

NOTES AND PROBLEM AREAS

Adjustment of Status

The persecutor bar does not apply to applicants for adjustment of status under INA § 245. However, an applicant must nevertheless be admissible to be granted such relief. The following related grounds of inadmissibility apply in this context:

- INA § 212(a)(3)(E)(i) - Participants in Nazi Persecutions
- INA § 212(a)(3)(E)(ii) - Participation in Genocide
- INA § 212(a)(3)(E)(ii) - Commission of Acts of Torture or Extrajudicial Killings

Burden of Proof

Laipenieks v INS:

Respondents' attorneys sometimes cite *Laipenieks v. INS*, 750 F.2d 1427, 1429 (9th Cir. 1985) for the proposition that the Government has the burden of proving its case "by clear, convincing and unequivocal evidence which does not leave the issue in doubt" that he was a "persecutor of others." However, this argument is misplaced in the context of an otherwise removable or deportable alien who seeks relief from removal. In *Laipenieks*, the Court was addressing the Government's burden generally in a deportation case where the alien was charged as being deportable under former INA § 241(a)(19) because he had engaged in the persecution of others as a Nazi; the petitioner did not seek any form of relief from removal.

Initial burden:

While it is clear that the Government has the initial burden of introducing evidence that the respondent engaged in the persecution of others, and after doing so, the burden shifts to the respondent to disprove this by a preponderance of the evidence, what is less clear is precisely how much evidence the Government must submit to meet its initial burden. The BIA in *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005), stated that the Government must "offer prima facie evidence" to indicate that a respondent incited, assisted, or otherwise participated in the persecution of persons on account of a protected ground before the burden shifts to the respondent. Besides *Matter of A-H-*, there is no other caselaw that addresses either the type or amount of evidence that is sufficient for the Government to meet its initial burden

EI Rescate Database

In cases where the Government alleges that a respondent is a persecutor of others due to his service in the El Salvadoran Armed Forces during that country's civil war, the Government often submits entries from EI Rescate Database. This database lists human rights violations according to the battalion or detachment of the respondent. Some concerns with these database are:

- there is often no foundation for the entries;
- the entries are based on at least double hearsay;
- the entries are vague— often there is no name for the victim, the location of the incident or even the date;
- there is the possibility that more than one entry is listed for the same incident;
- it is unclear that the incident is in fact a human rights violation, i.e. "capture" without more may not be a human rights violation.
- the Government often seeks to use an entry for, as an example, the DM3 which contains thousands of soldiers, to support their allegation that the respondent was involved in the incident.