

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>Sources of Authority</i>
Rev. Date	January 9, 2006
Lesson Description	This lesson describes the sources of law from which asylum officers derive their authority to act. The lesson provides an overview of the structure of the federal judicial and administrative bodies which render decisions that are binding on asylum officers. Through examples, visual aids and practical exercises, trainees become familiar with the proper format for citing to judicial and administrative opinions.
Field Performance Objective	Given a request for asylum or withholding of removal to adjudicate, the asylum officer will apply appropriate authority to adjudicate the request.
Academy Training Performance Objective	Given written scenarios, the trainee will correctly determine which judicial and administrative opinions are mandatory authority and which are persuasive. The trainee will demonstrate ability to cite to judicial and administrative opinions using the correct format.
Interim (Training) Performance Objectives	<ol style="list-style-type: none"> 1. Identify the legal sources from which asylum officers' authority is derived. 2. Identify the binding authority of administrative decisions and opinions. 3. Identify the binding authority of federal court decisions.
Instructional Methods	Lecture, discussion, demonstration, practical exercises
Student Materials/References	Participant Workbook
Method of Evaluation	Written Test
Background Reading	Langlois, Joseph, INS Office of International Affairs. <i>Use of the Basic Law Manual</i> , Memorandum to Asylum Office Directors, SAOs, QATs, Librarians, AOs (Washington, DC: 27 Aug 1999), 1 p.

CRITICAL TASKS**SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001**

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
011	Conduct legal research.
SS8	Ability to read and interpret statutes, precedent decisions and regulations.
E1	Relevant reference materials and databases.

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

This lesson will explain sources of authority that govern asylum officers' adjudication of asylum requests.

II. SOURCES OF AUTHORITY**A. Statutes**

1. INA § 101(a)(42)

Defines refugee

2. INA § 208(a)

Provides for an alien who is physically present in the United States or who arrives in the United States to apply for asylum, irrespective of the alien's status

3. INA § 208(b)

Provides that asylum may be granted in the discretion of the Secretary of Homeland Security or Attorney General if the alien is a refugee, as defined in section 101(a)(42)(A) of the Act, so long as one of the mandatory bars does not apply. (Mandatory bars include: persecution of others on account of one of the 5 protected grounds; conviction of a particularly serious crime; commission of a serious nonpolitical crime outside the United States; danger to the security of the United States; participation in terrorist activities or status as a representative of certain terrorist organizations; firm resettlement.)

See lessons, Eligibility for Asylum Parts I-IV, Mandatory Bars to Asylum and Discretion, and Bars to Asylum Relating to National Security

4. INA § 208(c)

a. provides rights to individuals granted asylum

(i) cannot be removed to country of nationality or, if stateless, last habitual residence

(ii) entitled to employment authorization

(iii) can travel abroad with prior permission

- b. provides that asylum may be terminated and the former asylee removed under certain circumstances

See lesson, Termination of Asylum and Withholding of Deportation or Removal

5. INA § 209(b)

Provides for adjustment of status from asylee to lawful permanent resident.

Section 101(g)(1) of the Real ID Act, signed on May 11, 2005 as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (H.R. 1268), amended INA section 209(a) by removing the previous 10,000-per-year cap on asylee adjustments.

6. INA § 235

Provides for expedited removal of an alien who by fraud or willfully misrepresenting a material fact seeks to procure admission into the United States, unless the alien indicates an intent to apply for asylum or a fear of return and an asylum officer or immigration judge determines that the alien has a credible fear of persecution.

See lesson, Credible Fear Standard

7. INA § 241(b)(3)

Prohibits the Department of Homeland Security from removing an alien to a country where the alien's life or freedom would be threatened on account of one of the protected grounds in the refugee definition (exceptions include Nazis, individuals who committed genocide, persecutors, and certain other individuals who have committed certain crimes or are a danger to the security of the United States).

See lesson, Reasonable Fear of Persecution and Torture Determinations

B. Regulations

The Executive agency charged with administering a law is responsible for providing regulations by which the law is administered. The regulations that establish the procedure for an alien present in the U.S. or at a land border or port of entry to apply for asylum are found at 8 C.F.R. § 208, et seq. These regulations govern not only basic asylum procedures, but also substantive eligibility issues such as burden of proof, standard of proof, and mandatory grounds for denial.

Regulations governing the procedures for applying for asylum before the Executive Office of Immigration Review (see below) are found at 8 C.F.R. § 1208, et seq.

C. Administrative Decisions

The Attorney General has established the Executive Office for Immigration Review (EOIR) to administer and interpret Federal immigration laws and regulations through the conduct of immigration court proceedings, appellate reviews, and administrative hearings in individual cases. Through administrative proceedings before an immigration judge or administrative appeals to the Board of Immigration Appeals (BIA), EOIR provides a process through which individuals can defend themselves against DHS charges of being present unlawfully in, or subject to removal from, the US, and apply for any immigration benefit or protection.

1. Immigration judges

8 C.F.R. §§ 1003.1(g) and 1003.38

Decisions issued by immigration judges are not precedent decisions and have no binding authority on asylum officers in deciding cases involving similar issues.

2. The Board of Immigration Appeals (BIA)

Immigration judges' decisions may be appealed to the BIA, either by the individual or DHS. The BIA designates some of its decisions for publication as precedent decisions. Asylum officers must follow BIA precedent decisions when adjudicating cases involving similar issues, except to the extent the decisions are modified or overruled by subsequent decisions of the BIA or by the Attorney General, or there is a conflicting precedent decision on the issue by the federal circuit court in the circuit in which the asylum decision is being made or by the Supreme Court. BIA decisions apply nationwide, except in federal circuits with conflicting law.

8 C.F.R. § 1003.1(g)

Some BIA decisions are cited by number as Interim Decisions.

Example: *Matter of Vasquez-Muniz*, Int. Dec. #3440 (BIA 2000)

Asylum officers will rarely have to cite cases in assessments but must know how to read cites to appropriately apply case law and understand references.

Other BIA decisions may be found in the bound volumes of

BIA decisions are available on the internet through

Administrative Decisions under Immigration and Nationality Laws of the United States. They are cited by volume.

EOIR's Virtual Law Library at <http://www.usdoj.gov/eoir/vll/libindex.html>.

Example: *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). This means that the decision may be found in volume 19 of the Administrative Decisions at page 211.

D. Federal Court Decisions

There are three levels of courts in the federal judicial system: United States District Courts, United States Courts of Appeals, and the United States Supreme Court. The federal court system is divided into thirteen judicial circuits.

1. United States District Courts

Federal district courts are trial courts where issues of fact are resolved by a judge or a jury. The judge may also rule on matters of law. An alien whose order of exclusion has been upheld on appeal to the BIA, could seek review of the BIA decision by filing a petition for writ of habeas corpus in federal district court.

Federal district court decisions usually are not binding on other courts. If there is no controlling precedent decision in the jurisdiction in which the case arises, an asylum officer may seek guidance from the legal reasoning of a federal district court judge who has decided a similar issue. Except in rare cases, federal district court decisions are not binding on asylum officers.

The decision by a district court in a class action lawsuit is binding on asylum officers. E.g., the order of the district court judge in *American Baptist Churches v. Thornburgh (ABC)*, 760 F. Supp. 796 (N.D. Cal. 1991), which includes the settlement agreement by the parties, is binding on asylum officers.

Federal district court cases are cited in the Federal Supplement.

Example: *Dwomoh v. Sava*, 596 F. Supp. 970 (S.D.N.Y. 1988). This case may be found in volume 596 of the Federal Supplement on page 970. It was decided by the Southern District of New York (S.D.N.Y.) in 1988.

2. United States Courts of Appeals (Circuit Courts)

Federal circuit courts are appellate courts that review

See map, "The Thirteen Federal Judicial Circuits" at

federal district court decisions. BIA decisions, with some exceptions (e.g., those upholding orders of exclusion) may be appealed directly to the federal court of appeals in the circuit that has jurisdiction over the case.

end of this lesson.

A precedent circuit court decision is binding on all lower courts within the jurisdiction of the circuit, except to the extent the decisions are modified or overruled by subsequent decisions of the circuit or by the US Supreme Court. Similarly, precedent circuit court decisions must be followed by EOIR (the BIA and immigration judges) and DHS (asylum officers) when adjudicating cases arising within the circuit court's territorial jurisdiction.

Note that different circuit courts can and sometimes do publish conflicting opinions on certain asylum issues. When such a "split" among the circuits occurs, EOIR and USCIS asylum officers must follow the opinion of the circuit in which the case arises. If there is no precedent opinion on the issue in the circuit in which the case arises, the opinions from the other circuits that have considered the issue should be consulted but are not binding on EOIR or DHS.

Example: An asylum officer deciding a case arising in the territorial jurisdiction of the Court of Appeals for the Second Circuit must evaluate the case consistently with precedent Second Circuit decisions (and precedent BIA decisions) involving similar issues. That asylum officer may seek guidance from the decisions of federal courts of appeals in other federal circuits but may only follow those holdings to the extent they do not conflict with precedent decisions rendered by the Second Circuit or the BIA.

Decisions by the federal courts of appeals are cited in the Federal Reporter Series (1st, 2nd, and 3rd).

Example: *Fatin v. INS*, 12 F.3d 1223 (3rd Cir. 1993). This case can be found in volume 12 of the Federal Reporter, 3rd Series, on page 1223. It was decided by the United States Court of Appeals for the Third Circuit in 1993.

3. United States Supreme Court

Note: The Supreme Court

The US Supreme Court has the discretion whether or not to hear appeals of decisions by federal circuit courts. A party to a federal circuit court decision seeking to appeal that decision files a petition for a writ of certiorari with the Supreme Court. The Supreme Court issues the writ of certiorari if it decides to hear the appeal. If the Supreme Court denies the petition for a writ of certiorari, the ruling of the circuit court stands.

also has jurisdiction in certain other matters described in the *US Supreme Court Rules*. The *Rules*, especially Rules 10-20, provide a detailed picture of the scope of Supreme Court jurisdiction. This lesson focuses on writs of certiorari as the other areas of Supreme Court jurisdiction are less relevant to asylum officers. <http://www.megalaw.com/fed/usscrules>

The *U.S. Supreme Court Rules* provides some indication as to how the Supreme Court exercises its discretion to grant a petition for a writ of certiorari. Factors the Supreme Court may consider (among others) include:

See, U.S. Supreme Court Rules, Rule 10. According to Rule 10, the considerations listed therein neither control nor fully measure the Court's discretion but indicate the character of the reasons it considers when determining whether to grant a petition for a writ of certiorari. The reasons listed are those indicated in the *Rules* most relevant to asylum officers.

- whether the circuit court decision conflicts with the decisions of other circuit courts
- whether the circuit court decision decides an important federal question that should be decided by the Supreme Court
- whether the circuit court decision decides an issue of federal law in a manner that conflicts with relevant decisions of the Supreme Court

The *Rules* indicate that a petition for a writ of certiorari is rarely granted when the petitioner asserts the circuit court has made an erroneous factual finding or misapplied a rule of law that it properly stated.

Supreme Court decisions are binding on all lower courts and administrative adjudicators throughout the country.

Supreme Court decisions are cited in three different sets of bound volumes. Often more than one set will be cited.

Example: *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207 (1987). This case can be found at either volume 480 of the United States Reporter on page 421, or volume 107 of the Supreme Court Reporter, page 1207. This case was decided in 1987.

E. DHS Office of the General Counsel and USCIS Office of the Chief Counsel

The DHS Office of the General Counsel may issue legal opinions that explain the Department's interpretation of particular legal issues. The USCIS Office of the Chief Counsel also may issue legal opinions. While an Office of the General Counsel opinion is binding on all DHS components, an Office of the Chief Counsel opinion is binding only on USCIS personnel. Asylum officers must apply the law as interpreted in the General Counsel's Opinions and Chief Counsel's Opinions.

An example of a legal opinion issued by the INS Office of the General Counsel (predecessor to the USCIS and other agencies now in DHS) is the following memo:

Rees, Grover Joseph III. INS Office of General Counsel. *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion*, Memorandum to Jan Ting, INS Office of International Affairs (Washington, DC: 19 January 1993), 12 p.

F. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee (UNHCR Handbook)

The *UNHCR Handbook*, produced by the Office of the United Nations High Commissioner for Refugees, provides guidance to government officials concerned with the determination of refugee status pursuant to their obligations under the *1951 United Nations Convention relating to the Status of Refugees* and the *1967 United Nations Protocol Relating to the Status of Refugees*.

The interpretations provided in the *UNHCR Handbook* do not have the force of law and are not binding on asylum adjudicators in the United States. However, the Supreme Court has stated that the *UNHCR Handbook* "provides significant guidance in construing the Protocol, to which Congress sought to conform." Explanations in the Handbook are often referred to by both the BIA and federal courts. Where guidance in the *UNHCR Handbook* is inconsistent with U.S. law, as interpreted by precedent decisions, asylum officers must follow U.S. law.

Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures And Criteria For Determining Refugee Status* (Geneva, 1992), p. 2

INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1217, n. 22 (1987); *INS v. Aguirre-Aguirre*, 119 S.Ct 1439, 1446-47 (1999); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982)

G. International Law

If no domestic law addresses a specific legal issue, reference to international law may assist in determining whether an applicant is a refugee. In particular, international human rights and humanitarian law may provide guidance when evaluating whether particular acts constitute persecution.

See lesson, International Human Rights Law

III. SUMMARY

A. Statute and Regulations

Asylum officers derive authority to adjudicate asylum requests, make credible fear determinations, and, in some cases, adjudicate requests for withholding of removal, from statute and regulations.

INA § 101 (a)(42) – definition of refugee
INA § 208 – asylum
INA § 209 – refugee and asylee adjustment
INA § 235 – credible fear determinations
INA § 241(b)(3) – withholding of removal
8 C.F.R. § 208. Et. seq. – process

B. Administrative Decisions

Decisions by immigration judges are not binding on asylum officers. Asylum officers must follow precedent BIA decisions, except to the extent they have been modified or overruled by subsequent decisions or by the Attorney General, or there is a conflicting precedent decision on the issue by the federal circuit court in the circuit in which the asylum decision is being made or by the Supreme Court.

C. Federal Court Decisions

Asylum officers may seek guidance in the reasoning contained in decisions of federal district court judges. Except in rare cases, federal district court decisions are not binding on asylum officers.

Asylum officers are bound by federal appeals courts' precedent decisions when adjudicating asylum cases arising within the courts' jurisdiction, except to the extent the decisions are modified or overruled by subsequent decisions of the circuit or by the US Supreme Court.

Asylum officers are bound by Supreme Court decisions regardless of jurisdiction.

D. General Counsel and Chief Counsel Opinions

Asylum officers must apply the law as interpreted in the DHS General Counsel's Opinions and USCIS Chief Counsel's Opinions.

E. *UNHCR Handbook*

Asylum officers should seek guidance from the *UNHCR Handbook*. However, the guidance in the *UNHCR Handbook* does not have the force of law and may not be followed where it is inconsistent with U.S. law.

F. **International Law**

If no domestic law addresses a specific legal issue, international human rights and humanitarian law may provide guidance in determining whether an applicant meets the definition of refugee.