imposes a "rebuttable presumption" (not a bar) of asylum ineligibility for migrants crossing the U.S. southern border. Limited exceptions exist

Asylum & Withholding Bars: Quick Reference

These bars apply to both asylum and withholding of removal. When both forms of relief are barred, CAT protection becomes the critical safety valve. Note that aggravated felony convictions trigger an **automatic** PSC designation for asylum purposes.

Bar	Statutory Authority	Regulatory Authority	Practice Notes
Terrorism / Threats to U.S. Security	INA §§208(b)(2)(A)(v); 241(b)(3)(B)	—	Triggers danger-to-security bar for withholding; narrow discretionary waivers exist
Persecutor of Others	INA §§208(b)(2)(A)(i); 241(b)(3)(B)(i)	—	DHS may pretermite if applicant clearly participated in persecution of others
Particularly Serious Crime (PSC)	INA §§208(b)(2)(A)(ii); 208(b)(2)(B); 241(b)(3)(B)(ii)	—	Aggravated felony = automatic PSC for asylum; IJ may pretermite when facts are undisputed
Serious Nonpolitical Crime	INA §§208(b)(2)(A)(iii); 241(b)(3)(B)(iii)	—	Pretermision possible when serious reasons to believe applicant committed offense outside the U.S.
Danger to Security of the U.S.	INA §§208(b)(2)(A)(iv); 241(b)(3)(B)(iv)	—	Often tied to terrorism-related bars

Withholding-Only Bars

Participation in Nazi Persecution, Genocide, or the Commission of Any Act of Torture or Extrajudicial Killing

Authority: INA §241(b)(3)(B)

Bars withholding of removal only. DHS may move to pretermite withholding claims when evidence indicates acts of participation in Nazi Persecution, Genocide, or the Commission of Any Act of Torture or Extrajudicial Killing. Asylum may still be considered if no other bars apply.

Burden of Proof: Bars to Asylum & Withholding

The following table outlines which party bears the burden of proof for each statutory bar to asylum and withholding of removal. Understanding the allocation of burden is critical for building effective legal strategy and anticipating government arguments.

Bar	Burden of Proof
Safe Third Country	Applicant must prove an exception applies or that they are not subject to a third country agreement or treaty
One-Year Filing Deadline	Applicant must prove eligibility despite delay, or establish changed or extraordinary circumstances
Previous Asylum Denial	Applicant must prove materially changed circumstances
Firm Resettlement	DHS has the initial burden of producing evidence that indicates a "firm offer" of resettlement was made to the applicant. The burden shifts to the applicant to show, by a preponderance of the evidence, that the firm resettlement bar does not apply
Terrorism	If the evidence indicates that the terrorism bar applies, respondent must show by preponderance of the evidence that the bar does not apply
Persecutor of Others	If the evidence indicates that the Respondent participated in persecution, respondent must show by preponderance of the evidence that the bar does not apply
Particularly Serious Crime (PSC)	If the evidence indicates that the Respondent was convicted of a PSC, respondent must show by preponderance of the evidence that the bar does not apply
Serious Nonpolitical Crime	If the evidence indicates that there is a serious reason to believe the applicant committed a serious nonpolitical crime, respondent must show by preponderance of the evidence that the bar does not apply
Danger to the Security of the U.S.	Government must show reasonable grounds to consider the applicant a security risk
Participation in Nazi Persecution, Genocide or the Commission of Any Act of Torture or Extrajudicial Killing	If the evidence indicates that that the Respondent participated in Nazi Persecution, Genocide, or the Commission of Any Act of Torture or Extrajudicial Killing, respondent must show by preponderance of the evidence that the bar does not apply

The CAT Protection Safety Valve

Convention Against Torture (CAT) protection is the critical last resort for applicants barred from asylum and withholding of removal. **No statutory bar eliminates eligibility for CAT protection.**

The Legal Standard

An applicant must demonstrate it is **more likely than not** they will be subjected to torture if removed to the designated country. This is an objective, forward-looking standard — past torture is relevant but not determinative.

Authority: 8 C.F.R. §§208.16–208.18

Two Forms of CAT Relief

- **Withholding of Removal under CAT** — mandatory protection; cannot be removed to country of torture
- **Deferral of Removal under CAT** — available even for those barred from withholding other than those whose applications for relief are pretermitted pursuant to an ACA agreement; subject to periodic review

Practice Note

Always evaluate CAT as an independent ground of protection — do not treat it as an afterthought. Even applicants with aggravated felony convictions, terrorism-related bars, or genocide participation bars remain eligible for CAT relief.

Deferral of removal under CAT is particularly important for applicants who are barred from withholding itself, as it provides a continuing — if reviewable — form of protection.

Note unlike with other bars, under the regulations governing the ACA agreements, a motion to pretermitt could still preclude relief under CAT

Complete Bar Applicability Matrix

Use this matrix as a quick-reference checklist when assessing a client's eligibility across all three forms of protection.

Bar	Asylum	Withholding	CAT	Key Statutory Authority
Safe Third Country	✗ Bars	? Contested Available except when applied pursuant to an ACA agreement	? Contested Available except when applied pursuant to an ACA agreement	INA §208(a)(2)(A)
One-Year Filing Deadline	✗ Bars	✓ Available	✓ Available	INA §208(a)(2)(B)
Previous Asylum Denial	✗ Bars	✓ Available	✓ Available	INA §208(a)(2)(C)
Firm Resettlement	✗ Bars	✓ Available	✓ Available	INA §208(b)(2)(A)(vi)
Terrorism / U.S. Security Threat	✗ Bars	✗ Bars	✓ Available	INA §§208(b)(2)(A)(v)
Persecutor of Others	✗ Bars	✗ Bars	✓ Available	INA §§208(b)(2)(A)(i); 241(b)(3)(B)(i)
Particularly Serious Crime (PSC)	✗ Bars	✗ Bars	✓ Available	INA §§208(b)(2)(A)(ii); 241(b)(3)(B)(ii)
Serious Nonpolitical Crime	✗ Bars	✗ Bars	✓ Available	INA §§208(b)(2)(A)(iii); 241(b)(3)(B)(iii)
Danger to Security of the U.S.	✗ Bars	✗ Bars	✓ Available	INA §§208(b)(2)(A)(iv); 241(b)(3)(B)(iv)
Participation in Nazi Persecution, Genocide or the Commission of Any Act of Torture or Extrajudicial Killing	✓ Available	✗ Bars	✓ Available	INA §241(b)(3)(B)
Circumvention of Lawful Pathways Rule	✗ Bars	✓ Available	✓ Available	INA § 208(b)(2)(C)

Key: ✓ Available, ✗ Bars, ? Contested / Unclear

Key Takeaways for Practice

Keep these principles front of mind when advising clients or preparing cases involving potential bars to protection.

1 Identify the Bar's Scope First

Determine whether the bar applies only to asylum, to both asylum and withholding, or only to withholding. This dictates which forms of relief remain open and shapes your litigation strategy from the outset.

3 Know the Exceptions

Many bars carry important exceptions: extraordinary circumstances for the one-year deadline; restricted living conditions for firm resettlement; narrow waivers for terrorism-related bars. Never concede a bar without fully analyzing exceptions.

2 Anticipate Pretermission Motions

Under *Matter of H-A-V* and *Matter of C-A-R-R*, IJs may dismiss legally defective applications without a merits hearing. Prepare to rebut pretermission arguments proactively — address the bar head-on in your brief.

4 CAT Could be on the Table

For clients facing multiple bars, CAT — including deferral of removal — may be the only pathway to protection. Plead it in every barred case where it is available.