

## Introduction to Asylum Law



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## Fundamentals of Asylum Law

- Basis for US Asylum Law
- Definition of a Refugee
- Persecution
- Nexus Requirement
- Five Grounds
- Bars to Asylum
- Withholding of Removal
- Convention Against Torture
- Affirmative Cases
- Defensive Cases



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## Basis for US Asylum Law

- UN Convention Relating to Status of Refugees (1951)
  - U.S. signed on 1968
- UN Protocol Relating to the Status of Refugees (1967)
- Refugee Act (1980)
  - Asylum= INA sec. 208
- UN Convention Against Torture (CAT) (1986)
  - US adopted 1994
- Illegal Immigration and Immigrant Responsibility Act (1996)
- Real ID Act (2005)



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### Definition of a Refugee

- INA §101(a)(42): any person who is outside of any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.
- In 1997, Congress added language classifying forced participation in or resistance to population control programs persecution on account of political opinion



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### Persecution in General

- Not defined; determined on a case by case basis
- The alien has characteristics the persecutor seeks to overcome through punishment
- Persecutor is aware or could potentially be aware of the alien's possession of these characteristics
- Persecutor has the capability of punishing the alien and the inclination to do so
- No subjective intent to harm or punish is required

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### Persecution in General

- Agent of persecution: Harm must be caused by the government or by persons/groups the government chooses not to or cannot control
- Criminal prosecution may be considered persecution if the law itself is illegitimate, punishment is excessive or a pretext and it is imposed without judicial process.
- Individual targeting required by most courts; "generally harsh conditions shared by many other persons" does not establish persecution

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### Forms of Persecution

- Physical violence
- Threats
- Detention
- Mental, emotional or psychological harm
  - Physical harm is not required for a determination of persecution.
- Economic harm
- Discrimination and harassment
  - Severe and pervasive measures
  - Asylum claim can be supported by the cumulative effect of harms which individually may not be enough to establish persecution




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### Past Persecution

- Alternative to establishing a well-founded fear
- Creates a rebuttable presumption of a well founded fear of persecution in the future
- Once the presumption is created, burden of proof to overcome shifts to DHS
- DHS must show a reasonable internal relocation alternative or changed conditions within the country in question




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### Well-founded Fear of Future Persecution

- Objective component
  - Reasonable person in applicant's circumstances would fear persecution
  - Satisfied if as little as 10% chance of persecution
  - Established through documentary evidence such as country condition reports and convincing credible testimony
- Subjective component
  - Applicant must establish through his or her testimony that he or she has a fear of persecution
- Standard of Fear
  - 10% chance
  - Fear is well-founded if a reasonable person in the same circumstances would fear persecution

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## Establishing Well Founded

- Matter of Acosta established 4 elements which applicant must show in order to establish a well-founded fear of persecution
- Applicant has a belief or characteristic a persecutor seeks to overcome.
- The persecutor is already aware, or could become aware that the applicant has such belief or characteristic.
- The persecutor has the capability to persecute the applicant.
- The persecutor has the inclination to persecute the applicant.

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## Nexus Requirement

- On account of...
- Applicant must show some evidence that the harm he or she fears is "on account of" one of the five enumerated grounds
- Evidence can be either direct or circumstantial
- Mixed Motives: As long as persecutor's motive is in part based on one of the five enumerated grounds and that ground is at least one central reason for the persecution, applicant is eligible for asylum.
- Advocates should explore all grounds with their client in constructing an asylum petition.

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## Five Enumerated Grounds

- **Race**
  - Defined by UNHCR handbook as "in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage"
- **Religion**
  - Not defined specifically
  - Prohibition of membership, worship, instruction or proselytizing can be persecution
- **Nationality**
  - Can overlap with race
  - Includes both citizenship and "membership of an ethnic or linguistic group"
- **Political Opinion**
  - Overtly expressed opinions
  - Neutrality can also be considered a political opinion
- **Membership in a particular social group**
  - Particularity
  - Social Distinction




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### Bars to Asylum

- One Year Filing Deadline
- Firm Resettlement/Safe Third Country
- Frivolous Finding
- Previous Denial
- Past Wrong-doing Bars
  - Crimes
  - Persecution of Others
- National Security Threat
- Terrorism/Terrorist Support

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### One Year Filing Deadline



- Applicant must file within 1 year of entry into the US
- Exceptions
  - Changed circumstances or
  - Extraordinary circumstances such as serious illness
    - Unaccompanied minor
    - Mental incapacity
    - Ineffective assistance of counsel
    - Applied for Temporary Protection within that 1 year and maintained that status

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### Firm Resettlement/Safe Third Country

- Firmly resettled: Applicant received an offer of permanent residence status in another country before entering the US
- Not firmly resettled if applicant did not remain there any longer than necessary, no "significant ties" were established, and entry into the third country was a necessary part of the applicant's escape from persecution
- Safe Third Country: DHS may remove asylum applicants to other countries if there is an agreement with that country. Canada is the only country which the US has such an agreement with




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### Frivolous Finding and Previous Denial Bar

- If previously application for asylum was denied, barred from applying again unless circumstances have changed
- If applicant is found to have made a frivolous application for asylum, he or she will be permanently ineligible for any benefits under INA
  - Very important

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### Past Wrong-doing Bars



- Persecution of others
- Particularly serious crime
  - Includes conviction of an aggravated felony
- Must be convicted in the U.S.
- Particularly serious includes
  - All aggravated felonies (INA 101(a)(43)), which paradoxically includes many misdemeanors
  - Other crimes the adjudicator determines are particularly serious. Fact intensive, but usually applied to violent or dangerous crimes.

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### Past Wrong-doings Bar (cont)

- Serious, non-political crime outside the US
  - Serious reasons to believe (equivalent to probable cause according to some courts)
  - Applicant committed a serious crime (not defined, but safe to assume includes at least crimes involving violence and drug trafficking)
  - Unless "the political aspects of the offense outweigh its common-law character" under Matter of McMullen, 19 I&N Dec. 90 (BIA 1984)
  - Committed outside the U.S.
- Reasonably regarded as a security risk to the US

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### Terrorism/Material Support

- Bars
- Engaged in terrorist activity, reason to believe likely to engage in it, or incited it
- Representative of terrorist organization or of a political, social, or other group that endorses or espouses terrorist activity—unless AG determines in his unreviewable discretion there are no reasonable grounds to believe applicant is a danger to U.S.
- Member of designated terrorist group
- Member of undesignated terrorist group that engages in terrorist activity— unless applicant can prove she did not know, and should not reasonably have known, of the terrorist activities.
- Material Support defined:
  - Commit or incite to commit terrorist activity
  - Solicit funds or things of value for terrorist organization or activity
  - Solicit members or participation

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### Material Support/ Terrorism

- Material support (very broadly defined) for
  - Terrorist activity
  - Designated terrorist organization
  - Undesignated (unless no reason to know of activity)
  - Individual who actor has reason to know has committed or plans to commit terrorist activity
- Terrorist Activity defined:
  - Unlawful hijacking, sabotage, assassination
  - Use of biological, chemical, or nuclear agent
  - Use of firearm, explosive, or other weapon or dangerous device for any purpose *other than for mere personal monetary gain* OR
  - Threat, attempt, or conspiracy to do any of the above

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### Withholding of Removal

- INA sec. 241(b)(3)
- Application for asylum is also considered an application for withholding of removal
- Heightened burden of proof
  - “Clear probability” that life or freedom would be threatened based on one of the five grounds
  - More likely than not or greater than 50% chance; higher standard than for well-founded fear
- Advantages
  - If elements are established, Court **must** grant relief
  - No filing deadline
  - Those with criminal convictions may still be eligible
- Disadvantages
  - Does not lead to permanent residence
  - Family reunification is not possible

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## Convention Against Torture

- Application for asylum is also considered an application for protection under the Convention against Torture
- "No State Party shall expel, return, or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"
- Def. of Torture: "Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."




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## Convention Against Torture

- Relief Under CAT
  - Withholding of Removal
  - Deferral of Removal: For claimants who are subject to one of the mandatory bars for asylum seekers
    - Statutory basis 8 CFR 208.18
- Advantages
  - No filing deadline
  - Overcomes bars to asylum for persecutors and those convicted of serious crimes
  - No nexus requirement
- Disadvantages
  - Does not lead to permanent residence
  - Does not allow for family reunification

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## What Bars Relief?

	Bars Asylum?	Bars Withholding/Withholding under CAT?	Bars Deferral under CAT?
One-Year Filing Deadline - INA § 208(a)(2)(B)	Yes	No	No
Firm Resettlement - INA § 208(b)(2)(A)(vi)	Yes	No	No
Persecutor - INA § 208(b)(2)(A)(i)	Yes	Yes	No
Terrorism - INA § 208(b)(2)(A)(v)	Yes	Yes	No
Particularly Serious Crime - INA § 208(b)(2)(A)(ii)	Yes	Yes, but PSC definition for withholding differs from definition for asylum	No
Conviction of an Aggravated Felony as Defined in INA § 101(a)(43)	Yes - is a PSC	Yes, if the aggregate term of imprisonment sentenced was at least five years it is a PSC. But other crimes may also be found to constitute a PSC, notwithstanding the prison sentence.	No
Serious Non-Political Crime Outside the U.S. - INA § 208(b)(2)(A)(iii)	Yes	Yes	No
Danger to the Security of the U.S. - INA § 208(b)(2)(A)(iv)	Yes	Yes	No

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Relief Sought	Definitions	Standards	Benefits/Limitations
Asylum	Persecution or well-founded fear of persecution based on 5 grounds	Reasonable Possibility (10% chance or even less ) See <i>INS v. Cardoza-Fonseca</i>	<ul style="list-style-type: none"> <li>• Derivative beneficiaries</li> <li>• Path to LPR (can adjust one year from the date of grant)</li> </ul>
Withholding of Removal	Threat to life or freedom based on 5 grounds	Clear probability 51% or more	<ul style="list-style-type: none"> <li>• No derivative beneficiaries</li> <li>• No path to LPR</li> <li>• Country-specific protection</li> </ul>
CAT	Face danger of being subjected to torture	Clear Probability	<ul style="list-style-type: none"> <li>• Only protection for individuals with serious crimes</li> <li>• Doesn't have to be based on 5 grounds</li> <li>• No beneficiaries</li> <li>• No path to LPR</li> <li>• Country-specific protection</li> <li>• Revocation of status is easier</li> </ul>

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### Affirmative Cases

- Filed with USCIS
- Non-adversarial with Asylum Officer making decision based upon the credibility of the interview and filed documents
- Asylum officers are specially trained USCIS employees that are suppose to have advanced knowledge of asylum claims
- Quicker turn-around in decision than through court

Difficulties with Affirmative Cases

- Asylum officers will typically grant obvious asylum claims with no gray area questions, all other cases, especially those deemed with credibility issues are referred to the Immigration court
- Applicant provides personal interpreter
- No record to appeal to in the future
- Cases dependent on the Asylum officer, if they are aggressively seeking credibility issues or in a good mood.

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### Defensive Cases

- Asylum claims before an Immigration Court are in defense of removability/deportability
- Defensive cases are more adversarial with a government attorney and in court-room setting
- Immigration courts have two calendars: detained and non-detained




Difficulties with Defensive Cases

- Longer to obtain a decision
- If client is detained, more difficult to meet and speak with client making application preparation more difficult
- Assigned judge sets tone for the hearing
- May have multiple hearing dates prolonging merits hearing

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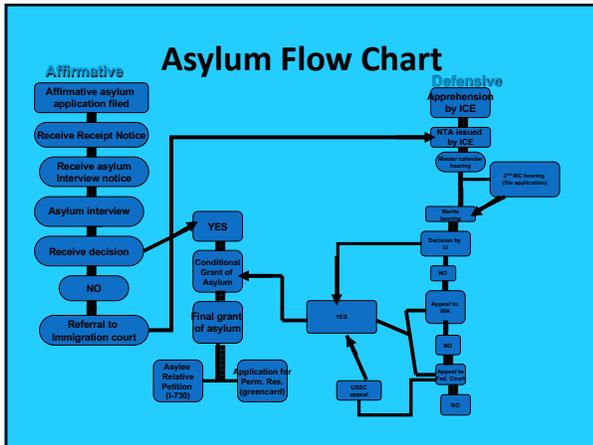
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### Filing Your Appearance in Court

E-28 appearance form: file as soon as possible

- Can file electronically once registered or in paper format

**E-Registry**

- All attorneys appearing before the immigration court and Board of Immigration Appeals (BIA) MUST register with the Executive Office for Immigration Review's E-Registry system in order to appear before the Court or BIA.
- E-Registry contains both an electronic and an in-person identification component.
- See <http://www.justice.gov/eoir/engage/eRegistration.htm> for more information.

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### Drafting the Affidavit

- Credibility is the most important part of any asylum case
- Can be based on demeanor, candor, inherent plausibility, consistency of statements (made any time/any circumstance)
- The adjudicator's credibility determination will be based primarily on the client's affidavit and testimony

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### Corroboration

- Can be required under the REAL ID Act “unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”
- But, “[t]he testimony of the application, if credible, may be sufficient to sustain the burden of proof without corroboration.” 8 C.F.R. §1208.13(a)
- Corroborate each asylum element OR show why your client cannot reasonably obtain corroboration.

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### Work Authorization

“Clock” begins to run when the asylum application is filed (received)

- By USCIS for asylum office cases (affirmative asylum)
- By the immigration court for court cases (defensive)

Apply for an Employment Authorization Document (EAD) at 150 days

- Can be approved and issued on 180<sup>th</sup> day and not before.

Clock stops if the applicant causes a delay

- Declines an expedited hearing date
- Requests a continuance or a change of venue

Clock begins to run again when delay has stopped

- Some uncertainty about when delay has technically stopped for some processes

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### Authority for Expedited Removal

• The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created expedited removal.

• DHS has the authority to apply at Port of Entry (POE) or place other than a POE to those inadmissible for misrepresentations and false claims to U.S. citizenship or lack of valid entry documents who have not been admitted or paroled, and cannot show that they have been continuously present in the United States for two or more years. INA § 235(b)(1)(A)(i)-(iii).

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## How to Avoid Expedited Removal

- An expression of fear to the DHS official should prompt an interview by an Asylum Officer (AO) to assess credible or reasonable fear. 8 C.F.R. § 235.3(b)(4)
- If AO determines that the individual has credible or reasonable fear, the expedited removal order is vacated and the non-citizen is placed in INA § 240 proceedings before the Immigration Judge.
- If AO determines no fear, the IJ may review this decision. 8 C.F.R. § 208.30(g); 8 C.F.R. § 208.31(g) (called an "IJ Review")
- Negative findings can be reviewed! 8 CFR § 1208.30(g)(2)(A)

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## Credible Fear or Reasonable Fear?

### CFI Applies:

If the person is subject to expedited removal, does not have a prior order of removal, and expresses fear, a DHS officer should refer the person to an AO for a CFI.

### RFI Applies:

If the person was previously removed or voluntarily leaves after getting an order and then re-enters the U.S. illegally, a DHS officer can reinstate the prior order of removal. INA § 241(a)(1)(5). **But** if the person expresses fear, a DHS officer should refer the person to an AO for an RFI.

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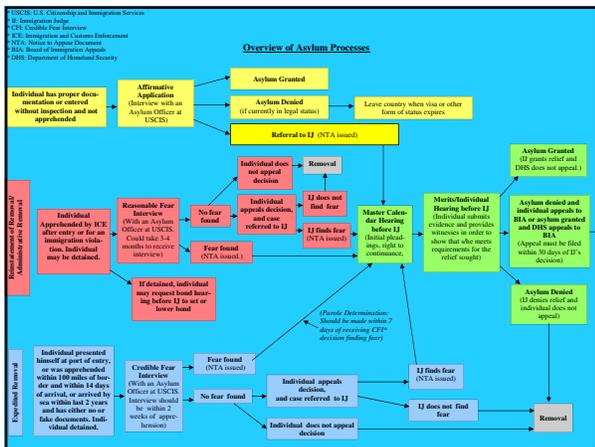
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