

STANDARD LANGUAGE

An alien is barred from obtaining asylum, withholding of removal, Temporary Protected Status and NACARA Special Rule Cancellation of Removal if s/he "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA §§ 208(b)(2)(i); 241(b)(3)(B)(i); 244(c)(2)(B)(ii); NACARA § 203.

A. Burden of Proof

The burden of proof is upon an asylum applicant to establish that s/he is a refugee as defined by INA § 101(a)(42). The term "refugee" "does not include any person who has ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA §101(a)(42). The regulations distinguish between applicants who filed for asylum before and after April 1, 1997. With regard to an applicant who applied for asylum before April 1, 1997, "if the evidence indicates" that the alien engaged in the persecution of others, an applicant has "the burden of proving by a preponderance of the evidence that he or she did not so act." See 8 C.F.R. § 1208.13(c)(2)(ii). For applications filed after April 1, 1997, "an applicant shall not qualify for asylum if" section 208(b)(2) of the Act, which includes the persecution of others, applies. 8 C.F.R. § 1208.13(c)(1). While this provision does not address the burden of proof for asylum applications filed after April 1, 1997, the regulation controlling the burden of proof generally in removal proceedings does:

The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

8 C.F.R. § 1240.8(d)(emphasis added).

It is therefore clear that the Government has the initial burden of introducing evidence that the respondent engaged in the persecution of others. In *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005), the Board of Immigration Appeals ("BIA") 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. *Id.* at 785. The Government met its burden in that case by presenting evidence that the respondent, in his capacity as a recognized and self-proclaimed leader of an armed Islamic group in Algeria, made "widely published statements that could be read as encouraging or condoning violent actions." *Id.*

An alien can meet his burden of disproving that he assisted in the persecution of others on account of a protected ground by showing that the persecutory acts were part of legitimate criminal prosecutions or that the acts were part of generalized civil discord, rather than, for example, politically motivated persecution. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 930-32 (9th Cir. 2006).

B. Definition of a Persecutor of Others

1. Persecution on Account of a Protected Ground

"Persecution" is defined as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996). However, activities "directly related to a civil war," such as the overthrow of a government or the defense of that government against an opponent, are generally not forms of persecution. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988); see also *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 930-32 (9th Cir. 2006) (distinguishing between "on-the-battlefield conflict" and activities not inherent in civil war, namely "torturing individuals selected for their affiliation with an opposition"). In addition to rising to the level of persecution, an alien's acts must also have been committed on account of a protected ground. In *Matter of Fuentes*, 19 I&N Dec. 658, 661 (BIA 1988), the BIA held that the dangers faced by a Salvadoran policeman from guerrillas during El Salvador's political struggles did not constitute persecution on account of political opinion. However, just as there is no blanket exclusion for asylum seekers coming from places besieged by civil war, an asylum seeker is not "insulated from application of the persecutor exception simply because his acts sought to further the interests of one side of the conflict." *Miranda Alvarado*, 449 F.3d at 932.

2. Culpability under the Persecutor Exception

There are two requirements for establishing culpability under the persecutor exception: individual accountability and assistance or participation in the persecution. *Miranda Alvarado v. Gonzales*, 441 F.3d 750, 760 (9th Cir. 2006) (citing *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) and *Laipenieks v. INS*, 750 F.3d 1427 (9th Cir. 2005)). While personal accountability and assistance in the persecution must be established, actual "trigger-pulling" is not necessary. *Miranda Alvarado*, 441 F.3d at 761-62 (9th Cir. 2006) (quoting *A-H-*, 23 I&N Dec. at 784). However, "mere acquiescence" or membership in an organization is insufficient to satisfy the persecutor exception. *Matter of A-H-*, 23 I&N Dec. at 784; *Miranda Alvarado*, 441 F.3d at 762 ("Although such membership could signal support for the persecutorial aims of others, it does not suffice, standing alone, to establish the requisite personal assistance or participation in persecutorial acts."). See also *Matter of Rodriguez-Mejano*, 19 I & N Dec. 811, 814-15 (BIA 1988) ("[M]ere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief, but only [sic] if one's action or inaction furthers that persecution in some way.").

The Ninth Circuit has instructed courts to engage in a "particularized evaluation in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution." *Vukmirovic*, 362 F.3d at 1252 (quoting *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001)). The Ninth Circuit has further described this test, advising courts to ask such questions such as, "How instrumental to the persecutory end were those acts? Did the acts further the persecution, or were they tangential to it?" *Miranda Alvarado*, 449 F.3d at 928. In *Miranda Alvarado*, the Court found that an interpreter for the Peruvian military engaged in the persecution of others. While he did not personally torture any individual, nor was he in any position of authority, his services were material to the interrogations of suspected Shining Path members, during which torture was used, because without his services the interrogation and torture would not have proceeded. In difficult "line-drawing cases," the Court may also consider such factors as: the length of time over which the person was involved in the acts; the kind of threats used to compel assistance; whether the respondent put himself at risk to protect those who were persecuted; and the efforts undertaken to escape. *Miranda Alvarado*, 441 F.3d at 761-62.