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Presents

Behind the Bench:
Breaking Down the Bars to Asylum

April 20, 2026

6:00 pm - 7:30 pm

Presenters:	Hon. Raisa Cohen
	Hon. Evalyn Douchy
	Hon. L. Batya Schwartz Ehrens
	Hon. Maria Lurye
	Hon. Alice Segal
	Hon. Mimi Tsankov

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.

Presented by former Immigration Judges Raisa Cohen, Evalyn Douchy, L. Batya Schwartz Ehrens, Maria Lurye, Alice Segal, and Mimi Tsankov

(Last updated April 2026)

CLE TRAINING REFERENCE

ASYLUM & WITHHOLDING

Bars to Protection Relief Covered Today

A comprehensive overview of the statutory bars to asylum and other forms of protection.

Safe Third Country and ACAs

One-Year Filing Deadline

Previous Asylum Denial

Firm Resettlement

Terrorism / Threats to U.S. Security

Persecutor of Others

Particularly Serious Crime (PSC)

Serious Nonpolitical Crime

Danger to the Security of the U.S.

Participation in Nazi Persecution and Genocide

Pretermissions under Matter of C-A-R-R and H-A-A-V and the Circumvention of Lawful Pathways Rule

Pretermission, CARR, and HAAV — How PM 25-28 Is Redefining Asylum Procedure

Presented by Raisa Cohen – Former Immigration Judge

I. How it all started

Immigration courts face an unprecedented crisis: over **3.4 million pending cases**, nearly half involving asylum or withholding claims. The Executive Office for Immigration Review (EOIR) backlog has fundamentally transformed the culture of immigration adjudication, creating intense pressure to prioritize speed over thorough process and meaningful review.

Three pivotal developments now redefine whether asylum seekers ever reach an evidentiary hearing:

- **EOIR Policy Memorandum 25-28** (April 2025)
- **Matter of C-A-R-R-**, 29 I&N Dec. 13 (BIA 2025)
- **Matter of H-A-A-V-**, 29 I&N Dec. 233 (BIA 2025)

Together, these developments establish gatekeeping mechanisms that determine access to hearings before any testimony is heard.

II. Policy Memorandum 25-28 – The Birth of Pretermission

The Core Authorization

PM 25-28 empowers Immigration Judges to pretermit (effectively deny) asylum applications **without conducting a merits hearing** if the written application is deemed legally insufficient on its face.

Stated Justification

The policy memorandum purports to improve docket efficiency by eliminating hearings in cases where written submissions fail to establish prima facie eligibility for relief.

Practical Reality

The practical effect fundamentally transforms asylum adjudication from an adversarial hearing process into a paper review system, eliminating the testimonial component that has been central to asylum law for decades.

Why PM 25-28 Is Fundamentally Flawed

Misreads Matter of Fefe

The policy memorandum fundamentally misinterprets *Matter of Fefe*, treating testimony as merely a regulatory convenience. In reality, the opportunity to testify constitutes a **due process right** rooted in constitutional protections, not administrative discretion.

Misstates Regulatory Requirements

PM 25-28 distorts 8 C.F.R. §1240.11(c)(3)(iii), which explicitly mandates that respondents must be given the opportunity to testify. The regulation does not authorize pretermission based on paper review alone.

Collapses Factual Into Legal Issues

The policy improperly converts complex **factual determinations**—including credibility assessments, nexus analysis, and particular social group definition—into supposedly simple legal conclusions that can be resolved without hearing testimony.

Eliminates Meaningful Record

Pretermission creates no substantive evidentiary record for Board of Immigration Appeals or circuit court review, effectively giving asylum seekers 'a page in court instead of a day in court.'

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

The Factual Background

A **pro se respondent** filed multiple iterations of Form I-589, each containing incomplete answers to critical questions about the basis for asylum. The Immigration Judge deemed the case abandoned due to the applicant's failure to file a supporting declaration elaborating on cursory form responses.

The BIA's Holding

The Board reversed, clarifying that while a separate declaration is **not required** to maintain an asylum application, it simultaneously reaffirmed the Immigration Judge's authority to reject applications with substantively incomplete forms.

Critical Takeaway

The completeness of every answer on Form I-589 now matters immensely. Relying on statements like "see declaration" or "details to follow" creates substantial risk of procedural dismissal.

Practical Impact of CARR

Protection From Abandonment

CARR shields asylum applicants from outright abandonment findings based solely on the absence of a separate supporting declaration or affidavit.

Form Completeness Requirement

The decision unequivocally confirms Immigration Judge authority to **enforce form completeness**, requiring substantive answers to each question on the I-589.

Cure Deadline Consequences

Missed deadlines to cure deficient applications can permanently preclude merits review, making calendar compliance essential.

Access to Hearings

Procedural precision in form completion now directly determines whether an asylum seeker reaches an evidentiary hearing or faces summary dismissal.

IV. Matter of H-A-A-V-, 29 I&N Dec. 233 (BIA 2025)

1

The Claim

Respondent alleged gender-based persecution in her country of origin, presenting detailed written submissions describing the feared harm.

2

IJ's Approach

The Immigration Judge **accepted the respondent's factual allegations as true** but concluded that even assuming their veracity, they failed to establish a cognizable particular social group or nexus to a protected ground.

3

The Pretermission

The claim was pretermitted without any evidentiary hearing, based exclusively on the written record and legal analysis of the pleadings.

4

BIA Affirmance

The Board affirmed: when facts taken as true do not establish prima facie eligibility and no factual disputes exist, the Immigration Judge may pretermit the application without testimony.

5

The Precedent

HAAV effectively codifies PM 25-28 into binding Board precedent, giving pretermission formal legal foundation beyond policy guidance.

The Danger in 'No Factual Dispute'

⚠ Critical Warning

The concept of "no factual dispute" is **extraordinarily vulnerable to misuse** and misapplication by Immigration Judges seeking to manage dockets through pretermission rather than hearings.

Master Calendar Hearing Strategy

Counsel must explicitly and comprehensively articulate **all factual issues** at the Master Calendar Hearing, including disputes regarding nexus, particular social group social distinction, government protection efforts, and internal relocation feasibility.

The Silence Trap

Silence or minimal proffers allow the Immigration Judge to create a record stating "no factual disputes exist", which becomes the foundation for pretermission without further hearings.

Appellate Consequences

Once the Immigration Judge records that no factual disputes exist, pretermission becomes nearly **unreviewable on appeal**, as the Board defers to factual findings and procedural determinations made by the trial-level judge.

V. The Combined Effect – Two Gates to Justice

1

CARR: The Form Gate

Governs procedural completeness and form sufficiency, creating the first barrier before any substantive review occurs.

2

HAAV: The Merits Gate

Governs prima facie legal sufficiency of claims, creating the second barrier that can eliminate cases on paper review alone.

Systemic Consequences

- Immigration Judges now possess **two distinct exit ramps** to dispose of cases before any testimonial hearing occurs
- The pathway to evidentiary hearings has dramatically narrowed, with procedural and substantive gatekeeping mechanisms operating in tandem
- Summary paper denials replace traditional adversarial proceedings in an increasing number of cases
- The risk of case closure without meaningful opportunity to present evidence has escalated substantially

VI. The Practitioner's Crossfire

Pre-Testimony Case Loss

Asylum cases can now be **lost entirely** before the respondent ever takes the stand, fundamentally altering traditional hearing preparation strategies.

Malpractice Exposure

Missing critical factual proffers at Master Calendar Hearings or failing to meet cure deadlines for deficient applications may constitute professional malpractice, exposing practitioners to liability.

Due Process Erosion

Pretermission systematically erodes due process protections and eliminates the creation of factual records necessary for meaningful appellate review.

Pro Se Vulnerability

Unrepresented respondents face **extreme vulnerability** under this procedural regime, lacking the technical knowledge to navigate form requirements and factual proffer obligations.

VII. Restoring the Hearing

> *"Testimony is the heart of fairness in asylum adjudication. Without it, we reduce protection determinations to bureaucratic paper processing that cannot capture the human reality of persecution."*

01

Remember Fefe

The opportunity to testify remains the foundational element of fairness in asylum proceedings, rooted in due process requirements that transcend administrative convenience.

02

Perfect the Forms (CARR)

Form I-589 completion is now **mandatory perfection**, requiring substantive, detailed answers to every question without reliance on external declarations.

03

Challenge Summary Denial (HAAV)

When Immigration Judges claim "no factual disputes" exist, counsel must affirmatively articulate contested factual issues including credibility, nexus, particular social group elements, and state protection.

04

Preserve the Record

Advocates must consistently object to pretermission, proffer factual disputes in detail, and preserve due process arguments for appellate review.

The Tension

Efficiency may move dockets and reduce backlogs.

The Truth

Fairness alone delivers justice.

The "Safe Third Country" and Firm Resettlement Bars to Asylum

Presented by Maria Lurye – Former Immigration Judge

LEGAL FOUNDATION

The "Safe Third Country" Bar to Asylum

Under **INA § 208(a)(2)(A)** (8 U.S.C. § 1158(a)(2)(A)), a respondent is not entitled to asylum if the Attorney General determines the alien may be removed to a third country where their life or freedom would not be threatened — *and* the alien would have access to a **"full and fair procedure"** for determining an asylum claim or equivalent temporary protection.

This statutory exception limits asylum eligibility when a bilateral or multilateral agreement is in place.

FRAMEWORK OVERVIEW

Framework at a Glance

Three interconnected legal mechanisms operate under one statutory authority:

Category	Nature	Law
Statutory Bar (INA)	Legal basis for denying asylum if person can be removed under a qualifying agreement	INA § 208(a)(2)(A) 8 U.S.C. § 1158(a)(2)(A)
Safe Third Country Agreement	Formal treaty-level obligation between sovereign nations	Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (signed Dec. 5, 2002; entered into force Dec. 29, 2004)
Asylum Cooperative Agreements	Administrative agreements allowing removal to third country	84 Fed. Reg. 63, 994 (Nov. 19, 2019) 8 C.F.R. § 1208.4 (a) (6) 8 C.F.R. § 1240.11(h).

BILATERAL AGREEMENTS

U.S.-Canada Safe Third Country Agreement

Implemented in December 2004, the Safe Third Country Agreement (STCA) between the U.S. and Canada mandates that most asylum-seekers apply for protection in the first safe country they arrive in. This prevents individuals from "asylum shopping" by crossing the land border between the two nations.

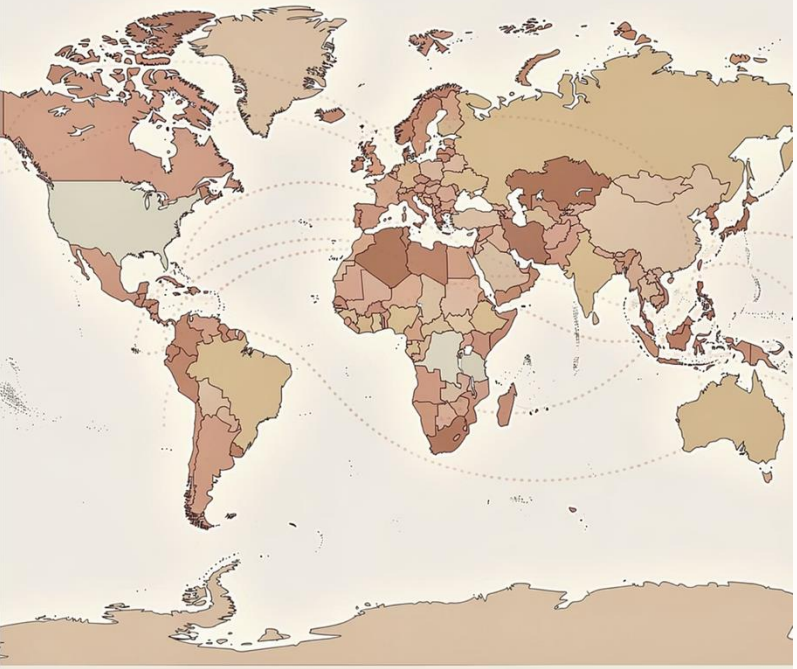
Key Exceptions to the STCA:

1. **Mode of Entry:** The Agreement applies along the U.S.–Canada land border, including both ports of entry and outside official checkpoints. Individuals arriving by air or sea may still seek asylum in the country of entry. Individuals who cross between ports of entry and remain in the country for at least 14 days before making a claim are also not subject to the Agreement.

2. **Valid Entry Status:** Applicants holding a valid visa for the second country, or who do not require one, may still pursue an asylum claim there.

3. **Unaccompanied Minors:** Children traveling without a parent or legal guardian are exempt and may apply for asylum in either country.

4. **Close Family Ties:** Individuals with qualifying family members in the second country, such as parents, children, grandparents, aunts/uncles, or nieces/nephews, may be exempt. Canada also recognizes common-law partners, which is not treated the same way under U.S. practice.



Countries With Asylum Cooperative Agreements ("ACA")

The landscape of safe third country and ACA agreements has expanded significantly since 2019, raising questions about whether each partner country genuinely satisfies the statutory requirements.

Traditional STCA

Canada — The only formal treaty-level agreement currently in force (signed 2002, effective 2004).

Asylum Cooperative Agreements

2019: Northern Triangle: Guatemala, Honduras, El Salvador (*agreements terminated by DHS in 2021*)

Other Third-Country Arrangements

2025: Uganda, Ecuador, Paraguay, Belize

2026: Dominica, Antigua and Barbuda, Congo, Eswatini, South Sudan and Equatorial Guinea ...

These arrangements raise separate legal questions about authority, process, and adequacy of protection.

STRATEGY

From Statute to Strategy

Three practical buckets for challenging ACA motions in Immigration Court — designed to be **clean, strategic, and preservative of appellate issues**.

Procedural Defects

Attack the motion before you argue the merits

Regulatory / Framework Defects (ACA Not Properly Invoked)

Argue the ACA bar applies only where the regulatory framework is properly invoked.

Ultra Vires Statutory Arguments

Challenge agency overreach on statutory grounds

Argue an Exception

Identify whether the respondent qualifies for an independent statutory basis to defeat the ACA bar

BUCKET 1

Start With Procedure: Attack the Motion First

Before engaging the substance of an ACA motion, scrutinize its procedural posture. Procedural defects are often the **cleanest and least controversial path** to defeating or delaying the motion — and they preserve due process arguments for appeal.

1

Timeliness

Check whether the Immigration Judge imposed a specific briefing schedule. Any deviation by DHS is a procedural deficiency to raise immediately.

2

10-Day Response Period

Non-detained respondents must receive **10 days to respond**. If meaningful rebuttal time is denied, a due process objection is ripe.

3

Proper Notice of Intent

DHS must provide adequate notice of its intent to invoke the ACA bar. Vague or conclusory notice is insufficient and warrants challenge.

BUCKET 2

Regulatory / Framework Defects

Challenge whether the government is operating within the established Asylum Cooperative Agreement (ACA) framework. The bar's applicability hinges on its proper invocation and adherence to defined procedures.

The Regulatory Scheme

The ACA bar stems from a specific regulatory scheme (2019 rule) with established requirements and conditions for its application.

Defined Procedures

This framework mandates specific procedures, including DHS screening and corresponding adjudication in Immigration Court.

Proper Invocation

The bar applies only where the framework is correctly invoked, with all required agreements and procedures fully in effect.

Label vs. Law

Mere use of the "ACA" label does not make it legally enforceable if the underlying regulatory framework is not properly applied.

BUCKET 3

Ultra Vires Arguments: Challenging Statutory Authority

Explore "ultra vires" arguments, asserting that the government's application of Asylum Cooperative Agreements (ACAs) exceeds or misinterprets its statutory powers. These challenges question the fundamental legality of the bar's implementation.

The "Full and Fair Procedure" Problem

Argue that the ACA process, as applied, fails to guarantee the statutorily mandated "full and fair procedure" for asylum applicants, undermining due process requirements.

Country of Removal Under INA § 241(b)(2)

Contend that applying the ACA bar results in removal to a country not permitted under INA § 241(b)(2), which specifies acceptable destinations for removal.

ACA Cannot Reach Withholding & CAT Claims

Assert that the ACA bar applies exclusively to asylum claims and lacks statutory authority to bar claims for Withholding of Removal or protection under the Convention Against Torture (CAT).

BUCKET 3

Arguing the Respondent Meets an Exception

Even where an ACA applies on its face, respondents may be exempt under several distinct statutory and agreement-specific exceptions. Each should be raised affirmatively and preserved for the record.

Unaccompanied Alien Children (UACs)

Pursuant to INA § 208(a)(2)(E), UACs are **categorically exempt** from the safe third country bar. No individualized showing of harm is required. If the respondent was classified as a UAC at any point, this exemption applies as a matter of law.

Agreement-Specific Exclusions

Certain ACAs (e.g., Guatemala, Honduras, El Salvador) included built-in exclusions based on nationality, vulnerability, or other criteria. Counsel must review the specific ACA text to identify enumerated exclusion categories — these are **contractual limitations** on the government's authority.

Protection Against Persecution or Torture in the Third Country

An applicant may not be removed if they face persecution on a protected ground, or torture, in the third country. This derives from (1) the statutory "full and fair" requirement under INA § 208(a)(2)(A), and (2) U.S. non-refoulement obligations under CAT at 8 C.F.R. §§ 208.16–208.18. **Country conditions evidence is essential.**

Firm Resettlement in Asylum Adjudications

A comprehensive legal framework

Legal Foundations

The firm resettlement bar limits eligibility for asylum when an applicant has already obtained protection in another country.

Statutory Basis

Codified at **INA § 208(b)(2)(A)(vi),** and **8 C.F.R. § 1208.13(c)(2)(B)**

Firm Resettlement Definition:

Codified at **8 C.F.R. § 1208.13** An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes that they meet an exception.

The Three Requirements of Firm Resettlement

The firm resettlement bar is comprised of three distinct, conjunctive elements. All three must be established before the bar applies. Adjudicators should evaluate each element in sequence before reaching the exceptions analysis.

1

Requirement 1

Entry into a Third Country prior to arriving in the United States — at any point after becoming a refugee

2

Requirement 2

An Offer or Receipt of a Status — permanent resident status, citizenship, or treaty-based rights to live and work indefinitely

3

Requirement 3

The Status Must Be Permanent — not temporary; the applicant must have had a practical ability to remain long-term

Requirement 1: Entry into a Third Country

The first element is satisfied when the applicant entered a third country at any point **after becoming a refugee** and **before arriving in the United States**.

No Flight Nexus Required

Unlike the lack-of-significant-ties exception, the entry itself need not be a consequence of flight from persecution to trigger the bar.

No Minimum Stay

There is no minimum length of stay required. Even a brief transit can satisfy this element if an offer of permanent resettlement was made or received.

Timing Is Critical

Entry must occur after the individual became a refugee and before arriving in the U.S. Entry while still in the country of persecution does not satisfy this element.

Requirement 2: Offer or Receipt of a Status

This is the analytical core of the firm resettlement bar. Ajudicators must determine whether the applicant was offered or received a qualifying status in the third country, using a strict evidentiary hierarchy that prioritizes direct evidence.

Qualifying Statuses

- **Permanent resident status** in the third country
- **Citizenship** granted or offered by the third country
- **Treaty-based rights** to live, work, and remain indefinitely (*Matter of L-T-A-*, 2025)

A formal written offer is the clearest form of direct evidence, but entry without formal conditions may also constitute an offer.

Evidence Hierarchy

Direct evidence (preferred):

- Passports and travel documents
- Refugee status documentation
- Government documents confirming indefinite stay

Indirect evidence may only be used if direct evidence is unavailable *and* the indirect evidence is of sufficient clarity and force — not mere speculation.

- Immigration laws or refugee process of the country of proposed resettlement
- Length of a person's stay in the third country
- The person's intent to settle in the country
- Family ties and business or property connections
- Social and economic ties developed by the person in the country
- The receipt of government benefits or assistance
- Whether the alien had legal rights normally given to people who have some official status, like the right to work and enter and exit the country

Requirement 3: Evaluating Permanency

Not every offer or status automatically satisfies the firm resettlement bar. Adjudicators must examine the nature of the status and whether any conditions effectively negate its permanency.

Permanent Statuses (Bar Applies)

- Unconditional permanent resident status
- Naturalized citizenship
- Treaty-based indefinite residency rights

Temporary Statuses (Bar Does Not Apply)

- Short-term visitor visas
- Temporary work permits without pathway to permanence

Conditional Offers (Examine Totality)

If conditions are so **substantial and restrictive** that the applicant could not live and work freely, permanency may not be satisfied. Both government and non-government actor-imposed conditions are considered.

Exceptions to the Firm Resettlement Bar

Even when all three elements of the firm resettlement bar are established, an applicant is not automatically barred from asylum. Two statutory exceptions may allow the applicant to overcome the bar. The burden of proving an exception rests with the applicant, by a preponderance of the evidence.

Exception 1: Restrictive Conditions

Conditions on the offer are so substantially and consciously restricted by the authority of the country of offer that the applicant was not in fact resettled.

Exception 2: Lack of Significant Ties

The applicant entered the third country in flight, stayed only as long as necessary to arrange onward travel, and did not establish significant ties to that country.

Exception 1: Restrictive Conditions

An applicant may overcome firm resettlement if the conditions attached to the offered status are so substantially and consciously restricted by the authority of the country of offer that the applicant was not, in practical terms, resettled. Adjudicators must examine the **totality of conditions** — not just a single restriction.

Property & Housing

Denial of the right to own property in the third country

Education

Restrictions on access to public education for the applicant or their family

Right to Work

Restrictions on the applicant's ability to legally obtain employment

Family Reunification

Inability to bring in immediate family members or sponsor relatives

Freedom of Movement

Restrictions on the right to travel or leave and re-enter the country

Civic & Religious Rights

Restrictions on political activity, religious practice, or access to public relief

Key Limitation: Conditions must be imposed by the **authority of the third country**, not self-imposed by the applicant. Self-imposed restrictions — such as voluntary non-participation — do not satisfy this exception.

Exception 2: Lack of Significant Ties

This exception is narrow and **conjunctive** — all three elements must be satisfied. Failure to establish any single element defeats the exception entirely.

Element 1: Entry as a Consequence of Flight

The applicant entered the third country **as a direct consequence of flight from persecution** — not for economic, educational, or other voluntary reasons.

Element 2: Stayed Only as Long as Necessary

The applicant remained in the third country **only as long as necessary** to arrange onward travel to the United States or another country of protection.

Element 3: No Significant Ties Established

The applicant did **not establish significant ties** to the third country — such as employment, property, family integration, or extended community connections.

The *Matter of A-G-G-* Four-Step Framework: Four-Step Framework: Step-by-Step Analysis

1

Step 1 — DHS's Prima Facie Burden

DHS bears the initial burden of presenting **prima facie evidence** of an offer of firm resettlement. Adjudicators must first seek direct evidence: passports, refugee status documentation, or government records indicating indefinite stay. Indirect evidence is permissible only when direct evidence is unavailable and is of sufficient clarity and force.

2

Step 2 — Applicant's Rebuttal

If prima facie evidence is established, the burden shifts to the **applicant** to rebut. The applicant may show the offer was never made, they would not qualify for it, or that status was conditioned or restricted. Credible testimony and travel documents reflecting only temporary permission are relevant rebuttal evidence.

3

Step 3 — Adjudicator Weighs Totality of Evidence

After rebuttal, the adjudicator must **weigh the totality of all evidence** — from both the adjudicator and the applicant — and determine whether the applicant has rebutted the evidence of firm resettlement by a preponderance of the evidence.

4

Step 4 — Applicant Establishes an Exception

If firm resettlement is found, the burden shifts back to the applicant to prove — by a preponderance — that either the **restrictive conditions** exception or the **lack of significant ties** exception applies.

Landmark Cases at a Glance

Matter of A-G-G- — 25 I&N Dec. 486 (BIA 2011)

The foundational decision. Established the **four-step burden-shifting framework** for analyzing the firm resettlement bar, centering the analysis exclusively on the existence of an offer and requiring adjudicators to prioritize direct evidence.

Matter of D-X- & Y-Z- — 25 I&N Dec. 664 (BIA 2012)

Applied and clarified the *A-G-G-* framework. Confirmed that **DHS bears the burden at Step 1** to produce prima facie evidence of an offer of firm resettlement before the applicant is required to rebut.

Matter of K-S-E- — 27 I&N Dec. 818 (BIA 2020) — VACATED

Held that an applicant's **unwillingness to accept an offer** does not negate firm resettlement. Subsequently vacated by the Ninth Circuit — adjudicators in the Ninth Circuit should take note of circuit-specific precedent on this point.

Matter of L-T-A- — 29 I&N Dec. 362 (BIA 2025)

Expanded the definition of qualifying status. Held that **treaty-based rights to live, work, and remain indefinitely** in another country can constitute "some other type of permanent resettlement," even absent a formal offer of permanent resident status or citizenship.

Circumvention of Lawful Pathways & the One-Year Filing Bar

Presented by Hon. L Batya Schwartz Ehrens

Case Scenario

01

Meet Rosa

Our case scenario

02

Part I — CLP

Circumvention of Lawful Pathways: the presumption, exceptions, and rebuttal grounds

03

Part II — One-Year Bar

Changed and extraordinary circumstances under INA § 208(a)(2)(B)

04

Lessons from the Bench

Practical takeaway on both bars

Meet Rosa — Our Case Scenario

Rosa. Honduran National, 28, Lesbian

When her sexual orientation became known in her community, a local gang began targeting her in Honduras, culminating in a violent assault, stab wounds, and death threat the night before she fled.

Her Journey

- Traveled through Guatemala and Mexico — did not apply for asylum in either country
- Had no smartphone, limited Spanish literacy — did not use CBP One
- Held at gunpoint by gangs in Mexico the night before fleeing to the US
- Entered the U.S. without authorization at the southern border in September 2023
- Settled in a Honduran migrant community; feared disclosing her sexual orientation
- Diagnosed with PTSD by a therapist at month 12; connected with *pro bono* counsel shortly after
- Filed her asylum application 14 months after entry

Two Bars Immediately in Play

Bar 1 — CLP Presumption Entered without authorization through two third countries after May 11, 2023

Bar 2 — One-Year Filing Deadline Filed 14 months after entry — two months beyond the statutory window

Part I — Circumvention of Lawful Pathways (CLP)

EFFECTIVE MAY 11, 2023

The Core Presumption

A noncitizen who crosses the southwest land border or adjacent coastal borders without authorization, after traveling through a third country, is presumed ineligible for asylum unless they establish an exception or rebut the presumption.

Categorically Exempt — Presumption Never Applies

- Unaccompanied minors (UACs)
- Mexican citizens or stateless persons last residing in Mexico
- Approved DHS parole program beneficiaries (CHNV / Ukraine)
- Individuals with a valid visa or other lawful admission document
- Presented at a port of entry with an appointment via CBP One

Important Structural Limits

- Applies to all entries during the **24-month window** after May 11, 2023
- Applies to asylum only. withholding of removal and CAT protection are not affected

Rosa Check: Honduran national ✅ · Unauthorized entry Sept. 2023 ✅ · Transited Guatemala + Mexico ✅ · No parole, no visa, not a UC ✅ — **Presumption applies.**

CLP — The Three Exceptions

Even when covered by the presumption, a respondent may escape it entirely by establishing one of three exceptions. If an exception is met, the IJ proceeds directly to the full asylum merits.

1

CBP One Access Barrier

Used the CBP One app to pre-schedule a port of entry appointment — **or** could not access or use the app due to: language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.

2

Third-Country Asylum Denial

Applied for and was denied asylum on the merits in a transit country en route to the United States. Abandonment-based denials do not qualify. The denial must have been a substantive adjudication.

3

DHS-Approved Parole

Traveled to the U.S. pursuant to an authorized DHS parole process, such as CHNV or the Ukraine Parolee program.

Rosa Check: No smartphone + limited Spanish literacy → **Exception 1 is arguable** — requires a detailed declaration and genuine factual inquiry. Did not apply in Guatemala or Mexico → Exception 2 unavailable. No parole authorization → Exception 3 unavailable.

CLP — Exceptionally Compelling Circumstances

Rebutting the Presumption

If no exception applies, a respondent may **rebut** the CLP presumption by demonstrating **exceptionally compelling circumstances** that existed *at the time of unauthorized entry*. The timing requirement is critical — the circumstances must have been operative at the moment of crossing, not merely in the home country generally.

Ground 1

Acute Medical Emergency

Ground 2

Extreme and Imminent Threat to Life or Safety

Ground 3

Severe Trafficking Victim

The rebuttal burden belongs to the respondent. The record must be fully developed before an IJ sustains the presumption.

Ground 1 — Acute Medical Emergency

Covers **physical and mental health emergencies** present at the time of crossing. The condition must be *acute* — a general or chronic condition that predates the journey will not suffice without evidence that it was actively impairing the individual at the moment of unauthorized entry.

Clinical documentation significantly strengthens the claim. An ongoing treatment relationship with a healthcare provider is more persuasive than a single retrospective evaluation performed after the fact. Where possible, counsel should obtain contemporaneous records, treating-physician declarations, and a narrative connecting the condition to the crossing decision.

What "Acute" Means in Practice

- An active psychotic episode at the time of crossing
- A physical injury requiring immediate care that prevented lawful entry
- Severe untreated trauma with documented acute presentation

What It Does Not Cover

- A general history of depression or anxiety without acute manifestation
- Conditions first diagnosed months after entry
- A one-time post-entry psychological evaluation alone

Rosa: PTSD diagnosed at month 12 — the timing weakens this ground for CLP purposes, though it becomes stronger for the one-year bar analysis.

Ground 2 — Extreme and Imminent Threat to Life or Safety

This is the most litigated rebuttal ground. The threat must have been imminent at the precise time of crossing — not a generalized fear of harm and not merely anticipated future danger.

Covered Threats

Rape or sexual violence · Kidnapping · Torture · Murder

The Timing Requirement

The threat must have been **imminent at the time of crossing.** Develop the record around what was happening *the day Rosa crossed*

Record Development

Contemporaneous police reports, witness statements, medical records, and a detailed respondent declaration describing the specific incident

Critical IJ Point: The record must establish *what was happening the day Rosa crossed* — not just what she feared in Honduras generally. The night-before assault and death threat in Mexico are precisely the kind of acute, imminent facts this ground was designed to reach. Counsel must develop that specific timeline in detail.

Ground 3 — Severe Trafficking Victim

Defined under **8 CFR § 214.11**. The ground covers both sex trafficking and labor trafficking, including "debt bondage" arrangements that compel movement across borders under conditions of force, fraud, or coercion.

Key Trafficking Indicators

- Control of movement by a third party
- Use of force, fraud, or coercion
- Cross-border transportation as part of the scheme
- Debt bondage or withholding of identity documents

IJ Note — For All Three Rebuttal Grounds

Burden on Respondent

The respondent must affirmatively establish the ground — but the IJ must ensure the record is *fully developed* before sustaining the presumption

Withholding & CAT Survive

CLP bars asylum only — always preserve withholding and CAT claims regardless of CLP outcome

CLP Applied to Rosa — What Does the Judge See?

Issue	Rosa's Facts	Assessment
Covered by CLP?	Honduran national, unauthorized entry Sept. 2023, transited Guatemala + Mexico	✅ Yes — presumption applies
Exception 1 — CBP One	No smartphone; limited Spanish literacy	⚖ Arguable — requires declaration and genuine factual inquiry
Exception 2 — Third-country deni	Did not apply in Guatemala or Mexico	✕ Unavailable
Rebuttal — Imminent threat	Gang assault and death threat the night before crossing	✅ Strong — this is precisely what the rule contemplates
Rebuttal — Acute medical	PTSD diagnosed at month 12, not at time of crossing	⚠ Weak for CLP (timing issue); stronger for one-year bar

IJ's Analytical Path

1

Step 1 — CBP One?

If barrier established → presumption does not apply → proceed to full asylum merits

2

Step 2 — Imminent Threat?

If CBP One fails → assess imminent threat rebuttal → the night-before assault is the record to develop

3

Step 3 — Withholding & CAT

Even if CLP bars asylum → withholding and CAT remain available — always preserve the record for both

Family Unity Note: Rosa can regain eligibility for asylum if she has a derivative who is either outside of the US, or present but unable to independently qualify for protection from removal. 8 C.F.R. Sections 1208.33(c) , 1208.35(c)

CLP — Key Takeaways for IJs

Rebuttable Presumption, Not a Categorical Bar

The government must establish coverage; the respondent must be given a **meaningful opportunity to rebut**

CBP One Barriers Deserve Real Inquiry

Low literacy, no device, and app failures are **genuine obstacles** recognized by the rule's broad language. This can be raised and supported by factual development

Timing Is Everything for Imminent Threat

Develop the record around what was happening **at the moment of crossing**, not just in the home country generally; the night-before assault in Mexico is the critical fact for Rosa

Family Unity Principle

Exception for accompanying family member who is unable to independently qualify for protection . Assess full family composition. This is low hanging fruit exception if the facts fit.

CLP Only Bars Asylum

Withholding of removal and CAT protection survive regardless of the CLP outcome. Always preserve the full record for these alternative forms of relief

Part II — The One-Year Filing Bar

INA § 208(A)(2)(B)

An asylum applicant must demonstrate by **clear and convincing evidence** that the application was filed within **one year of last entry** into the United States. Filing date is the date *received* by USCIS. The IJ must conduct an individualized analysis even when facts appear to fit an enumerated category. *(Matter of Y.-C.-, 23 I&N Dec. 286)*

Rosa Check: Entered September 2023, Filed November 2024 (**14 months).** Untimely on its face. Burden shifts to Rosa to establish an exception. The one-year bar applies to asylum only, not withholding or CAT.

Two Pathways to Excuse a Late Filing

Changed Circumstances

Something changed that **materially affects asylum eligibility** — and the application was filed within a reasonable time after the applicant became aware of the change. The clock runs from awareness, not occurrence.

Extraordinary Circumstances

Something **beyond the applicant's control** prevented timely filing — not caused by the applicant's own action or inaction — and the application was filed within a reasonable time given those circumstances.

One-Year Bar — Changed & Extraordinary Circumstances

Changed Circumstances

Something changed such that the applicant did not fear return when they arrived, but now does — or a change that materially affects eligibility:

Changed Country Conditions

New regime, passage or enforcement of anti-LGBTQ laws, new persecution campaigns

Changed Personal Circumstances

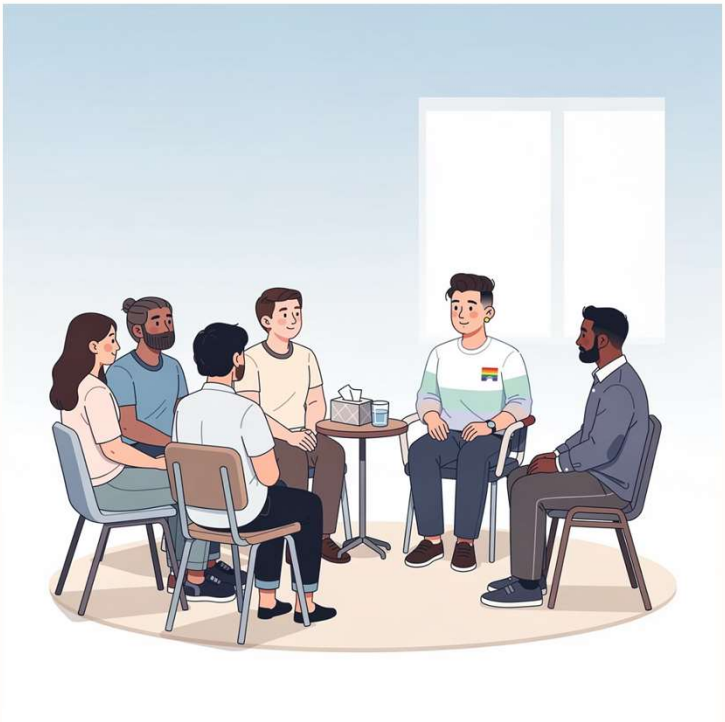
Coming out as LGBTQ+, HIV diagnosis, joining a targeted religious or political organization, loss of derivative status

IJ Timing Note: The "reasonable period" clock runs from when the applicant *became aware* of the change — not when it occurred. Delayed awareness is a recognized mitigating factor and must be assessed individually.

Rosa's Changed Circumstances Analysis

Rosa's sexual orientation was known, and the basis of persecution, *before* she arrived in the United States. No new personal or country conditions change occurred after entry that materially altered her eligibility.

This pathway is weak for Rosa on current facts. The anchor of her late-filing defense must be extraordinary circumstances — specifically PTSD and LGBTQ+ isolation in her community.



Extraordinary Circumstances — Six Categories

#	Category	Key Notes
1	**Serious illness / mental or physical disability**	PTSD expressly recognized *(Mukamusoni v. Ashcroft, 1st Cir. 2004)*; ongoing treatment relationship more persuasive than a single retrospective evaluation
2	**Legal disability**	Unaccompanied minor status; potentially extended to minors unable to disclose LGBTQ+ status due to family or community dynamics
3	**Ineffective assistance of counsel**	Requires: affidavit of fee agreement, notice to prior attorney, complaint filed or explained — strict procedural compliance under *Matter of Lozada*
4	**Maintenance of lawful status**	File within reasonable period after TPS, visa, or parole ends; DOJ has stated 6 months post-expiration is NOT reasonable
5	**Improperly filed timely application**	Filed on time, rejected for technical defect, corrected, and re-filed within a reasonable period after rejection
6	**Death / serious illness of legal rep or family member**	Requires individualized assessment of the relationship and its impact on the applicant's ability to file

Catch-All (not in the regulations): Severe family or spousal opposition · Extreme isolation in a refugee community · Profound language barriers · Profound difficulties in cultural acclimatization. These are the grounds most relevant to Rosa.

One-Year Bar Applied to Rosa — What Does the Judge See?

Issue	Rosa's Facts	Assessment
Timely filing?	14 months after entry	✕ Untimely — exception required
Changed circumstances	Sexual orientation known before arrival; no new personal change after entry	⚠ Weak — situation did not materially change after entry
PTSD / mental disability	Diagnosed at month 12; resulting from gang assault and sexual violence	✅ Strong — if supported by clinical records and ongoing treatment relationship
LGBTQ+ isolation in community	Feared disclosure in Honduran migrant community; did not seek help until month 12	✅ Recognized catch-all — pairs powerfully with PTSD narrative
Reasonable period after circumstance?	Filed within ~2 months of obtaining counsel	✅ Defensible — document the full timeline carefully

IJ's Analytical Path

1 PTSD Is the Anchor

It must be clinically supported ,not self-reported alone. An ongoing treating-clinician relationship and contemporaneous records are essential to the claim.

2 Isolation Narrative Strengthens the Package

LGBTQ+ isolation in Rosa's community explains *why* she did not seek help sooner — directly supporting both the extraordinary circumstance and the "reasonable period" analysis.

3 Two-Month Filing Window Is Defensible

Filing within ~2 months of engaging pro bono counsel is reasonable — but every unexplained gap between diagnosis, legal contact, and filing is a vulnerability. Document the full timeline.

Practice Note: Document every step: first symptom → diagnosis → legal contact → filing. Each unexplained delay after the triggering circumstance is a potential ground for denial.

Summary — Lessons from the Bench

Bar	Core Question	Rosa's Strongest Argument	Often Overlooked
CLP	Was there an imminent, acute threat *at the time of crossing*?	Gang assault and death threat in Mexico the night before entering — imminent threat rebuttal under Ground 2	CBP One access barrier (no device + low literacy); Family Unity Principle (?)
One-Year Bar	Is there a changed/extraordinary circumstance, AND was filing reasonably prompt after it?	PTSD + LGBTQ+ isolation in refugee community — catch-all extraordinary circumstances	Delayed awareness individualized "reasonable period" analysis

The Through-Line from the Bench

Complete the Record

Both bars require a full, individualized factual record

Real Room for Advocacy

Develop the facts. Strong arguments can emerge from record building

Withholding & CAT Always Survive

Neither bar touches withholding of removal or CAT. Preserve those claims regardless of outcome on asylum

Key authorities: Matter of Y.-C.-, 23 I&N Dec. 286 (BIA 2002) · Mukamusoni v. Ashcroft, 390 F.3d 110 (1st Cir. 2004) · Matter of Lozada, 19 I&N Dec. 637 (BIA 1988) · 8 CFR §§ 208.4(a)(4)–(5) · DHS/DOJ CLP Final Rule (May 11, 2023)

The Particularly Serious Crime Bar and Danger to the Community Bar

Presented by Hon. Mimi Tsankov

The Particularly Serious Crime Bar

A mandatory wall that discretion cannot climb — how *Matter of E-A-S-O-* reshapes asylum and withholding litigation in 2026

IMMIGRATION LAW CLE

PSC BAR

Legal Framework

Two Tracks of PSC Analysis

Under INA §§ 208 and 241, a PSC finding automatically deems a noncitizen a "danger to the community" per *Matter of Carballe* — no independent dangerousness test required.

Track 1 — Per Se Bar

Automatic. Mechanical. No discretion.

- Asylum: any aggravated felony = PSC
- Withholding: aggravated felony + 5-year sentence

Track 2 — *Frentescu* Analysis

Case-by-case. Facts matter.

- Nature and circumstances of the crime
- Sentence imposed
- Underlying facts — the critical battleground

The "silent record" strategy died in 2026 with *E-A-S-O-*.

Case Brief

Matter of E-A-S-O-, 29 I&N Dec. 422 (BIA 2026)

The most consequential PSC decision in a decade. A misdemeanor sexual abuse conviction — evaluated under *Frentescu* — triggered the bar based on underlying conduct involving victim coercion and drug use.

1

No Misdemeanor Safe Haven

There is **no presumption** that a misdemeanor is not a PSC. Any single misdemeanor conviction can trigger the bar.

2

The Burden Shift

Under **8 C.F.R. § 1240.8(d)**, government need only show the bar "might" apply. The burden then shifts to the applicant to prove the crime was *not* serious.

3

The Ambiguity Trap

An ambiguous record — where the judge is left guessing — means the **applicant loses.** Vague testimony conflicting with the arrest warrant was fatal in *E-A-S-O-*.

Post-*E-A-S-O-* Practice

Four Golden Rules for 2026 Litigation

Affirmatively Build the Record

Don't rely on the ROC alone. IJs may consider **all reliable evidence**. Provide sentencing transcripts proactively — silence invites the worst inference.

B-Z-R- Mental Health Shield

A diagnosed mental health condition at the time of the offense is a cognizable **"circumstance"** under *Frentescu* — deploy it to defeat a PSC finding.

Rebut the Drug Presumption

Under *Matter of Y-L-*, "small amount" arguments fail without proof. Bring weighing logs and lab reports to establish **extraordinary and compelling** circumstances.

Prepare Experts Rigorously

E-A-S-O- warned that expert testimony is **undercut** when based on inaccurate facts. Ensure every expert has reviewed the actual criminal record before testifying.

The PSC Bar Is Now an Evidentiary Battle

Under *Matter of E-A-S-O-*, **silence is a denial.** Litigate the *Frentescu* factors aggressively — and always build the CAT record as your fallback.

The Only Safety Valve

CAT Deferral is the sole form of relief the PSC bar cannot touch. When the bar appears insurmountable, the CAT record is your life-raft — build it from day one.

The 2026 Mandate

- Don't let the record be ambiguous or silent
- Anticipate the burden shift — address it first
- Proactive offense is the best defense
- CAT + *Frentescu* together, not either/or

Legal Framework Update

Public Health and Danger to the Community as a Security E

DHS and DOJ have announced a new rule clarifying when public health risks can render noncitizens ineligible for asylum or withholding, broadening the definition of a "danger to the security of the United States."

Expanding "Security Threat"

The rule explicitly includes **public health emergencies** as grounds for ineligibility, impacting asylum and withholding cases.

Strategic Alignment

This aligns with administration priorities by retaining the ability to consider public health risks as a **security risk bar**.

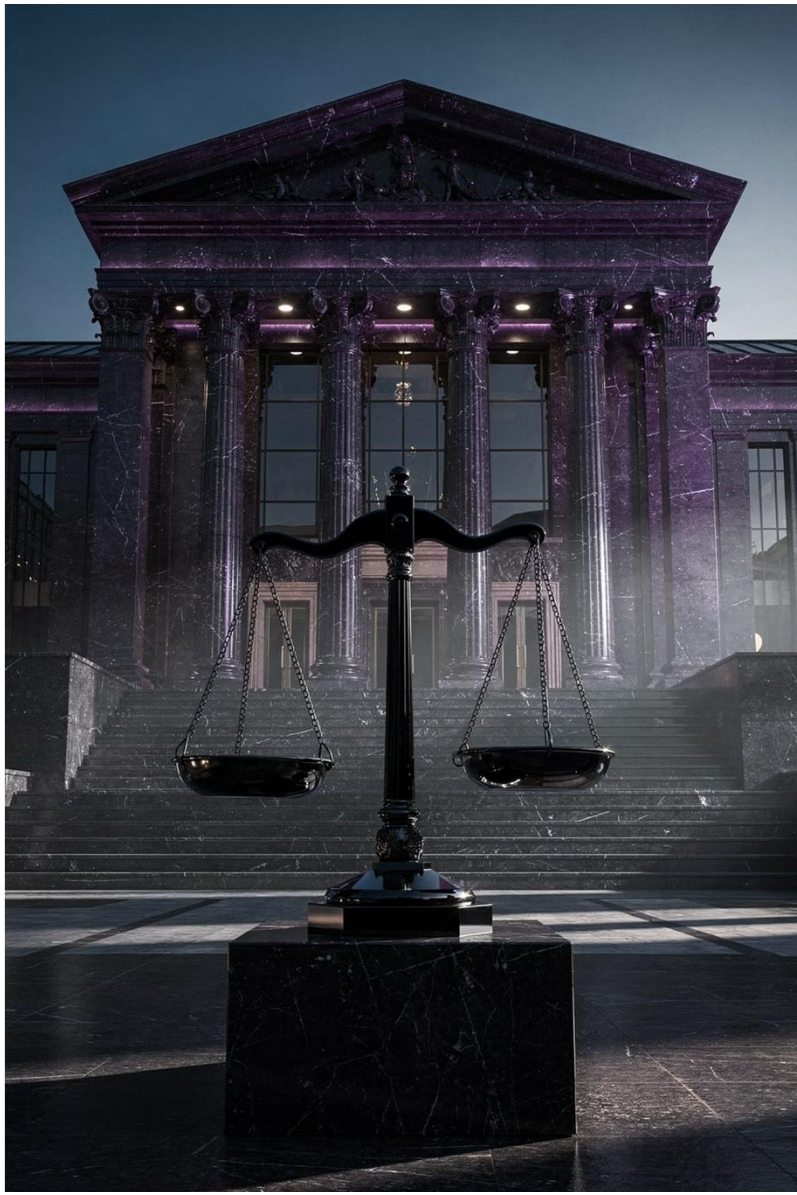
Effective Date

The final rule was announced on December 29, 2025, and becomes **effective December 31, 2025**.

The Serious Non-Political Crime Bar and Material Support Bar

Presented by Hon. Evalyn Douchy

Serious Non-Political Crimes



Serious Non-Political Crimes:

What Qualifies?

The "serious non-political crime" bar is applicable if “there are serious reasons for believing that the applicant has **committed a serious nonpolitical crime outside the United States prior to the arrival of the applicant in the United States.**” Section 208(b)(2)(A)(iii) of the INA

The Consequence

Individuals found to have committed such crimes outside the United States are **barred from asylum and withholding of removal.**

Burden of Proof

DHS bears the original burden to show that the bar may be applicable.

The term "**serious reasons to believe**" **is equivalent to probable cause**. *Gonzalez-Castillo v. Garland*, 47 F.4th 971, 974 (9th Cir. 2022); *Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012). "**Probable cause** 'is not a high bar'" and **"requires only a probability or substantial chance of criminal activity, not an actual showing of such activity**." *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (citations omitted); see also *Villalobos Sura v. Garland*, 8 F.4th 1161, 1167 (9th Cir. 2021) ("Probable cause exists when there is a 'fair probability' that the defendant committed the alleged crime." (citation omitted)). An **indictment may provide strong reasons to believe that the person committed serious nonpolitical crime**. *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1187-90 (9th Cir. 2016) [Guatemalan indictment corroborated by an alleged eyewitness provided strong reasons to believe applicant was involved in murder].

Once DHS submits sufficient evidence to establish probable cause that a respondent committed a serious nonpolitical crime, the burden shifts to the respondent to show by a preponderance of the evidence that the disqualifying bar does not apply. See *Villalobos Sura*, 8 F.4th at 1167; 8 C.F.R. § 1240.8(d) (2025).

No duress exception- *Matter of D-G-B-L-*,29 I&N Dec. 392, 395 (BIA 2026) -The BIA found "[H]ad Congress intended the serious nonpolitical crime bar to be subject to a duress exception, it would have expressly included such a waiver." *Id.* at 395.

Important Considerations:

1. No Conviction required. *See* INA 208(b)(2)(A)(iii).
2. Must balance the seriousness of the criminal acts against the political aspects of the conduct.
3. BIA found that an Interpol Red Notice may constitute reliable evidence that the bar applies. *Matter of W-E-R-B-*, 27 I&N Dec. 795 (BIA 2020). However, 8th circuit ruled that probable cause was not found where the respondent was the subject of an Interpol Red Notice. *Barahona v. Wilkinson*, 986 F.3CJNGd 1090 (8th Cir. 2021).

Cases Finding Serious Non-Political Crime Bar

1. Assault with a firearm with intent to murder
2. Armed robbery3. Burglary4. Drug trafficking
5. Burning civilian buses, breaking windows, and fighting with police

Crimes that may be political:

1. Participation in Coup-Participation in a coup d'état
2. Applicant who contributed money to a group that fights against government repression by the illegitimate Burmese military government provided material support to a terrorist organization.

Material Support Bar: A Complex Legal Landscape

Pursuant to INA § 212(a)(3)(B)(iv)(VI) an individual who provides "material support" to terrorist organization is barred from asylum and withholding of removal. Section 212(a)(3)(B)(iv)(VI) of the Act defines the term “engage in terrorist activity” to include a person who commit[s] an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training [to a terrorist organization or for a terrorist activity.

The DHS bears the initial burden to establish that the bar may apply and then the respondent needs to establish by proving by a preponderance of the evidence that the bar is not applicable. *See* 8 C.F.R. § 1240.8(d); *see also Matter of M-B-C-*, 27 I&N Dec. 31, 36–37 (BIA 2017); *Matter of S-K-*, 23 I&N Dec. at 939.

The Consequence

Individuals found to have committed such crimes outside the United States are **barred from asylum and withholding of removal.**

Types of Terrorist Organizations:

Tier I terrorist organizations are officially listed groups designated by the Secretary of State. Such groups are listed as a Foreign Terrorist Organization ("FTO") on the DOS website and are thus easily identifiable to immigration authorities. Link for list of FTO: **https://www.state.gov/foreign-terrorist-organizations**

Tier II terrorist organizations are groups that have engaged in terrorist activity, and are designated by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, for purposes of immigration exclusion.**Link to Terrorist Exclusion List: https://www.state.gov/terrorist-exclusion-list/**

Tier III terrorist organizations, are groups "of two or more individuals, whether organized or not, which engage [ ] in, or [have] a subgroup which engages in," terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(vi)(III). Terrorist activity is defined broadly by the statute as conduct "unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)" and which involves one of several enumerated actions, including the "highjacking or sabotage of any conveyance," "an assassination," use of any "biological agent, chemical agent, or nuclear weapon or device, or [ ] explosive, firearm, or other weapon or dangerous device (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," or a "threat, attempt, or conspiracy to" commit such acts. 8 U.S.C. § 1182(a)(3)(B)(iii).

There is no official register of Tier III organizations; instead, groups are adjudicated as Tier III organizations on a case-by-case basis.

DHS must produce evidence "indicat[ing]" that a group qualifies as a Tier III terrorist organization. Then, the burden shifts to the applicant to prove "by a preponderance of the evidence" that the bar does not apply. 8 C.F.R. § 1208.16(d)(2).

Practice Tip:

If an applicant is deemed a member of a Tier III organization, then the individual can avoid the terrorism bar if he/she can "demonstrate by clear and convincing evidence that [he] did not know, and should not reasonably have known, that the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i)(VI).

Insight from the bench: In NY, the DHS used to argue that the BNP party in Bangladesh was a Tier III terrorist organization. The DHS submitted huge packets of evidence reflecting that members of BNP committed violent acts including killings, arson and attacks over local institutions and transport hubs. In *Uddin v. Attorney Gen. United States*, 870 F.3d 282, 289-293 (3rd Cir. 2017), the third circuit held that unless the agency finds that party leaders authorized terrorist acts committed by its members, an entity such as the BNP cannot be deemed a Tier III terrorist organization.

Material Support Found for both voluntarily and involuntarily doing the following:

1. Fundraising

2. Making payments of money and physical labor

3. Providing food and shelter-4th circuit Departure - *OZURUMBA v. Bondi* 153 F.4th 396 (4thCircuit 2025). held that the petitioner's forced cooking for a Tier III terrorist group did not constitute "material support" under the relevant statute, as his actions were not sufficiently substantial to help the organization accomplish its terrorist activities. Their finding implies that "material support" must be both relevant (logically related to terrorism) and significant (enough to make a difference).

FTO EXPANDED IN 2025-ADDED GANGS LIKE MS-13

Persecution Victims Caught in the Crossfire

A critical paradox emerges: many asylum seekers flee violence perpetrated by these very cartels. Yet if they were forced to provide any support — paying extortion, cooking food, providing shelter under threat — they may simultaneously be both victims of persecution AND subject to the material support bar. Courts and practitioners must carefully distinguish between persecution suffered at the hands of these organizations and any conduct that could be characterized as "support."

Navigating the Bars: What Practioners Need to Know

1. Did the respondent provide support to the group before the Tier I or Tier II designation?
2. Even if the respondent provided support to the group prior to the designation, DHS may argue that the group engaged in Tier III activity before the designation
3. **If your client was under duress, make sure to flesh it out and ask the IJ to make a finding that the respondent would have been granted asylum "but for" the designation. This is crucial to preserve the record for USCIS to adjudicate a duress waiver.**

Note-Sufiyan v. Bondi, No. 22 6392 (2d Cir. Mar. 12, 2026)-last month 2nd circuit remanded for the IJ to make a finding whether the individual would be eligible for asylum "but for" the material support bar.

USCIS has sole authority to grant the duress waiver Scarfen Memo addressing Material Support Under Duress.
https://www.uscis.gov/sites/default/files/document/legal-docs/2007%20Scharfen%20Memo-%20Material%20Support%20Under%20Duress%20and%20to%20Selected%20Groups.pdf

Persecutor & Previous Denial Bars to Asylum

Presented by Hon. Alice Segal

Statutory Foundation

The Persecutor Bar

Statutory Citation

INA § 208(b)(2)(A)(i) 8 U.S.C. § 1158(b)(2)(A)(i)

A noncitizen is barred from asylum if the applicant **"ordered, incited, assisted, or otherwise participated in persecution"** of others.

Critical Requirement: Protected Grounds

The persecution at issue must be **on account of** a protected ground. The bar does not apply to all harmful conduct — only persecution tied to one of the five recognized categories:

- Race
- Religion
- Nationality
- Political opinion
- Membership in a particular social group (PSG)

Landmark Case

Fedorenko v. United States, 449 U.S. 490 (1981)

Facts

Fyodor Fedorenko, a Ukrainian national, was captured by German forces during WWII and coerced into service as an armed guard at the Treblinka extermination camp. He admitted to serving as a guard while prisoners were confined and killed.

Entry to the U.S.

Fedorenko entered the United States under the Displaced Persons Act (DPA) by concealing his wartime service. His citizenship was later challenged on the grounds that he was ineligible for a visa at the time of entry.

Legal Issue

Whether **voluntariness** was required to trigger the statutory bar — i.e., could a person compelled into service still be barred?

Holding

The Supreme Court held: **No voluntariness requirement** exists under the DPA. Service as an armed guard — whether voluntary or involuntary — rendered an individual ineligible.

Key Language from the Supreme Court

Fedorenko Footnote 34 — The Spectrum of Conduct

> "An individual's service as a concentration camp armed guard — **whether voluntary or involuntary** — made him ineligible for a visa under the DPA."
>
> *— 449 U.S. at 512 n.34 (armed guard: barred)*

> "[A]n individual who did no more than **cut the hair of female inmates** before they were executed cannot be found to have assisted in the persecution of civilians."
>
> *— 449 U.S. at 512 n.34 (minimal role: not barred)*

Footnote 34 establishes the "continuum of conduct" principle.

Challenging Fedorenko's Reach

Negusie v. Holder, 555 U.S. 511 (2009)

Facts

Daniel Negusie, an Eritrean national, was forcibly conscripted and compelled to guard prisoners — including individuals who were later persecuted. He sought asylum, arguing his involuntary conduct should not trigger the persecutor bar.

Holding

The Supreme Court held that ***Fedorenko*** does not directly control the INA persecutor bar. Because the DPA and INA use different statutory language, the Court declined to simply import the DPA's no-voluntariness rule into the INA framework.

Remand & Duress Question

The case was **remanded to the BIA** to interpret the INA's persecutor bar in the first instance — specifically, whether a **duress exception** exists when an individual is compelled to participate in persecution under threat of serious harm.

This question remained contested for over a decade, culminating in a critical 2025 decision by the Attorney General.

Attorney General Decision — 2025

Matter of Negusie, 29 I&N Dec. 285 (A.G. 2025)

Core Holding

No duress exception exists to the INA persecutor bar. An applicant who participated in persecution — even under threat of serious harm — remains subject to the bar and is ineligible for asylum. Attorney General Barr's *Matter of Negusie* decision, 28 I&N Dec. 120 (A.G. 2020) is now in effect.

What Was Overturned

This decision **overturns the 2018 BIA decision** in *Matter of Negusie*, which had recognized a **limited duress exception** to the persecutor bar. That prior BIA holding had offered a narrow pathway for applicants who participated in persecution only under severe compulsion.

Remaining Open Question

With duress now foreclosed and *Fedorenko*'s DPA-based rule still technically distinguished, practitioners must grapple with: Is ***Fedorenko*** once again the controlling standard in INA persecutor bar cases? Attorney General Barr's *Negusie d*ecision suggests that the *Fedorenko* analysis is still applicable in persecutor bar adjudications.

Defining the Scope of "Assistance"

What Conduct Triggers the Bar?

Xu Sheng Gao v. U.S. Att'y Gen., 500 F.3d 93 (2d Cir. 2007)

A Chinese official supervised bookstore inspections under a regulatory enforcement regime. The Second Circuit held that his **regulatory conduct was insufficient** to trigger the persecutor bar — he had no direct role in persecution of individuals on account of a protected ground.

Key rule: Mere membership in an organization that engages in some acts of persecution is *not* in and of itself assistance in persecution.

Balachova v. Mukasey, 547 F.3d 374 (2d Cir. 2008)

The Second Circuit further refined the standard, requiring that the applicant's participation constitute **knowing and meaningful assistance** in the persecution of others. Mere presence at a location or indirect conduct are insufficient.

Key rule: The assistance itself must be **on account of** a protected ground — casual or administrative proximity to persecution does not satisfy the statutory threshold.

Persecutor Bar — Summary of Key Cases

Case Law at a Glance

Case	Court / Year	Key Takeaway
Fedorenko v. United States	SCOTUS, 1981	No voluntariness requirement under DPA; armed guard service = ineligible regardless of compulsion
Negusie v. Holder	SCOTUS, 2009	*Fedorenko* does not control INA bar; remanded to BIA to resolve duress question
Matter of Negusie	A.G., 2025	No duress exception under INA; overturns 2018 BIA ruling recognizing limited duress defense
Xu Sheng Gao v. U.S. Att'y Gen.	2d Cir., 2007	Regulatory conduct insufficient; mere organizational membership ≠ persecution assistance
Balachova v. Mukasey	2d Cir., 2008	Requires knowing and meaningful assistance on account of a protected ground

Second Statutory Bar

Bar Based on Previous Asylum Denial

Statutory Basis

INA § 208(a)(2)(C)–(D) 8 U.S.C. § 1158(a)(2)(C)–(D)

A noncitizen **cannot reapply for asylum** if they have received a prior **administratively final** asylum denial. This is a jurisdictional bar — the immigration court lacks authority to consider a successive application absent an exception.

The "Changed Circumstances" Exception

The bar is not absolute. An applicant may overcome it by demonstrating **"changed circumstances"** that *materially affect* their asylum eligibility. Practitioners should note:

- Changed circumstances must relate to the **applicant's eligibility**, not mere changes in conditions abroad
- The change must be **material** — significant enough to alter the outcome of the prior denial
- The applicant bears the burden of establishing the exception applies

Closing Summary

Key Takeaways for Practitioners

Persecutor Bar — Statutory Text

INA § 208(b)(2)(A)(i) bars asylum for those who ordered, incited, assisted, or participated in persecution on account of a protected ground. The nexus to a protected ground is essential.

No Duress Exception (2025)

The A.G.'s 2025 ruling in *Matter of Negusie* eliminates the duress defense. Whether *Fedorenko*'s no-voluntariness standard now governs the INA bar remains an open and critical question for circuit courts.

Meaningful Assistance Required

Under Second Circuit precedent, only **knowing and meaningful** assistance in persecution on account of a protected ground triggers the bar. Regulatory, incidental, or indirect conduct is insufficient.

Previous Denial Bar

A final prior denial forecloses re-filing unless the applicant can show **changed circumstances** that materially affect eligibility. This is a high standard requiring more than changed country conditions alone.

Thank You for Joining Us!

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We appreciate your engagement and hope this presentation has provided valuable insights into the complexities of asylum law. Please feel free to reach out to any of the panelists for further discussion or assistance.