

## **AVOID THE NOID! HOW TO PREVENT ASYLUM OFFICE NOIDS**

*by David Cleveland, Cheri Attix, and Dree Collopy,*

*AILA Asylum and Refugee Liaison Committee*

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If an affirmative asylum applicant is in valid nonimmigrant status at the time of his or her interview before one of the U.S. Asylum Offices, and the asylum officer decides to deny the claim, the officer must first prepare and provide to the applicant a Notice of Intent to Deny (NOID), and allow the applicant to respond to the identified concerns.

In an effort to better understand the problems that commonly cause officers to issue NOIDs, the AILA Asylum and Refugee Committee posted a call for examples on AILA's website to gather NOIDs from all over the country. The committee received and studied 12 examples to see if there were any commonalities or mistakes that could help attorneys prepare future applications. The practice pointers below are meant to assist practitioners in identifying common reasons for NOID issuance so that those issues can be raised and dismissed early in the asylum application process, rather than through a response to a NOID. Overall, practitioners can "avoid the NOID" with a thorough I-589, detailed declaration, well-prepared interviewee, and attentive representative at the interview.

### *Trend #1: Applicant Was Not Confronted with Alleged Inconsistencies*

In one NOID an officer acknowledged that the applicant was not confronted with an inconsistency that arose during the interview, stating "[Y]ou were not confronted with this inconsistency during your interview; therefore you were not provided with an opportunity to explain." Such an acknowledgement in a NOID is rare. Many applicants are never directly confronted with discrepancies or inconsistencies and provided the opportunity to explain during the interview. More commonly, a NOID notes discrepancies and inconsistencies as grounds for a potential denial of the application without saying that the applicant was not confronted with this inconsistency in the interview.

An applicant for asylum should be confronted with any inconsistencies during the interview and given an opportunity to explain. According to the Asylum Officer Basic Training Course, asylum officers "must provide the applicant an opportunity during the interview to explain any discrepancy or inconsistency that is discovered."<sup>1</sup>

**PRACTICE POINTER #1:** First and foremost, avoid any inconsistencies by knowing everything in your client's record and by spending sufficient time preparing the I-589, the declaration, and the client for the interview. Inconsistencies are often the result of the officer misunderstanding something that the applicant cannot explain well or fully on the spot. If you

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<sup>1</sup> See Asylum Officer Basic Training Course Lesson Modules, "Interview Part 1: Overview of Nonadversarial Asylum Interview," September 14, 2006, at page 9, available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Interview%20Part-Overview-Nonadversarial-Asylum-Interview-31aug10.pdf>.

spend enough time working with the applicant, getting all of the details and writing them down, you can spot the things that do not appear to make sense and explore them more fully with the applicant. If you make these explanations a part of a detailed declaration, everything is pre-explained to the asylum officer before the interview even begins. Working on preparing a detailed declaration also forces the applicant to think through a sequential timeline of what happened first, next, last, and helps the applicant to avoid mixing up events—another source of perceived inconsistencies by adjudicators. No asylum officer has the luxury of spending hours and hours getting the story ironed out. Only the attorney can do that. Once the declaration is written out and clear, the applicant can better prepare for the interview by reviewing the declaration.

At the conclusion of the interview, when given the opportunity to provide any concluding remarks, practitioners should consider referencing the directive that applicants be provided the opportunity to explain any discrepancies or inconsistencies. Practitioners may then state the following in their closing remarks:

- “The applicant provided credible testimony, answering all questions without any discrepancies or inconsistencies. Are there any discrepancies or inconsistencies that you noted that we may address at this time?”
- OR: “I noticed that you asked a few follow-up questions to clarify some possible inconsistencies. I believe the applicant’s explanations were sufficient and that all apparent inconsistencies have been resolved. Are there any discrepancies or inconsistencies that still need to be resolved? We would be pleased to address any concerns at this time.”

### *Trend #2: Applicant Was Not Confronted with Failure to Provide Details*

Some officers noted in the NOID a general failure to provide details as a concern. However, only one officer acknowledged that the applicant was actually confronted with an alleged failure to provide details in response to a request. Many applicants are never put on notice that an asylum officer would like more details, nor are they given the opportunity to provide those desired details during the interview process itself. Instead, they receive a NOID requiring a response.

**PRACTICE POINTER #2:** Prior to the asylum interview, practitioners should educate their clients about the legal standards for asylum so their clients understand the importance of providing substantial detail in support of their claims. Sufficient detail helps clients establish their credibility and the reasonableness of their fear. Specifically, clients should be prepared to discuss the details of their protected characteristic. For example, if a claim is based on the individual’s membership in a political party, he or she should be able to explain the party’s history and goals, as well as the client’s day-to-day activities with the group, and any leadership positions he or she held. Overall, practitioners should stress to their clients that this is their opportunity to tell their story. No matter how difficult the subject matter may be for them to discuss, if they do not share important details about their claims, their applications likely will be denied.

This is another reason why it helps to prepare a detailed I-589 and declaration prior to the interview. Often, asylum officers fail to ask probing questions that will elicit the detail they seek during the interview. Sometimes, they just repeat the same question that they asked before (and which the applicant did not understand). When the applicant gives the same non-responsive or confused answer, the asylum officer may interpret this as a lack of sufficient detail or “evasiveness” on the part of the client. The only way to ensure that details get in front of the officer is to make sure they are included in the I-589 and declaration prior to the interview.

Before the interview, do a practice interview with the applicant and give him examples of the kinds of detail he should provide in his answers. Think of the types of vague questions an asylum officer might ask and discuss them with the applicant. Also, advise the applicant to pay attention to whether the officer keeps asking the same question or is looking confused or frustrated. Advise the applicant to ask questions in this circumstance: “I’m not sure I understood your question. Did you want to know X? Y?” or “Could you explain to me what you mean by X?” This will help clarify any confusion to ensure effective communication during the interview.

### *Trend #3: Assumption that a Return to the Applicant’s Home Country Means No Danger*

Another identified trend in the NOIDs that the committee received, was a tendency by asylum officers to assume that any return trip to the country of feared persecution meant that the applicant did not have a well-founded fear of return or that there was no true danger there. Based on the language of the NOIDs, it seems that the applicants were not asked relevant follow up questions about the reasons why they returned or whether they were safe when they were there. Instead, they were simply asked whether they returned, and then were issued NOIDs citing this issue as a concern.

**PRACTICE POINTER #3:** Again, it is very important to discuss this issue in detail with the applicant in preparing her application. If the applicant has a passport, review all of the stamps very thoroughly to look for any return trips to the home country. Sometimes, applicants routinely cross in and out of neighboring countries and forget to tell you about it as you are preparing their application. If you check the passport stamps carefully, you can catch this before it becomes a problem.

Question 4 of part C on the I-589 directly addresses this issue. If the applicant returned to her home country, be sure to answer this question fully on the I-589. A clear explanation in both the I-589 and declaration of the reasons for and circumstances of the return, as well as what, if anything, happened to the applicant while in her home country, will help the asylum officer understand the issue before the interview even begins.

Prior to the asylum interview, practitioners should educate their clients regarding the significance of this issue. Practitioners should prepare their clients to explain the reasons why they returned to their home countries, whether they returned reluctantly, how long they were there, what happened while they were there, what they feared would happen while they were there, whether they felt safe, whether they were able to live in the open or were in hiding, why they had to leave again, etc. Practitioners should emphasize the importance of getting these explanations on the

record during the interview and make sure that their clients understand that it is sometimes up to them to vocalize these explanations to the officer, rather than waiting for the officer's follow-up questions. If this is an issue in the client's application, the practitioner should raise and dismiss this issue during closing remarks. If the applicant did not provide testimony regarding this issue, the practitioner should ask that the officer provide the applicant with the opportunity to explain a return trip to his or her home country.

*Trend #4: Automatic Denial if the Applicant Failed to Seek Police Protection*

Another common concern cited by asylum officers in NOIDs was applicants' failure to seek police protection or assistance in response to apparent dangers in their home countries. Based on the language of the NOIDs, it seems that the applicants were given little prompting by the asylum officers to provide important explanations about why they did not seek police protection and why doing so may have been futile. Instead, many applicants received NOIDs citing this particular concern.

**PRACTICE POINTER #4:** Prior to the asylum interview, practitioners should educate their clients as to the significance of this issue. Practitioners should prepare their clients to explain the reasons why they did not seek police protection and why doing so may have been futile. Applicants should be familiar with and be prepared to explain police culture and conduct in their home country. This information should be incorporated into the applicant's written declaration. Practitioners should also conduct research and submit country conditions evidence and/or expert reports explaining the futility of seeking police protection in the clients' circumstances. During closing remarks, practitioners should cite to the evidence of record demonstrating the futility of seeking police protection. If the applicant did not provide testimony regarding this issue, the practitioner should ask that the officer provide the applicant with the opportunity to explain why he or she did not seek police protection.

*Trend #5: Assumption that Safety of Family Members Means Safety of the Applicant*

There was also a common assumption by asylum officers that if an applicant's family member was safe or unharmed, that meant the applicant also would be safe or unharmed. It did not seem that the officers had any information other than the fact that the applicants' family members were residing safely in the home countries. The officers then issued the NOIDs stating that this was evidence that the applicants did not have a well-founded fear of persecution in their home countries.

**PRACTICE POINTER #5:** Practitioners should discuss with their clients each family member the individual has who is still residing in his or her home country. Ask your clients if their family members are safe. If not, why not? Do they plan to flee as well? If they are safe, why are they safe when the applicant would not be? What differentiates the family member from the applicant? For example, maybe the applicant's mother is not a member of the relevant political party and is not involved in politics. Therefore, she was not targeted by the opposing political party. Or, perhaps the applicant's brother is a practicing Muslim who prays five times a day, and

therefore, is living in compliance with Sharia Law. Practitioners should explain to the applicant that asylum officers often ask questions about family members who are still residing in the home country, specifically focusing on whether those family members are safe. Any and all circumstances that differentiate the applicant's family members from the applicant should be explained in the declaration and emphasized in response to questions about family members at the interview. Are the family members actually in danger? Do they plan to flee? Are they able to live safely because they have different characteristics from the applicant that are relevant to the applicant's fears? During closing remarks, practitioners should be prepared to emphasize these facts to the asylum officer and point the officer's attention to supporting documentation that has been submitted.

Trend #6: Failure to Acknowledge that a Non-Credible Applicant May be Granted Asylum

Many of the NOIDs cited inconsistencies and discrepancies as cause for concern and potential denial of the applications. In citing these credibility concerns, two officers described the additional documents submitted and indicated that they had read and considered the documents, before stating that said documents "do not overcome your non-credible testimony." Yet, many other officers deemed the applications inconsistent and not credible without mentioning the other evidence of record at all. These officers failed to acknowledge that an applicant who does not testify credibly may nonetheless be granted asylum. As the U.S. Court of Appeals for the Fourth Circuit stated in *Lin v. Holder*, "Although adverse credibility determinations are generally fatal to an asylum claim, an applicant can still prevail if she can prove actual past persecution through independent evidence." See *Lin v. Holder*, 736 F.3d 343, 354 (4<sup>th</sup> Cir. 2013) (citing *Camara v. Ashcroft*, 378 F.3d 361, 369 (4<sup>th</sup> Cir. 2004)).

Similarly, in a case arising in the Eleventh Circuit, the applicant presented medical reports, photographs, and other documentary evidence. The applicant's oral testimony was inconsistent, so the Immigration Judge deemed him not credible and denied asylum, without considering and evaluating the documentary evidence. The Eleventh Circuit reversed and remanded, stating, "an adverse credibility determination does not alleviate the IJ's duty to consider other evidence produced by an asylum applicant," and that "the failure to consider [applicant's] corroborating evidence was error." *Olivares v. U.S. Att'y Gen.*, 2013 U.S. App. LEXIS 23511, \*5 (11<sup>th</sup> Cir. 2013) (quoting *Forgue v. U.S. Att'y Gen.*, 401 F.3d 1282, 1287 (11<sup>th</sup> Cir. 2005)). See also, *Al-Harbi v. INS*, 242 F.3d 882 (9<sup>th</sup> Cir. 2001); *Zahedi v. INS*, 222 F.3d 1157 (9<sup>th</sup> Cir. 2000).

**PRACTICE POINTER #6:** Obviously, it is most important for practitioners to ensure that their clients are ready and able to testify credibly about their asylum claims. However, these cases demonstrate that, even with inconsistencies, if the documentary evidence on its own demonstrates past persecution, the applicant may still be granted asylum. Thus, practitioners should prepare substantial independent documentation that corroborates their clients' claims. There may be any number of reasons why an honest asylum applicant may have difficulty testifying consistently (effects of trauma, lengthy time lapses between the events in question and the application, the number of times they must recount their stories, cultural differences, etc.). Practitioners can protect their clients by preparing and submitting enough independent evidence of their clients' claims that credible testimony may not even be needed. Please note that this

evidence must pertain to the applicant specifically; general country conditions evidence will almost never be sufficient on its own.

Trend #7: Assumption that if Testimony is Not 100% Consistent, the Applicant is Not Credible

Again, inconsistencies and discrepancies seemed to be the main reason for NOID issuance by asylum officers. In the case of an applicant who had suffered through several terrible events, including the burning of his house, murder of his sister, murder of his brother, and his own severe beating and detention, the officer noted that the applicant was inconsistent regarding only one of these events. Since that portion of the applicant's testimony was not credible, the officer indicated that the entire claim would be denied due to lack of credibility. This officer ignored the BIA and circuit court case law to the contrary. In the same way that an entirely non-credible applicant may be granted asylum, so, too, may a partially-credible applicant be granted relief.

Multiple courts have made "split-credibility" findings. For example, the Board of Immigration Appeals found that an applicant was credible about the forced abortions she suffered, but was not truthful about her activities in the United States. *See Matter of T-Z-*, 24 I&N Dec. 163, 165 (BIA 2007). The Third Circuit found an applicant credible about threats received by FARC, but not about the abuse she suffered at the hands of her brother. *See Serna-Garcia v. Att'y Gen.*, 346 Fed. Appx. 778 (3d Cir. 2009). Additionally, in *Lin-Jian v. Gonzales*, the Immigration Judge ruled that the applicant's testimony about future persecution was not credible and denied asylum. The Fourth Circuit reversed and remanded, reminding the Immigration Judge that a "determination that [testimony about future harm] was not believable does not defeat an asylum claim where there is also evidence of past persecution." *Lin-Jian v. Gonzales*, 489 F.3d 182, 191 (4<sup>th</sup> Cir. 2007).

**PRACTICE POINTER #7:** Under the REAL ID Act, the adjudicator has wide latitude to consider even immaterial inconsistencies in a credibility determination. Thus, practitioners should make sure that their clients are ready to testify credibly regarding all aspects of their claims. The most helpful way to prepare the applicant in this regard is to spend enough time with the applicant to prepare a detailed I-589 and declaration, with all facts clearly and consistently stated. However, if issues of partial credibility arise, there is some useful case law that may be cited to support the notion that 100% credibility is not required.

Trend #8: Failure to Consider Future Persecution

In the NOIDS received by the committee, several contained detailed discussions of inconsistencies regarding claims of past persecution, but did not mention the possibility of future persecution. Case law tells us that even in cases where there is no past persecution, an individual may still be granted asylum if he or she can establish a well-founded fear of future persecution. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

In *Matter of Mogharrabi*, the BIA found that, even though Mr. Mogharrabi suffered no physical harm and no past persecution, his political activities in the United States had yielded a well-

founded fear of return to his home country. Mr. Mogharrabi was granted asylum, and this BIA decision is now the capstone decision regarding well-founded fear. Various U.S. Circuit Courts of Appeals have continued to remand asylum cases where the Immigration Judge and BIA failed to make findings as to future persecution. See *Sharma v. Holder*, 729 F.3d 407 (5<sup>th</sup> Cir. 2013); *Nesterenko v. Att’y Gen.* 518 Fed. Appx. 732, 740 (11<sup>th</sup> Cir. 2013).

**PRACTICE POINTER #8:** Asylum officers usually cite *Matter of Mogharrabi* for its four-part test for well-founded fear, rather than the underlying facts of the case. Thus, if the applicant is a “refugee *sur place*,” be sure the application and declaration clearly explain why it is reasonable to assume that the home government would become aware of her activities outside the country.

Practitioners should prepare and submit substantial evidence demonstrating that the applicant has a well-founded fear of future persecution, even if that applicant clearly suffered past persecution. Although there is a rebuttable presumption of a well-founded fear of future persecution once past persecution has been established, there is always the potential that the applicant will not testify convincingly about the past persecution that he or she suffered. Thus, practitioners should not discount the importance of demonstrating future persecution on an independent basis as well.

During the interview, practitioners should pay careful attention if the questions are focused solely on past persecution. If the asylum officer fails to ask questions about future persecution as well, practitioners should raise this issue during closing remarks and ask that it be addressed.

#### *Trend #9: Conclusions Based on Unfounded Speculation*

In several of the NOIDs, the asylum officers based their conclusions on unfounded speculations, rather than reasonable inferences supported by evidence. A common sign of this trend was the officers’ use of “may” throughout the NOID. For example, “You were a member of Saddam Hussein’s army; so you may have been a persecutor of others.” Such speculation is not grounds for denial of an asylum application. Asylum officers should make specific factual findings, provide detailed discussions of the facts and the law, and come to reasoned conclusions based on the testimony and evidence considered.

**PRACTICE POINTER #9:** In preparing clients for their asylum interviews, practitioners should ensure that they understand the importance of providing substantial detail in response to asylum officers’ questions. Not only will such detail help them to establish their credibility and the reasonableness of their fear, it will also not leave the door open for the officer to complete the answer with his or her own speculations. During asylum interviews, practitioners should pay careful attention to the officer’s questions and follow-up questions (or lack thereof). If there are potential areas where the officer may be concerned, practitioners should make sure that all concerns have been fully addressed before ending the interview.

## CONCLUSION

Upon reviewing these 12 NOIDs, it is obvious that officers are under extreme time pressure when deciding asylum applications. They typically do not have the luxury to spend as much time with each applicant as they would like. Consequently, if the application is poorly prepared and/or the applicant is not well-prepared for the interview, the chance of a misunderstanding or important aspects of the case being missed increases. Overall, it is our duty as practitioners to make the adjudication process as easy as possible for the asylum officer, especially given that the burden of proof falls on the applicant. We hope that these practice pointers will encourage and help practitioners to be extra diligent in preparing their clients for their asylum interviews and in ensuring that all relevant information has been discussed in detail both in the I-589 and declaration, and on the record during the asylum interviews themselves.