



U.S. Citizenship
and Immigration
Services

120/9.3b

Interoffice Memorandum

To: ASYLUM OFFICE DIRECTORS
ASYLUM OFFICE DEPUTY DIRECTORS
SUPERVISORY ASYLUM OFFICERS
QUALITY ASSURANCE/TRAINING ASYLUM OFFICERS
ASYLUM OFFICERS

From: Joseph E. Langlois /s/
Director, Asylum Division
Office of Refugee, Asylum, and International Operations

Date: May 11, 2006

Re: Updates to Asylum Officer Basic Training Course Lessons as a Result of Amendments to the INA Enacted by the REAL ID Act of May 11, 2005

The purpose of this memorandum is to outline changes made to several of the Asylum Officer Basic Training Course (AOBTC) Lessons incorporating revisions made to the Immigration and Nationality Act (INA) as a result of the passage of the REAL ID Act of 2005 and their impact on asylum adjudications.

The REAL ID Act, Division B of H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, was signed into law by President Bush on May 11, 2005. Section 101(a) of the REAL ID Act amends the asylum eligibility portions of the INA at section 208 to codify what is required of an applicant to satisfy his or her burden of proof and how to evaluate the credibility of an applicant's testimony in an asylum adjudication. The REAL ID Act amendments to INA section 208 apply to asylum applications filed on or after May 11, 2005.

The REAL ID Act also amended the terrorist-related grounds of inadmissibility and deportability at INA sections 212(a)(3)(B) and 237(a)(4)(B). The amendments to these sections took effect on the date of enactment of the statute, May 11, 2005, and apply to acts and conditions constituting a ground for inadmissibility occurring or existing before, on, or after the date of enactment.

The amendments of the INA resulting from the enactment of the REAL ID Act, and the necessary changes to the AOBTC lesson plans are described in greater detail below. Training on the new lesson plans and changes outlined below must be conducted in all offices no later than May 30, 2006. Please contact Jedidah Hussey for any assistance required in coordinating the trainings or questions about this guidance.

Asylum Eligibility Part IV: Burden of Proof & Evidence

INA section 208 (b)(1)(B) as amended by the REAL ID Act states that the burden of proof is on the applicant to establish that the applicant is a refugee as defined in INA section 101(a)(42)(A). In order to meet that burden, “the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant. INA section 208(b)(1)(B)(i) (emphasis added). See “*Asylum Eligibility Part III: Nexus and the Five Protected Characteristics*,” below, for a more detailed discussion of the impact of this amendment on asylum adjudications.

Prior to the enactment of the REAL ID Act, federal courts of appeals and the Board of Immigration Appeals (BIA) had adopted differing approaches to the evidentiary requirements in asylum adjudications. Section 101(a)(3) of the REAL ID Act, codified at INA section 208(b)(1)(B), resolves those conflicts by establishing a uniform standard for evaluating whether an asylum applicant has met his or her burden of proof. This amendment applies to applications for asylum filed on or after May 11, 2005.

The text of the Act states that, “The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” INA section 208(b)(1)(B)(ii).

This standard, which is based on the standard articulated by the BIA in *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997), recognizes that the testimony of the applicant may be sufficient to satisfy the applicant's burden of proof without corroboration, *but only* if the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. Congress recognized that many aliens validly seeking asylum arrive in the United States with little or no evidence to corroborate their claims. Conference Report No. 109-72 on H.R. 1268, May 3, 2005. At the same time, the statute requires asylum applicants to provide reasonably available corroborating evidence. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

Because many federal courts of appeals had previously adopted the BIA corroboration standard as articulated in *Matter of S-M-J*, the amendments to this section of the INA will not affect the adjudication of cases in most asylum offices. See, *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000); *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004). These amendments will primarily affect adjudications by offices within the jurisdiction of the Court of Appeals for the Ninth Circuit, which had rejected the BIA's corroboration rule, see *Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000), and to some degree in the Court of Appeals for the Seventh Circuit, which had expressed concern about the BIA's rule requiring corroborating evidence in some circumstances. See *Gontcharova v. Ashcroft*, 384 F.3d 873 (7th Cir. 2004); *Uwase v. Ashcroft*, 349 F.3d 1039 (7th Cir. 2003). Keep in mind that for cases filed before May 11, 2005, adjudicators must apply the corroboration rule as was in effect prior to the enactment of the REAL ID Act.

The AOBTC Lesson Plan *Asylum Eligibility Part IV: Burden of Proof, Standards of Proof, and Evidence*, Draft, January 27, 2006, discusses in greater detail this amendment to the INA and the relevant legislative history of the REAL ID Act of 2005.

Credibility

Prior to the enactment of the Real ID Act, the INA did not provide any specific parameters for making a determination as to the credibility of an applicant's testimony. Asylum Program guidance, based on established legal precedent, was that an applicant's testimony would be found credible if consistent, detailed, and plausible. A negative credibility finding had to be supported by material flaws in the consistency, detail and/or plausibility of the applicant's testimony. Asylum Program guidance cautioned that an applicant's demeanor could be considered in evaluating credibility only in the context of the entire record and prohibited the reliance on an applicant's demeanor as the exclusive basis for a credibility finding.

The INA as amended by the REAL ID Act sets forth a standard for the evaluation of an applicant's credibility, requiring the adjudicator to consider "the totality of the circumstances, and all relevant factors," when making a credibility determination. INA § 208(b)(1)(B)(iii).

The new credibility clause added by the REAL ID Act "codifies factors identified in case law on which an adjudicator may make a credibility determination." Conference Report No. 109-72 on H.R. 1268 at 166-67, May 3, 2005; see INA § 208 (b)(1)(B)(iii). Pursuant to the statute, an asylum officer, "[c]onsidering the totality of the circumstances, and all relevant factors,... may base a credibility determination on:

- the demeanor, candor, or responsiveness of the applicant,
- the inherent plausibility of the applicant's account,
- the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made),
- the internal consistency of each such statement,
- the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions),
- any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or
- any other relevant factor." INA § 208 (b)(1)(B)(iii) (bullets added).

In the House Conference Report on the REAL ID Act (hereinafter "Conference Report"), Congress commented on the list of factors included in the statute stating that, "although [this] clause ... would allow an adjudicator to base an adverse credibility determination on any of the factors set forth therein, such a determination must be reasonable and take into consideration the individual circumstances of the specific witness and/or applicant." Conference Report No. 109-72 on H.R. 1268, May 3, 2005.

Because the factors now included in the statute had been previously identified in case law, most items in the list of factors do not represent a significant change in Asylum Program guidance regarding the evaluation of an applicant's credibility. There are, however, two aspects of the codified credibility evaluation parameters that do represent a change in the analysis of credibility: 1) the requirement that the adverse factor

be “relevant,” but not necessarily a factor that “goes to the heart of the applicant’s claim”; and 2) reliance on demeanor as a factor in a credibility determination.

Previous Asylum Program guidance required that a credibility flaw in an applicant’s testimony had to be material to the claim in order to support an adverse credibility determination. The REAL ID Act amendments to the INA specifically indicate that a credibility determination can be based on “any ... relevant factor” and that inaccuracies or falsehoods need not “go[] to the heart of the applicant’s claim” in order to be considered in the totality of the circumstances as supportive of an adverse credibility determination. *See* INA § 208 (b)(1)(B)(iii).

Relevant evidence is “[e]vidence tending to prove or disprove a matter at issue. Relevant evidence is both probative and material...” *Black’s Law Dictionary 8th Edition 2004*. The relevancy of any inconsistencies, inaccuracies and falsehoods will depend on its relation to factors material to establishing asylum eligibility. As noted by the Seventh Circuit, “[i]nconsistencies that do not relate to the basis of the applicant’s alleged fear of persecution are less probative than inconsistencies that do.” *Balogun v. Ashcroft*, 374 F.3d 492, 504 (7th Cir. 2004) (citations omitted). But inconsistencies, inaccuracies and falsehoods that do not go to “the heart of the applicant’s claim” can still be relevant to the final credibility determination. This is because the applicant’s general willingness and ability to testify truthfully is a relevant factor in a credibility finding. As the Seventh Circuit also noted, “multiple misrepresentations to Agency officials can serve as a *factor* in the credibility calculus; lying in a sworn statement is not irrelevant to credibility.” *Id.*

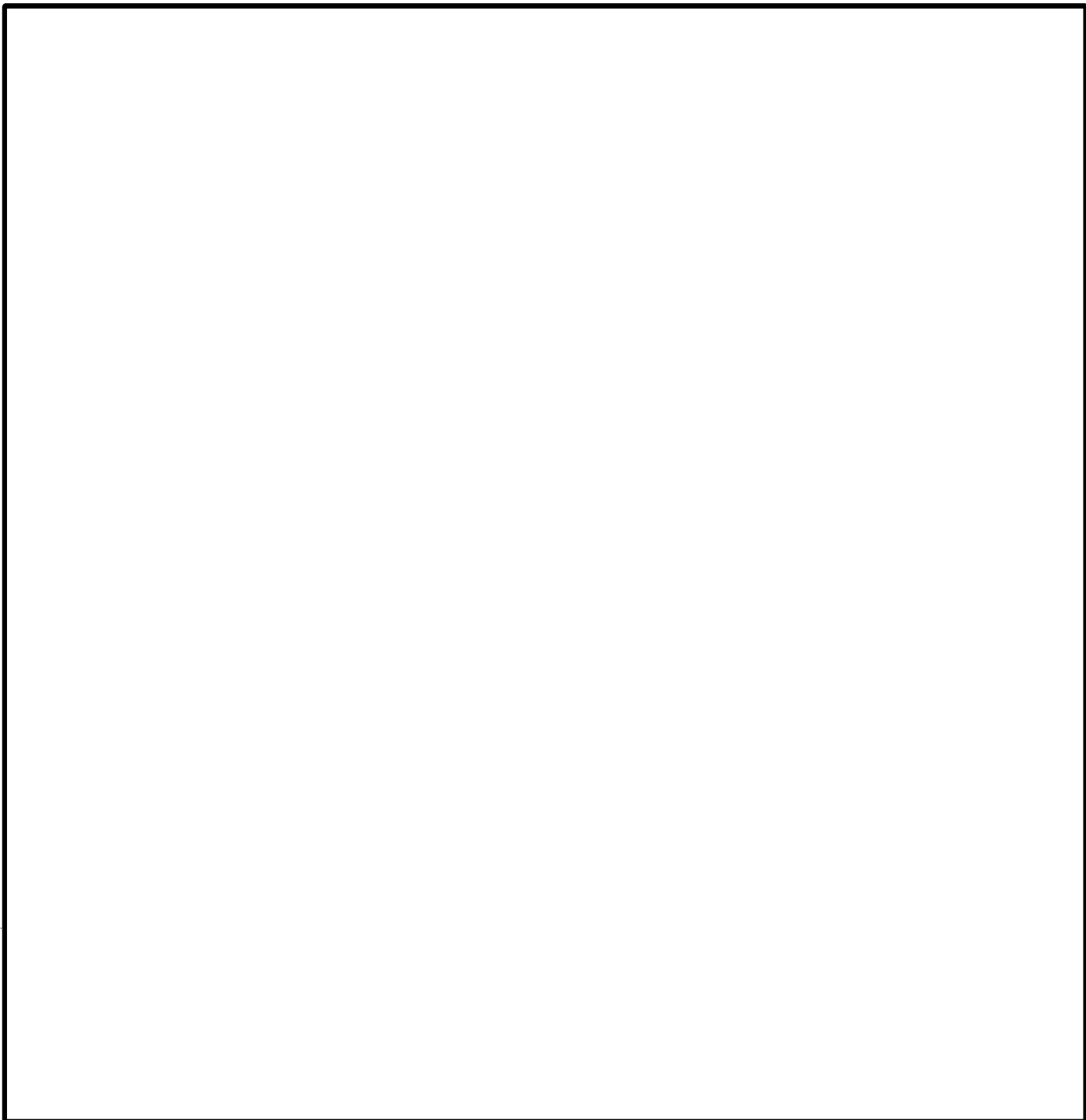
An applicant’s demeanor may be considered in evaluating credibility, but the asylum officer must “rely on those aspects of demeanor that are indicative of truthfulness or deception.” Conference Report No. 109-72 at 168 on H.R. 1268, May 3, 2005. Officers should keep in mind that demeanor can be an unreliable indicator of credibility, particularly in the asylum context where cultural differences and effects of trauma make it difficult to read non-verbal signals accurately. The circumstances of an asylum interview, including the use of an interpreter, cultural assumptions, and the possible effects of past trauma, need to be taken into account as part of the totality of circumstances when considering an applicant’s demeanor as part of the overall credibility determination.

The AOBTC Lesson Plan *Credibility*, Draft, January 24, 2006, discusses in greater detail the application of these factors in making a credibility determination under the “totality of the circumstances” standard enacted by the REAL ID Act.

Asylum Eligibility Part III: Nexus and the Five Protected Characteristics

As stated above, INA section 208 (b)(1)(B) as amended by the REAL ID Act states that the burden of proof is on the applicant to establish that the applicant is a refugee as defined in INA section 101(a)(42)(A). In order to meet that burden, “the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.” INA § 208(b)(1)(B)(i) (emphasis added).

The Conference Report reflects Congress’s intention in amending the INA to require that “at least one central reason” for the persecutor’s motivation be connected to a protected characteristic. In the report, the Conference Committee indicated that Congress included this amendment to the statute to require the asylum applicant to present evidence that allows the adjudicator to reasonably believe the harm suffered was motivated in “meaningful part” by a protected characteristic. Conference Report No. 109-72 on H.R. 1268,



Bars to Asylum Relating to National Security Matters

The REAL ID Act of 2005 significantly amended INA sections 212(a)(3)(B), 237(a)(4)(B) and 208(b)(2)(A)(v), the terrorism-related inadmissibility grounds, deportability grounds, bars to asylum, respectively.

First, the REAL ID Act broadened the categories of individuals who are inadmissible for terrorist-related activities. The grounds of inadmissibility under INA section 212(a)(3)(B) as revised include those aliens who have received military-type training from or on behalf of a terrorist organization. The revisions also expanded the inadmissibility ground regarding espousing terrorist activity to no longer require that the individual hold a "position of prominence" in order to be found inadmissible. The ground for espousing terrorist activity was further expanded to include endorsing terrorist activity as well as persuading others to endorse or espouse terrorist activity. Unlike the pre-REAL ID ground covering incitement of terrorist activity, there is no requirement that the endorsing or espousing indicates an intention to cause bodily harm.

The amendments also broaden the categories of aliens who are admissible as "members" of terrorist organizations. Prior to the REAL ID Act, the inadmissibility ground for "members" of terrorist organizations referred only to aliens members of organizations designated as foreign terrorist organizations (FTOs) under INA section 219. After the REAL ID Act amendments, an alien is inadmissible if he or she is a member of a terrorist organization designated as an FTO, designated under INA section 212(a)(3)(B)(vi)(II) (Terrorist Exclusion List), or as defined under INA section 212(a)(3)(B)(vi)(III) (a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, terrorist activity – "undesignated terrorist organizations").¹ Similarly, the REAL ID Act broadened the category of aliens inadmissible as representatives of terrorist organizations to include representatives of terrorist organizations according to any of the three definitions of terrorist organization (as opposed to only terrorist organizations under INA section 219) or representatives of "a political, social, or other group that endorses or espouses terrorist activity," without requiring that the Secretary of State determine that the endorsement of terrorist activity undermines US efforts to reduce terrorism, as was required previously.

Second, the statute limited the affirmative defense to the inadmissibility for "engaging in terrorist activity" through soliciting things of value, soliciting individuals for membership in, or for providing material support for an undesignated terrorist organization to require the alien to "demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the organization was a terrorist organization."²

The statute also revised the Patriot Act's inapplicability provision for material support to terrorist organizations and adding to INA section 212(d) to create an inapplicability provision for the material support ground, as well as individuals or representatives of terrorist organizations who endorse or espouse terrorist activity. The inapplicability ground allows the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, to not apply the provisions of INA sections 212(a)(3)(B)(i)(IV)(bb) or 212(a)(3)(B)(i)(VII) (relating to those who endorse or espouse terrorist activity) or 212(a)(3)(B)(iv)(VI) (related to material support to a terrorist or terrorist organization) to an alien in the Secretary's sole unreviewable discretion.³

¹ A member of an undesignated terrorist organization is not inadmissible if he or she can demonstrate by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization.

² Prior to the REAL ID Act, the alien did not have to make this showing by the higher "clear and convincing" standard. In addition, the INA previously exempted an alien who did not know, and should not reasonably have known, that the act would further the organization's terrorist activity, as opposed to simply knowing about the group's terrorist activities.

³ DHS is currently developing guidelines for implementing the exemption provisions as enacted by the REAL ID Act.

Finally, the REAL ID Act revised the language of INA section 208(b)(2)(A)(v) such that an individual is barred from a grant of asylum if he or she is "*described in*" either selected terrorist-related inadmissibility grounds or the terrorist-related deportability ground (INA section 237(a)(4)(B)). The terrorist-related deportability ground reads as follows:

TERRORIST ACTIVITIES- Any alien who is described in subparagraph (B) or (F) of section 212(a)(3) is deportable.

Because the bar to asylum refers to aliens who are *described in* the terrorist activities deportability ground, which in turn refers back to *all* of the terrorist-related inadmissibility grounds, all of the terrorist inadmissibility grounds are bars to asylum for applications filed on or after May 11, 2005. This is so despite that INA section 208(b)(2)(A)(v) identifies particular sub-sections of the terrorist inadmissibility grounds as constituting a bar to asylum.⁴

In addition, INA section 212(3)(F), through its inclusion in the terrorist-related deportability ground, is a bar to asylum. That section reads:

ASSOCIATION WITH TERRORIST ORGANIZATIONS- Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

Review the AOBTC Lesson Plan *Bars to Asylum Relating to National Security Matters*, Draft, February 16, 2006, for a more detailed discussion of the application of the terrorist-related bar to asylum in light of the REAL ID Act. In addition, the lesson provides a discussion of the most recent caselaw (as of February 16, 2006) regarding the persecution and security risk bars to asylum.

Other Lessons Updated Before the January AOBTC

Prior to, and shortly thereafter, the AOBTC that commenced in January, several other lesson plans were updated in light of legal developments and policy or procedural changes. Please review the following lessons, which are all available through the asylum intranet lesson plan page.

- Corps Values and Goals (*revised January 9, 2006*)
- Affirmative Asylum Process and Procedure (*revised Draft January 23, 2006*)
- History of the Affirmative Asylum Program (*revised Draft January 9, 2006*)
- Sources of Authority (*revised January 9, 2006*)

⁴The five inadmissibility grounds identified as bars to asylum refer to aliens: 1) who have engaged in terrorist activity; 2) for whom there are reasonable grounds to believe will engage after entry in terrorist activity; 3) who have, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity; 4) who are representatives of terrorist organizations, or political, social, or other groups that endorse or espouse terrorist activity; 5) who are members of undesignated terrorist organizations, unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization.

Updates to Asylum Officer Basic Training Course Lessons

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- Caselaw: How to Read a Case (*revised January 9, 2006*)
- Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution (*revised Draft January 24, 2006*)
- Interviewing Part II: Note-Taking (*revised January 9, 2006*)
- Decision Writing Part II: Legal Analysis (*revised January 9, 2006*)
- One-Year Filing Deadline (*revised February 4, 2006*)
- Female Asylum Applicants and Gender Related Claims (*revised Draft January 27, 2006*)
- The International Religious Freedom Act (IRFA) and Religious Persecution Claims (*revised March 3, 2006*)

As noted above, please contact Jedidah Hussey by e-mail at [REDACTED] or by phone [REDACTED] if you have any questions about the REAL ID Act and/or the most recent revisions to the AOBTC lesson plans.

(b)(6)