



An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part Two)

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Under [Section 208 of the Immigration and Nationality Act](#) (INA), 8 U.S.C. § 1158(a)(1), a non-U.S. national (*alien* as the term is used [in the INA](#)) who is physically present in the United States or who arrives in the United States (whether or not at a designated U.S. port of entry) may pursue asylum, regardless of that person’s immigration status or manner of entry into the country. INA § 208, however, [renders some asylum seekers](#) ineligible to apply for asylum or to be granted asylum. This Legal Sidebar, which discusses the mandatory bars to a grant of asylum, is the second in a two-part series discussing the statutory asylum restrictions. The first Sidebar is available [here](#).

Limitations on Ability to Be Granted Asylum

An alien who might otherwise qualify for asylum relief may still be ineligible for asylum because of certain mandatory bars under [INA § 208\(b\)\(2\)](#), 8 U.S.C. § 1158(b)(2). If the government presents evidence that one or more of these bars applies, the [asylum applicant must prove](#) by a preponderance of the evidence (i.e., more likely than not) that the bar does not apply.

Persecution of Others

Asylum applicants who have persecuted others are generally barred from receiving asylum (this ineligibility is also known as the “persecutor bar”). INA § 208(b)(2)(A)(i) [provides](#) that an alien who has “ordered, incited, assisted, or otherwise participated in the persecution of any person” on account of a statutorily protected ground (e.g., political opinion) is ineligible for asylum. Federal appeals courts have [adopted various standards](#) to determine whether an applicant is subject to the persecutor bar. Generally, courts [require a causal nexus](#) between the alien’s actions and the persecution of others. If an alien did not directly order, incite, or engage in persecution, courts require evidence that the alien “assisted” or “otherwise participated” in the persecution through actions that are [materially instrumental—not merely tangential or inconsequential](#)—to the persecution. In other words, the alien must have done something that [furthered or contributed to the persecution](#). For that reason, courts [have held](#), membership in (or association with) a group engaged in persecution [does not](#), standing alone, trigger application of the persecutor bar. Courts also require that the alien [acted with contemporaneous knowledge](#) or with scienter that the persecution was occurring.

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Based on these standards, courts have applied the persecutor bar in varied cases, including where an alien [transported captive women](#) to hospitals to undergo forced abortions; [provided translation assistance](#) in police interrogations where suspects were beaten and tortured; and covertly [gathered information](#) for superiors that led to the imprisonment and death of political opponents. Conversely, courts have declined to apply the persecutor bar when the connection between the alien’s conduct and the persecution was more attenuated, including where an alien [provided post-surgical care](#) to victims of forced abortions and an alien [worked as a low-ranking constable](#) in a prison facility.

In *Negusie v. Holder*, the Supreme Court in 2009 considered whether the persecutor bar applies to an alien whose assistance or participation in persecution resulted from coercion or duress. The Court determined that INA § 208(b)(2)(A)(i) is ambiguous as to whether the bar applies to those who involuntarily assisted in persecution, and instructed the [Board of Immigration Appeals](#) (BIA), the highest administrative body responsible for interpreting and applying federal immigration laws, to decide the correct interpretation of the statute. On remand, the BIA in 2018 [interpreted the statute](#) as allowing an alien to raise a duress defense in certain situations (e.g., if the actions were taken under imminent threat of death or serious bodily harm to the alien or others). In 2020, Attorney General William Barr (who, as Attorney General, had [authority](#) to review “administrative determinations in immigration proceedings”) [vacated that decision](#), declaring that, based on its statutory context and history, the persecutor bar contains no exception for coercion or duress. In 2021, Attorney General Merrick Garland, [exercising his authority](#), [directed](#) the BIA to refer the case to him for his review. As of the date of this Sidebar, no decision has been issued.

Particularly Serious Crimes

INA § 208(b)(2)(A)(ii) [provides](#) that an alien who, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States,” is barred from asylum. The statute [states](#) that an alien convicted of an aggravated felony “shall be considered to have been convicted of a particularly serious crime.” Under [INA § 101\(a\)\(43\)](#), an aggravated felony is defined to encompass a [broad range of criminal offenses](#), including murder, rape, drug trafficking, money laundering, significant fraud offenses, and human trafficking. The aggravated felony definition applies to an enumerated criminal offense under federal or state law, as well as foreign law if the term of imprisonment was completed within the last 15 years. Additionally, an attempt or conspiracy to commit one of the enumerated offenses constitutes an aggravated felony.

While an alien convicted of an aggravated felony is deemed to have committed a “particularly serious crime”—and is thus barred from asylum—the classification of a “particularly serious crime” is [not limited to](#) aggravated felonies. INA § 208(b)(2)(B)(ii) [authorizes](#) the Attorney General to designate, by regulation, other criminal offenses as covered. Furthermore, the [BIA](#) and [federal appeals courts have recognized](#) that an immigration judge within the Department of Justice (DOJ) may also evaluate, through case-by-case administrative adjudication, whether an alien’s non-aggravated felony conviction constitutes a particularly serious crime. This inquiry [considers various factors](#), including the nature of the criminal offense, the type of sentence imposed, and the circumstances and underlying facts of the conviction.

Both the [BIA](#) and [federal appeals courts have held](#) that, if an alien is found to have been convicted of a particularly serious crime, there is no separate inquiry into whether the alien “[constitutes a danger to the community of the United States](#).” They have reasoned that, based on the statutory language and legislative history showing Congress’s intent, a particularly serious crime finding is determinative of whether an alien presents a danger to the community. For that reason, the [Attorney General](#) and [some courts have held](#) that asylum adjudicators may consider an alien’s mental health at the time of a crime when making case-by-case assessments of whether an alien committed a particularly serious crime, and is thus a “danger to the community.”

Serious Nonpolitical Crimes Outside the United States

An alien is **barred** from asylum under INA § 208(b)(2)(A)(iii) if “there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.” According to the BIA, a “serious” crime involves a **“substantial risk of violence and harm to persons”** (e.g., arson, robbery, or assault). The BIA **has stated** that in analyzing the “political” nature of a crime, it is “important that the political aspect of the offense outweigh its common law character.” The BIA added that this analysis considers whether (1) the offense was directed at a governmental entity or political organization (rather than a private or civilian entity); (2) it was directed toward changing the political organization of the state; and (3) there is a direct causal link between the crime and its political objective.

In applying the “serious nonpolitical crime” bar, the BIA **first considers** whether the criminal conduct is “of an atrocious nature” (e.g., murder). If the BIA determines that it is not, then the BIA **employs a balancing test** that compares the seriousness of the crime with its political character. If the serious criminal conduct outweighs or is disproportionate to its political objective (or lacks a political nexus), it is a “serious nonpolitical crime.” In *INS v. Aguirre-Aguirre*, the Supreme Court in 1999 held that the BIA’s interpretation of the “serious nonpolitical crime” provision was a permissible reading of the statute.

The serious nonpolitical crime bar requires only **“serious reasons for believing”** the crime occurred, and not a criminal conviction. The BIA and **federal appellate courts have interpreted** “serious reasons for believing” as the equivalent of **probable cause**, which may be established by the alien’s own testimony or corroborating evidence. The BIA has **held** that an **Interpol “Red Notice”** (issued when a country seeks to locate and arrest a wanted person pending extradition) can be sufficient to establish the requisite probable cause. Following the BIA’s decision, however, some courts **have held or otherwise recognized that** a Red Notice alone fails to reliably meet that threshold.

Danger to the Security of the United States

INA § 208(b)(2)(A)(iv) **provides** that asylum may not be granted if “there are reasonable grounds for regarding the alien as a danger to the security of the United States.” In a **2005 opinion**, Attorney General John Ashcroft clarified the meaning of this provision and **described** a “danger to the security of the United States” as being “any nontrivial level of danger” (rather than a “significant” or “grave” danger) to the nation’s “defense, foreign relations, or economic interests.” The Attorney General **construed** the “reasonable grounds for regarding” standard as being similar to probable cause, concluding that there must be sufficient “information that would permit a reasonable person to believe that the alien may pose a danger to the national security.” While **some federal appellate courts** have deferred to the Attorney General’s interpretation of the national security bar, **they have clarified** that the “reasonable grounds” standard requires evidence that the alien poses an *actual* (and not merely speculative) danger to national security.

Terrorist Activity

An applicant who is subject to certain terrorism-related grounds of **inadmissibility** (if the alien has not been lawfully admitted into the United States) or **deportability** (if the alien has been admitted) is **barred from asylum** under INA § 208(b)(2)(A)(v). The specified grounds cover, among others, an alien who has **“engaged in terrorist activity”** (including providing **“material support”** to a **“terrorist organization”**), has incited **“terrorist activity”** with intention to cause death or serious bodily harm, is a member of a “terrorist organization” (subject to certain exceptions), or endorses or espouses terrorist activity.

Much of the litigation over the terrorist bar concerns whether an asylum applicant provided “material support” to a terrorist organization. The BIA **has held** that, in assessing whether there is “material

support,” the government does not have to prove that the applicant’s assistance was *intended* (either by the applicant or the recipient) to be used for terrorist activity. Additionally, [according to the BIA](#), “material support” contains no quantitative requirement—it covers any act that has “a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree.” The BIA has also [held](#) that there is no exception for an alien who provided material support under duress or coercion. Federal [appeals courts have likewise ruled](#) that “material support” covers both voluntary and involuntary support, and that the statute [does not exempt](#) minimal or low-level support. Courts have thus applied the “material support” provision to many cases, including where an alien [provided food and shelter](#) to Sikh militants; [paid an annual “war tax”](#) to a Colombian paramilitary group; and [served as an interpreter](#) for the leader of a Liberian rebel group.

The Secretary of State or the Secretary of Homeland Security (after interagency consultation) has [authority to waive](#) application of the terrorism-related grounds of inadmissibility. They may also waive application of the “terrorist organization” definition to a group that has not been formally designated as a terrorist organization. No waiver, however, may be provided in some cases (e.g., if the alien is engaged in or likely to engage after entry in terrorist activity). The Department of Homeland Security (DHS) has issued guidance describing the [“situational exemptions”](#) (e.g., where aliens provided material support under duress or insignificant or limited material support to terrorist organizations) and [“group-based exemptions”](#) (i.e., where aliens are associated with certain specified terrorist organizations) that may warrant a waiver. Immigration judges [lack authority](#) to waive application of the terrorist bar to asylum applicants in [formal removal proceedings](#). If an applicant is subject to a final order of removal, and would have otherwise been eligible for asylum but for the terrorist bar, DHS [may consider](#) whether to grant a waiver and allow the alien to reopen proceedings to pursue asylum.

INA § 208(b)(2)(D) states that there is [no judicial review](#) of a determination that an alien is subject to the terrorist bar. However, [INA § 242\(a\)\(2\)\(D\)](#) provides that courts retain jurisdiction to review constitutional claims or questions of law raised in a [petition for review](#) of a final order of removal. Citing § 242(a)(2)(D), [federal appeals courts have exercised jurisdiction](#) to review legal questions about the scope and meaning of the terrorist bar (e.g., the meaning of “material support”), and the application of law to undisputed facts (e.g., whether the alien’s activities constitute “material support”).

Firm Resettlement

An alien who “was firmly resettled in another country prior to arriving in the United States” is [barred](#) from asylum under INA § 208(b)(2)(A)(vi). Under current [DHS](#) and [DOJ regulations](#), an alien is “firmly resettled” if, before arriving in the United States, the alien “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.”

The BIA has adopted a [“four-step analysis”](#) for making firm resettlement determinations. Under the first step, DHS [has the burden](#) of showing the alien received an offer of firm resettlement in the third country (e.g., evidence of refugee status or other evidence indicating permanent residence). If direct evidence is unavailable, DHS may produce “indirect evidence” of the alien’s ability to permanently reside in the country (e.g., the third country’s immigration laws, the alien’s family or economic ties, the alien’s length of stay). Second, the alien [may rebut evidence](#) of firm resettlement by showing that an offer of resettlement was not made or that the alien would not have qualified for it (e.g., by showing that the country’s immigration laws would not have applied to the alien). The BIA has held that a failure to [apply](#) for or [accept](#) permanent residence in the third country where it is otherwise available does not rebut evidence of firm resettlement. Under the third prong of the BIA’s framework, the immigration judge [considers](#) whether the alien has rebutted the evidence of firm resettlement. Fourth, if firm resettlement is established, the alien [has to show](#) that one of the [regulatory exceptions](#) applies.

The [regulations provide](#) an exception to the firm resettlement bar if (1) the alien’s entry into the third country was “a necessary consequence of his or her flight from persecution,” the alien remained in that country “only as long as was necessary to arrange onward travel,” and the alien “did not establish significant ties” there; or (2) the conditions of residence in the third country “were so substantially and consciously restricted” by the government of that country that the alien was not truly resettled. In determining whether conditions of residence were “substantially and consciously restricted,” the regulations require consideration of certain factors, including the conditions in which other residents of the country live and the availability of housing and employment to the applicant.

The [BIA](#) and some [federal appeals courts have held](#) that the expiration of an alien’s legal status in a third country after entry into the United States does not preclude a finding of firm resettlement, even if the alien might be unable to return to that country, and that the firm resettlement bar applies even if an alien had obtained documentation or legal status in the third country through fraud. With regard to the [exceptions](#), the [BIA](#) and some [courts](#) have held that, if a firmly resettled alien travels to the United States or the country of claimed persecution and then *returns* to the third country, that person cannot establish that he or she remained in the third country “only as long as was necessary to arrange onward travel.”

In 2020, DHS and DOJ [issued a rule](#) that, among other things, would have expanded the firm resettlement definition to apply to more classes of aliens (e.g., aliens who held a “non-permanent but indefinitely renewable legal immigration status”). A federal district court [preliminarily enjoined](#) the agencies from implementing the new rule during the pendency of litigation.

Additional Limitations on Asylum

Under [INA § 208\(b\)\(2\)\(C\)](#), the Attorney General or the Secretary of Homeland Security “may by regulation establish additional limitations and conditions, consistent with [INA § 208], under which an alien shall be ineligible for asylum.” Citing this authority, in 2018, DHS and DOJ [announced a rule](#) that would have barred asylum to aliens unlawfully entering the United States at the southern border in violation of a [Presidential Proclamation](#). In 2019, the agencies [issued a rule](#) that barred asylum to those arriving at the U.S. southern border without first seeking protection from other countries through which they transited. Then, in 2020, the agencies [issued a rule](#) that would have barred asylum to aliens convicted of, among other things, any felony offense, illegal reentry, any gang-related crime, driving under the influence, and domestic violence offenses. These agency rules, which [were subject to legal action and federal court orders](#) blocking their implementation, are not currently in effect.

Previously, in 2000, the former Immigration and Naturalization Service (the predecessor agency to DHS) established, through regulation, “additional limitations and conditions” by [barring asylum](#) to applicants who suffered past persecution (and would otherwise be presumed to have a well-founded fear of future persecution) if there had been a “fundamental change in circumstances” that undercut their fear of future persecution; or if they could safely relocate within their native countries to avoid future persecution. This rule remains [codified in federal regulations](#).

Recent Legislative Activity

Like the statutory restrictions on applying for asylum, INA § 208(b)(2)’s mandatory bars could require the denial of asylum to an applicant who might otherwise qualify for relief. In the 117th Congress, bills have been introduced to amend the statute, generally by increasing the circumstances that would preclude asylum. For example, some bills would bar asylum to those who were the spouses or children of an alien subject to the terrorist grounds of inadmissibility ([H.R. 89, S. 1045](#)); were associated with criminal gangs ([H.R. 1995, S. 1056](#)); could reasonably relocate to another part of their country to avoid persecution ([H.R. 1901, S. 884](#)); were convicted of any crime ([H.R. 398](#)); or, for purposes of the firm resettlement bar, lived in a third country in any legal status without fear of persecution ([H.R. 759](#)). One bill, however, would

limit the asylum bars by applying the “particularly serious crimes” provision only to aggravated felony convictions for which the term of imprisonment is at least five years ([H.R. 536](#)).

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