

Chapter 8

Protection-Based Relief: Forging a Path to Permanent Status

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§ 8.1 GENERAL INFORMATION

Several sections of the United States immigration laws provide a means for clients to remain in the United States indefinitely, or temporarily with the possibility of eventual permanency in the case of U/T visas and special immigration juvenile status, for purposes of protecting the client from harm. The types of harm and the criteria to determine whether protection will be afforded vary. The initial benefits, if relief is granted, vary as well, but all of the forms of relief presented in this chapter ultimately lead to an opportunity to seek an indefinite, if not permanent status in the United States.

This chapter provides an overview of the basic forms of protection-based relief: asylum, withholding of removal, relief under the Convention Against Torture, U Nonimmigrant Status, and T Nonimmigrant Status, and special immigrant juvenile status.

As part of an initial consultation with a potential client, the lawyer should always screen for protection-based relief. Clients may not be intuitively aware that past harms or future fears would allow them an opportunity to remain in the United States. Moreover, rapidly shifting policies on protection-based relief require careful consideration before pursuing a claim. The past few years have seen sweeping changes to policies and regulations, often followed by intense litigation efforts to minimize their impact. Below are a few of the major changes impacting asylum-seekers.

- **Asylum Regulation Overhaul:** On Oct. 20, 2020, the Trump Administration issued final regulations designed to eviscerate the United States' asylum system. The rules, set to go in effect on Nov. 20, 2020, are the latest attempt to undermine the right to seek and enjoy asylum from persecution guaranteed in federal statute and international treaty.
- **Changes to Work Permit Eligibility and Processing:** New regulations impacting asylum seekers' access to an Employment Authorization Documents (EAD) went into effect on August 21, 2020 and August 25, 2020, though several provisions have been partially enjoined through litigation in *Casa de Maryland Inc. v. Wolf*, Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Key changes include dropping the 30-day processing time for initial EAD filings and limiting access to work permits for those who do not meet the one-year deadline, enter the U.S. illegally, and expand limitations for those with criminal histories.
- **COVID Bars to Asylum:** Proposed regulations were released in July 2020 to expand the ability of Department of Homeland Security (DHS) to prevent access to the asylum process during pandemics. The rule proposes to allow Customs and Border Patrol (CBP) to consider emergency public health concerns based on communicable disease as a bar to asylum. Specifically, it would allow CBP to bar asylum seekers whose entry they determine pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States, pose a significant danger to the security of the United States.
- **Safe Third Country Bar:** In July 2019, the United States implemented a new regulation requiring any refugee seeking asylum at the southern U.S. border who has passed through another country to have first asked for and been denied asylum in that country before seeking asylum in the United States. This policy, in effect, removes asylum as an option for individuals from Honduras, El Salvador, Guatemala, and others who are fleeing violence and persecution in their home countries and seeking safety in the U.S. The United States Supreme Court ruled in September 2019 that the proposed DHS rule may stand while being litigated in U.S. courts. On June 30, Judge Timothy Kelly of the U.S. District Court for the

District of Columbia struck down President Trump's second asylum ban, ending a restrictive policy that had virtually halted asylum at the southern border for the last year. The Ninth Circuit affirmed a preliminary injunction in the *East Bay* case in July 2020.

The Immigration Court and Asylum Office have initiated new policies to maximize efficiency in processing claims. Asylum claims filed after January 2018 can expect priority scheduling for interviews. See U.S. Citizenship and Immigration Services, *USCIS to Take Action to Address Asylum Backlog* (Jan. 21, 2018), available at <www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog>. The Director of the Executive Office for Immigration Review has instituted performance measures for immigration judges based on case completion times. See James R. McHenry, *Memo: Case Priorities and Immigration Court Performance Measure*, (Jan. 17, 2018), available at <www.justice.gov/eoir/page/file/1026721/download>. This will speed up the processing times for asylum claims filed following a credible fear interview. It will also impact the ability of respondents to continue a removal case while awaiting a decision on a benefit over which USCIS has jurisdiction, including U visas, T visas, and Special Immigrant Juvenile Status.

§ 8.2 ASYLUM, WITHHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

Asylum, withholding of removal, and relief under the Convention Against Torture (CAT) are related forms of relief designed to protect individuals who fear returning to their country of origin due to persecution or torture. Each form of relief has separate elements to satisfy the legal standard, but the lawyer can prepare a request for all three forms of relief simultaneously using the application Form I-589 available on the USCIS website, <www.uscis.gov>.

The lawyer should keep in mind that asylum can be granted by USCIS asylum officers (Department of Homeland Security) or the immigration judge (Department of Justice), while withholding of removal and CAT relief can only be granted by the immigration judge.

Asylum offers the most protection of these three forms of relief. It is the only one that creates a path to permanent residence, reunification with some family members, and the opportunity to travel outside of the United States without forfeiting the protection offered under the immigration laws. Not all clients will be eligible for asylum, however, so it is important that the lawyer evaluate and pursue withholding of removal and CAT as alternative forms of relief if colorable claims exist.



PRACTICE TIP

Although the legal standards governing eligibility for asylum and refugee status are the same, refugee status can only be sought by individuals who are outside of the U.S. at the time they file their application for protection. See U.S. Citizenship and Immigration Services, *Flow Chart: United States Refugee Admissions Program*, available at <www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27I%20Ops/USRAP_FlowChart.pdf> (explaining how refugees apply for status and the process they undergo prior to being admitted to the United States). In contrast, the asylum process exists to permit individuals already present in the U.S. or who present at a U.S. port of entry seeking protection, to apply for that protection from inside the United States. See INA § 208(a).

A. Asylum Eligibility Requirements

In order to qualify for asylum, the client must be in the U.S. (or at a U.S. border) and have a well-founded fear of persecution in the client's country of nationality or last habitual residence on account of their race, religion, nationality, membership in a particular social group, or political opinion. INA § 208(b)(1)(A).



CAVEAT

The number of refugees that the United States will agree to admit each year is decided by the President in consultation with Congress. INA § 207(a)(2). The Trump Administration has reduced the number of refugees admitted to the United States each year since taking office. See Presidential Memorandum, *Presidential Determination on Refugee Admissions for Fiscal Year 2021* (Oct. 27, 2020), available at <www.whitehouse.gov/presidential-actions/presidential-determination-refugee-admissions-fiscal-year-2021/>; Michael D. Shear and Zolan Kano-Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N.Y. TIMES, Sept. 26, 2019, available at <www.nytimes.com/2019/09/26/us/politics/trump-refugees.html> (describing how the administration not only halved the refugee cap from last year's numbers, but also has restricted refugees admitted to a few very specific categories that further restricts access to refugee protection to broad groups of individuals who may seek protection from persecution). However, the cap on refugee admissions does not impact the number of individuals who can receive asylum. Unlike refugees, there is no cap on the number of individuals who can be granted asylum in the United States.

1. Persecution

Neither the Immigration and Nationality Act (INA) nor accompanying regulations define persecution. The Board of Immigration Appeals (BIA) and federal circuit courts have broadly defined “persecution” as a “threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). Another definition is “the infliction or threat of death, torture, or injury to one’s person or freedom” on account of one of the five statutory grounds (race, religion, nationality, political opinion, and social group). *Ngure v. Ashcroft*, 367 F.3d 975, 990 (8th Cir. 2004). Physical abuse that poses a threat to life or freedom can generally constitute persecution. See, e.g., *Bracic v. Holder*, 603 F.3d 1027, 1035–36 (8th Cir. 2010) (overturning an IJ’s holding that past persecution was not present, holding that any reasonable fact finder would find persecution had occurred where an asylum applicant was beaten until he lost consciousness on one occasion). Discrimination, low level harassment, and intimidation are generally not considered to rise to the level of persecution; however, a series of incidents which individually might not meet the standard could meet the standard when considered in the aggregate. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998). Economic harms may also be considered persecution if they constitute a threat to life or freedom. *Mirisawo v. Holder*, 599 F. 3d 391 (4th Cir. 2010). Death threats are a form of persecution. *Sholla v. Gonzales*, 492 F.3d 946, 952 (8th Cir. 2007) (“this country’s asylum statute would be quite hollow indeed if our definition of persecution required Sholla to wait for his persecutors to finally carry out their death threats before Sholla could seek refuge here. Our accepted definition of persecution is far less demanding, and the numerous [death threats] that Sholla describes fall squarely within it”). “Threats

alone constitute persecution . . . when the threats are so menacing as to cause significant actual suffering or harm.” *La v. Holder*, 701 F.3d 566, 571 (8th Cir. 2012).

2. Government and Non-Government Persecutors

In order to qualify for asylum, the agent of persecution must either be the government or a non-government agent that the government either cannot or will not control. Non-government agents may include groups such as paramilitary forces or organized crime groups. They may also include families, clans, or society-at-large.

Numerous BIA and Eighth Circuit cases containing helpful analysis demonstrating that an applicant persecuted by a private group or individual may demonstrate their eligibility for asylum based on the government’s inability and/or unwillingness to protect the applicant from that private actor persecutor. Below, the authors have included just a few prominent examples, but many more cases from both the BIA and the circuit court are available recognizing this point.

In *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013), the court found that the Kenyan government was unable or unwilling to control the Mungiki group, where the record contained numerous reports detailing the murders of defectors and formation of Mungiki death squads. Reports also suggested the Kenyan government was complicit in attacks by Mungiki, and that the Kenyan police force was widely corrupt, with some members bribed by Mungiki or were Mungiki members themselves.

In *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007), the Eighth Circuit found that a Somali applicant who feared being subjected to female genital mutilation by members of her clan had met her burden of proof to show eligibility for asylum.

In *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), the BIA found that a young woman, a member of the Tchamba-Kunsuntu Tribe of northern Togo who resisted forced female genital mutilation and forced marriage from members of her community, qualified for asylum. The applicant was forced by her family into a polygamous marriage that required her to undergo severe genital mutilation before the marriage could be consummated. According to her testimony, upon return to Togo, the police would return her to her husband, a prominent member of the police. Upon examining evidence in the case, including reports regarding country conditions, the court found that in Togo, women remain without effective legal recourse “and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice.” *Kasinga*, 21 I&N Dec. at 361–62. In so holding, the BIA emphasized the Togo President’s poor human rights record and that government forces have been known to engage in human rights abuses.

In re S-A-, 22 I&N Dec. 1328 (BIA 2000) is one example of the clear provision from both the BIA and numerous circuit courts that an applicant may succeed in showing lack of government protection if the applicant can demonstrate that seeking government protection would be futile, under the facts and circumstances of the particular case. In the *S-A-* decision, the BIA considered the specific facts of the case to determine whether reasonable protection was available to the applicant. In this case, a young Muslim woman in Morocco consistently experienced physical and emotional abuse from her father, who followed strict Islamic beliefs. The young woman, however, adhered to far more liberal beliefs. Although the young woman never sought protection from the police, the court found that in the Moroccan society such efforts would have proven futile and even dangerous. The court considered various reports on the country conditions that demonstrated the law in Morocco was skewed against women and violence against women was commonplace without legal remedies available to survivors.

In the BIA decision *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998), the court found that the applicant had showed that the government was unable or unwilling to control his anti-Semite persecutors, even though the government’s official position condemned anti-Semitism. In this case, a Jewish resident of Ukraine was repeatedly subjected to physical assaults, vandalism to his property, and humiliation of his son at school by Ukrainian nationalists. Counsel for the DHS argued that the violence was not government-directed or condoned and that country conditions demonstrated that anti-Semitism ceased to be a government policy. Both the immigration judge and the BIA on appeal found to the contrary. They noted that the police in Ukraine did nothing to assist the persecuted individual beyond filing a report. The BIA also gave significant weight to the evidence of country conditions demonstrating that local officials take no action against those who foment ethnic hatred. The BIA made its findings despite reports that the Ukrainian government was officially speaking out against anti-Semitism. Based on the country conditions in the record, as well as the experience of the particular applicant, the BIA found that the government had failed to rebut the presumption of a well-founded fear or persecution based on prior persecution suffered by the asylum seeker.

Matter of K-S-E-, 27 I&N Dec. 818, 823 (BIA 2020) contains unhelpful analysis of firm resettlement, but does reaffirm the standard governing inability and unwillingness to control the persecutor as permitting applicants to show that a non-government individual or entity could have persecuted the applicant. The decision states that “[s]ince the respondent fears private actors, he must establish that the Government is unable or unwilling to control them.” *Matter of K-S-E-*, 27 I&N Dec. at 823. The decision acknowledges that the respondent could have shown lack of government protection either by showing that the government was unable or unwilling to control his persecutor, or that it would have been futile to report the crime to the government. *Id.* Although the Board found the record presented by the applicant in *K-S-E-* insufficient to show lack of government protection, it is important that the BIA correctly reaffirms the standard governing inability/unwillingness to control a private actor, given the confusion created by 2018 Attorney General decision *Matter of A-B-*, discussed further below.

A 2018 decision by the Attorney General caused confusion regarding the analysis of the “government control” aspect of the refugee definition, stating in the dicta of the *Matter of A-B-* decision that an applicant “seeking to establish persecution based on violent conduct of a private actor must show more than difficulty . . . controlling private behavior. . . . The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.” *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (internal citations omitted). Yet, the case the Attorney General relied upon in using the above “complete helplessness” language—*Galina v. I.N.S.*, 213 F.3d 955, 958 (7th Cir. 2001)—suggests that the language in the dicta in *Matter of A-B-* is nothing more than an inartful articulation of the correct standard. Other cases the Attorney General relied upon support a less onerous standard. For example, on rehearing of *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005), the court held that the applicant met the standard despite the fact that the police intervened several times, suggesting that despite the use of the “complete helplessness” language in that decision, the government inability/unwillingness to control standard can be met even where the police have intervened. *See Hor v. Gonzales*, 421 F.3d 497, 502 (7th Cir. 2005).

The AG opinion in dicta is inconsistent with decades of circuit court and BIA case law. *See, e.g., Gathungu v. Holder*, 725 F.3d 900, 908–09 (8th Cir. 2013) (finding sufficient evidence that the government of Kenya was unable or unwilling to control the Mungiki criminal group, where there was evidence that the government was complicit in various attacks by Mungiki and where the record contained evidence that the Kenyan police force is widely corrupt); *Edionseri v. Sessions*, 860 F.3d 1101, 1104–05 (8th Cir. 2017); *Matter of McMullen*, 17 I&N Dec. 542, 544 (BIA 1980); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975). The Eighth Circuit appears to continue to read *Matter of A-B-* narrowly as overturning prior BIA decision *Matter of A-R-C-G-* and continues to apply the “unable and unwilling to control” standard. *See, e.g., Juarez-Coronado v. Barr*, 919 F.3d 1085, 1088–89 (8th Cir. 2019) (indicating that to qualify for asylum, an applicant must demonstrate that persecution was “inflicted by a country’s government or by people or groups that the government is unable or unwilling to control,” and that “the government’s

ability to control the persecutors is a question of fact” and not stating that the government must condone violence or be completely helpless to prevent it). Interpretations from various DHS branches appear consistent with the Eighth Circuit’s reading. For instance, the Office of the Principal Legal Advisor for ICE, in a Memorandum to all ICE attorneys regarding interpretation of the *Matter of A-B-* decision (hereinafter, “OPLA Memo”), indicated that the impact “of primary importance” of *Matter of A-B-* was to overrule the BIA’s decision in *Matter of A-R-C-G-*. Tracy Short, Memorandum: Litigating Domestic Violence Based Persecution Claims after *Matter of A-B-* (July 11, 2018) (memorandum on file with Deskbook chapter authors). The OPLA Memo notes that the principal impact of the decision is to eliminate the protected group previously recognized in *Matter of A-R-C-G-* as affording protection to certain domestic violence survivors seeking asylum. *Id.* However, the OPLA Memo does not suggest at any point that the decision establishes a heightened standard regarding government protection. The OPLA Memo also notes that the Attorney General “did not conclude that particular social groups based on status as a victim of private violence could never be cognizable.” *Id.* USCIS, in its initial guidance to asylum officers following the decision, referred asylum officers to the Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) for questions regarding the proper application of the decision. *Id.* Following the D.C. Circuit’s decision in *Grace v. Whitaker*, 344 F. Supp. 3d 96, 106 (D.D.C. 2018) addressing the application of *Matter of A-B-* in the context of credible fear and reasonable fear interviews, USCIS issued new guidance to asylum officers requiring them to follow *Grace*’s guidance in their adjudication of applications for asylum and related relief.



COMMENT

Although the *Grace* decision abrogated aspects of *Matter of A-B-* as the decision is applied in the context of credible fear interviews, the policy memorandum issued by USCIS following the *Grace* decision is explicitly directed at all asylum officers. See John Lafferty, *Today’s US DC District Court Decision in Grace v. Whitaker and Impact on CF Processing* (Dec. 19, 2019), available at <www.aclu.org/legal-document/grace-v-whitaker-uscis-guidance-re-grace-injunction>.

The *Grace* decision provides helpful, well-reasoned guidance regarding the unable/unwilling standard following *Matter of A-B-* that is binding on asylum officers and persuasive authority for immigration judges. “Congress was clear that its intent in promulgating the Refugee Act was to bring the United States’ domestic laws in line with the [United Nations Protocol Relating to the Status of Refugees].” *Grace*, 344 F. Supp. 3d at 06.



COMMENT

In a decision issued on January 25, 2019, the D.C. District Court denied the government’s request for a stay of the decision in *Grace* pending its review of the government’s appeal from the decision. See *Grace v. Whitaker*, Civ. No. 18-1853, 2019 WL 329572 (D.D.C. Jan. 25, 2019). In July 2020, *Grace v. Whitaker* was affirmed in part, vacated in part, and remanded to the district court. *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). Among the key findings is that the “condoned or completely-helpless standard” cannot replace the “unable or unwilling to control” standard in determining whether persecution by non-state-actors qualifies.

Because Congress demonstrated in promulgating the Refugee Act its intent to bring U.S. law into compliance with the United States' treaty obligations under the UN's Refugee Convention, the *Grace* court reasoned that the UN's guidance interpreting the "unable and unwilling" standard is helpful guidance in understanding congressional intent. *Grace*, 344 F. Supp. 3d at 128. The court cited to the UN's *Handbook on Procedures and Guidelines for Determining Refugee Status and Guidelines on International Protection*, in which the UNHCR explains that "persecution included 'serious discriminatory or other offensive acts ... committed by the local populace ... if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer *effective* protection.'" See UNHCR Handbook ¶ 65 (emphasis added)." *Id.* Based on this interpretive guidance, the court concluded that the "unable and unwilling" definition was not ambiguous and, thus, the AG's interpretation of the statute in *Grace* was not entitled to the *Chevron* deference typically afforded reasonable federal agency interpretations of ambiguous statutes impacting procedures before that agency. *Id.* Second, the court also commented that the AG's citation to circuit court case law in support of his proposed heightened standard is inapposite. The court pointed out that, in the small handful of cases that used the "condoning or complete helplessness" language, the circuit court ultimately found inadequate government protection, suggesting that the language was not meant to articulate a heightened government protection standard beyond that laid out in the language of the statute, but rather was used to illustrate a specific point in particular cases. *Id.* at 129.

Furthermore, any application of heightened standard of unable/unwilling analysis would likely be inconsistent with congressional intent, given the plain language of the refugee definition and statutes governing other, more restricted forms of humanitarian relief from removal. For instance, this is demonstrated by comparing the language of the refugee definition and the Convention Against Torture (CAT). Under the CAT, an applicant must show that the government would consent to or acquiesce in the torture, a standard acknowledged to be higher than the standard for establishing a right to asylum. See 8 C.F.R. § 208.18(a)(1). See also, e.g., *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017) (describing standard for showing entitlement to relief under CAT as "more onerous" than that for asylum). Yet even under the CAT, an applicant can show entitlement to relief where the government has made some effort to respond to the torture, i.e., not complete helplessness. See, e.g., *Rodriguez-Moliner v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015).

3. Well-Founded Fear

In order to establish a well-founded fear of persecution, the applicant must establish that there is a reasonable possibility that the client would be persecuted. The United States Supreme Court has described this as constituting an approximately one in 10 chance:

Let us ... presume that it is known that, in the applicant's country of origin, every tenth adult male person is either put to death or sent to some remote labor camp. ... In such a case, it would be only too apparent that anyone who has managed to escape from the country in question will have "well founded fear of being persecuted" upon his eventual return.

See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (citing ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, 180 (1966)).

There are four elements that may establish a well-founded fear of persecution. They include:

- (1) **Possession or Imputed Possession:** The applicant must establish that they possess or are believed to possess a characteristic the persecutor seeks to overcome.

- (2) **Awareness:** The applicant must establish that the persecutor is aware or could become aware that the applicant possesses (or is believed to possess) the characteristic.
- (3) **Capability:** The applicant must establish that the persecutor has the capability to persecute the applicant.
- (4) **Inclination:** The applicant must establish that the persecutor has the inclination to persecute them. Note that the applicant need not establish either that the persecutor is inclined to *punish* the applicant, or that the persecutor's actions are motivated by a malignant intent.

See Immigration Officer Academy Asylum Training Manual, *Asylum Eligibility Part II: Well-Founded Fear*, available at <www.aila.org/infonet/aobt-lesson-plan-on-well-founded-fear>.



PRACTICE TIP

The USCIS uses the Asylum Officer Basic Training Course (AOBTC) to train its adjudicators. These AOBT lesson plans cover a variety of topics related to asylum law and how asylum officers adjudicate cases. Though no longer posted on the USCIS website, the University of St. Thomas Interprofessional Center for Counseling and Legal Services has an entire set of lessons that were current as of January 2017. See USCIS, *Asylum Officer Basic Training Manual* (Jan. 26, 2017) available at <<https://www.dropbox.com/sh/lnzysf0yu5sgjcd/AAD-94hCtMYKzG25unrgQvjla?dl=0>>. The AOBT has not only been long relied on by the Asylum Office, but also cited favorably as persuasive guidance in immigration judge and Board of Immigration Appeals decisions.

The applicant's fear must be both subjectively and objectively reasonable. The lawyer can establish subjective fear through a detailed affidavit from the client, describing past experiences and what the client thinks may happen upon return. Other evidence, such as medical records, police reports, other witness statements, news articles, etc., that relate to harm suffered are also strong evidence, if available. In order to support a claim that the fear is objectively reasonable, the lawyer should compile primary and secondary documentation that supports the likelihood the client would be harmed.



PRACTICE TIP

The first place adjudicators will look for secondary documentation on country conditions is the United States Department of State Human Rights Reports. They are issued annually on most countries throughout the world: <www.state.gov/j/drl/rls/hrrpt/>. The Executive Office for Immigration Review (EOIR) recently created a Virtual Law Library with country condition research information including United States government, foreign government, and non-government organization resources: <www.justice.gov/eoir/vll/country/country_index.html>. The Immigration and Refugee Board of Canada and RefWorld are also other very good resources. See Immigration

**PRACTICE TIP, CONTINUED**

and Refugee Board of Canada, <<http://www.irb-cisr.gc.ca/eng/Pages/index.aspx>>; <<http://www.refworld.org/>>. The Latin American Working Group's Central America/Mexico Migration News Brief, which attorneys can sign up to receive by email, provides a helpful regularly updated compilation of articles and reports on country conditions in the Northern Triangle and Mexico.

Be sure to adequately vet resources before submitting them—long reports should not be submitted in their entirety unless the attorney has ensured they support their case.

4. Past Persecution and Rebuttable Presumption of Future Fear

If the client meets the burden of establishing past persecution, there is a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1). Once established, the burden then shifts to the government to rebut the presumption by establishing either: (1) that there has been a fundamental change in circumstances such that there is no longer a well-founded fear of persecution; or (2) that the applicant can avoid persecution by relocating to another part of the country and it would be reasonable to do so. Even if the government rebuts the presumption, the client may still be eligible for humanitarian asylum if they suffered severe past persecution or would face other serious harm.

a. Changed Circumstances

Changed circumstances most commonly include changes in country conditions, such as a regime change. They may also include other changes related to the applicant's claim, such as death of the persecutor, or changes to the applicant's situation in the United States. Regardless of the change, analysis of each applicant's facts is required to determine whether the presumption is rebutted. The lawyer should anticipate arguments regarding changed circumstances and preemptively address them with supporting documentation and legal arguments. 8 C.F.R. § 208.13(b)(1)(i)(A).

b. Internal Relocation

A client's well-founded fear can also be rebutted if the client can reasonably relocate to another part of the country of origin. 8 C.F.R. § 208.13(b)(3). The applicant need not fear country-wide persecution; rather, the presumption of well-founded fear may be rebutted if it is reasonable for the applicant to relocate considering a broad range of factors. *Hagi-Salad v. Ashcroft*, 359 F.3d 1044, 1048 (8th Cir. 2004). Further, the Board of Immigration Appeals, in *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012), emphasized that: “[f]or an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of persecution.” The BIA provided guidance in assessing whether there is an area that is sufficiently safe for an applicant to be required to relocate: “the purpose of the relocation rule is not to require an applicant to stay one step ahead of persecution in the proposed area, that location must present circumstances that are substantially better than those giving rise to a well-founded fear of persecution on the basis of the original claim.” *Matter of M-Z-M-R-*, 26 I&N Dec. at 33.

The BIA clarified that adjudicators assessing the possibility of relocation must engage in a two-step analysis. First, there must be a location within the country where the applicant would have no well-founded fear of persecution, that “is practically, safely, and legally accessible” to the applicant. *Id.* at 34. If the first prong of this

analysis is met, the adjudicator must then assess whether “under all the circumstances” it would be reasonable to require the applicant to relocate to that other part of the country. *Id.* The Board reminded adjudicators that the regulations list an explicitly non-exclusive set of factors they are to assess in determining whether it would be reasonable “under all the circumstances” to require an applicant to relocate, namely:

- (1) whether the applicant would face other serious harm in the place of suggested relocation;
- (2) any ongoing civil strife within the country;
- (3) administrative, economic, or judicial infrastructure;
- (4) geographical limitations; and
- (5) social and cultural constraints, such as age, gender, etc.

Id. at 34–35; *see also* 8 C.F.R. § 208.13(b)(3).



CAVEAT

When the client establishes past persecution, the government bears the burden of establishing the reasonableness of internal relocation by a preponderance of the evidence. When there is no past persecution, the applicant bears the burden of establishing internal relocation is unreasonable. In both cases, internal relocation is presumed to be unreasonable if the persecutor is the government. 8 C.F.R. § 208.13(b)(3).

c. Humanitarian Asylum

In instances where the applicant establishes past persecution, but the government has rebutted the presumption of a future fear of persecution, the applicant may still be eligible for asylum if the applicant shows there are compelling reasons not to return or that the applicant would suffer other serious harm if removed to that country. 8 C.F.R. § 208.13(b)(1)(iii).



COMMENT

In April 2020, The Advocates for Human Rights presented a training on making and documenting humanitarian asylum claims, which is available in recorded form via the Immigrant Advocates Network website, <www.immigrationadvocates.org/>.

i. Severity of Past Persecution

Compelling reasons not to return must be linked to the severity of the past persecution. 8 C.F.R. § 208.13(b)(1)(iii). *See Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). Factors considered include the duration and intensity of the past persecution, the applicant’s age at the time of persecution, persecution of family members, conditions under which persecution was inflicted, whether it would be unduly frightening or painful for the applicant to

return, or whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted. See AOBTC, Asylum Eligibility Part I: Definition of Refugee, available at <www.aila.org/infonet/uscis-lesson-plan-overview-on-asylum-eligibility>.

ii. *Other Serious Harm*

If the government rebuts the presumption of a well-founded fear of future persecution, the applicant may also be eligible for humanitarian asylum if there is a reasonable possibility that she or he may suffer other serious harm upon removal. Importantly, the other serious harm need not be inflicted on the basis of one of the protected grounds, but the harm feared must be so serious that, in the aggregate, it equals the level of persecution. 8 C.F.R. § 208.13(b)(1)(iii). See also AOBTC, Asylum Eligibility Part I: Definition of Refugee, available at <www.aila.org/infonet/uscis-lesson-plan-overview-on-asylum-eligibility>. An adjudicator must consider factors in the applicant’s home country that could present dangers to the applicant if they returned, including both “major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant.” *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). New physical and psychological harm are important elements to consider as other serious harm that any asylum seeker may face if returned. *Id.* at 714.



CAVEAT

Asylum pursuant to the humanitarian asylum subsection of the asylum regulations is only available to applicants who establish past persecution based on a protected ground. If the facts do not establish past persecution or cannot show a tie between that past persecution and a valid protected ground attributable to the applicant, risk of other serious harm is not considered when determining whether facts are sufficient to warrant a grant of asylum.

HUMANITARIAN ASYLUM – FACTORS TO CONSIDER	
Severity of Past Persecution	Other Serious Harm
<ul style="list-style-type: none"> • “Atrocious” • Ongoing injuries—mental or physical • Age at time of harm • Discretionary • “[D]eplorable, involving the routine use of various forms of physical torture and psychological abuse” • “Aggravated circumstances” 	<ul style="list-style-type: none"> • Reasonable possibility of other serious harm: <ul style="list-style-type: none"> <input type="checkbox"/> civil strife <input type="checkbox"/> extreme economic deprivation beyond economic disadvantage <input type="checkbox"/> situations where the claimant could experience severe mental or emotional harm or physical injury <input type="checkbox"/> forward-looking

5. Protected Grounds: Race, Religion, Nationality, Membership in a Particular Social Group, and Political Opinion

In order to establish eligibility, an asylum seeker must show that the past or future feared persecution is “on account of” one of five protected grounds: race, religion, nationality, membership in a particular social group or political opinion. The client must establish both that the client possesses characteristics to fit into one of these categories or that the persecutor has imputed characteristics to the client that fit one of these categories *and* that the

persecutor targeted the client on account of that characteristic. *See, e.g., Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996) (discussing how both applicants who possess protected characteristics and applicants to whom protected characteristics have been imputed may be eligible for asylum). There may be mixed motives for the persecutor to target the applicant, but a protected ground must be “one central reason” for the persecution. INA § 208(b)(1)(B). Further, the applicant need not show the exact motivation of the persecutor, but does need to establish a “clear probability” that the persecution was on account of one of the grounds. An asylum applicant is not required to definitively prove the exact motivation of their persecutor. Instead, the applicant must provide some evidence, either direct or circumstantial, of the persecutor’s motive. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

The client does not need to demonstrate that the persecutor has punitive intent. Rather, the client only need demonstrate that the persecutor harmed the client in order to overcome a protected characteristic the client possesses. *See, e.g., Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (applicant established that she suffered past persecution on account of a protected ground, even though her persecutors may have had “subjectively benign intent” in subjecting her to female genital mutilation).

a. Race

Race as a protected ground includes “all kinds of ethnic groups that are referred to as ‘races’ in common usage.” United Nations High Commissioner on Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, ¶¶ 68–70 (2011), available at <www.unhcr.org/publ/PUBL/3d58e13b4.pdf>. (Hereinafter “*UNHCR Handbook*”). For example, ethnic Albanians and Chechens would qualify as “races” under this definition.

b. Religion

Asylum claims based on religion can include persecution in the form of prohibition of public or private worship, membership in a particular religious community, or religious instruction. *UNHCR Handbook*, ¶¶ 71–73. Mere membership in a religious group is not usually sufficient; the asylum seeker must show ongoing serious discrimination based on religion, economic pressure, physical harm, and/or intimidation that impact the ability to practice one’s religion.



PRACTICE TIP

An applicant may establish grounds for asylum if she or he belongs to a group that has experienced a “pattern or practice” of persecution, even if the applicant has not been singled out for persecution. 8 C.F.R. § 208.13(b)(2)(iii).

c. Nationality

For purposes of asylum law, “nationality” includes citizenship or membership in an ethnic or linguistic group and often overlaps with race. *UNHCR Handbook*, ¶¶ 74–76. For example, ethnic Serbs in Croatia would qualify as a nationality for purposes of asylum law.

d. Political Opinion

An applicant's overt *or* imputed political opinion may constitute a protected ground. Overt political opinions often involve explicit membership and participation with a political party. An imputed political opinion is defined as an opinion that the persecutor believes the applicant to have, regardless of the applicant's actual opinion or even lack of an opinion. *See, e.g., De Brenner v. Ashcroft*, 388 F.3d 629 (8th Cir. 2004) (finding persecution due to political opinions imputed to petitioner by the guerillas and the government where Peruvian Shining Path guerillas expressly named petitioner as a member and supporter of APRA (political party), accused her family of supporting the government, and mistakenly singled her out as an actual worker for the APR). Political opinions can also include overt and imputed opinions on policies in the country in question, such as coercive population control, female genital mutilation, or domestic violence. According to the UNHCR, political opinion is “understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society or policy may be engaged. It goes beyond identification with a specific political party or recognized ideology.” UNHCR, *UNHCR Refugee Resettlement Handbook* (2011), available at <www.unhcr.org/46f7c0ee2.pdf>.

The BIA has provided a non-exhaustive list of factors to adjudicators for assessing political opinion and imputed political claims in the context of generalized unrest: “[i]n situations involving general civil unrest, the motive for harm should be determined by considering the statements or actions of the perpetrators; abuse or punishment out of proportion to nonpolitical ends; treatment of others similarly situated; conformity to procedures for criminal prosecution or military law;...and the subjection of political opponents to arbitrary arrest, detention, and abuse.” *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996). In *Matter of S-P-*, the BIA found that nexus to the applicant's imputed political opinion was present where the applicant was interrogated by government officials because of his suspected separatist political opinion, as well as to obtain information. *Id.* at 497.

e. Membership in a Particular Social Group

The most vague and complex of the protected groups is “membership in a particular social group.” Though the UNHCR defines the “social group” as “persons of similar background, habit or social status,” *UNHCR Handbook*, ¶¶ 77–79, United States case law has elaborated on this definition to include the following requirements for a group to constitute a particular social group (PSG):

- (1) common immutable characteristic;
- (2) defined with particularity;
- (3) socially distinct within the society in question.

A “common immutable characteristic” has consistently been described as one that the group (and in particular the applicant) cannot change or should not be required to change. Common immutable characteristics have included such things as age, geographic location, gender, sexual orientation, and family ties.

For nearly 30 years, the legal test for a PSG was defined by “immutable characteristic” as articulated by the BIA in *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). In 2008, the BIA introduced particularity and social visibility into caselaw in its decisions in *Matter of S-E-G-*, 24 I&N 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). After mixed acceptance by the circuit courts, the BIA reiterated these requirements with minimal revisions in a pair of cases issued in 2014, *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) and *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).



PRACTICE TIP

A circuit split remains in regard to the requirements that a group be defined with particularity and be socially distinct. Both requirements have been accepted by the Eighth Circuit. The lawyer may include a rejection to these additional requirements in a legal brief by explaining how the particular social group meets the *Acosta* definition, but argue in the alternative that the definition also meets the particularity and social distinction requirements.

The Attorney General has issued two recent decisions on “particular social group” that have shifted the landscape for asylum seekers pursuing protection based on their membership in protected groups that had previously been clearly recognized by the BIA and circuit courts as cognizable. In *In Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Attorney General reversed the BIA’s 2014 decision recognizing “Guatemalan married women unable to leave their relationship” as a valid protected group potentially available to individuals seeking protection from domestic violence. However, as noted in section 8.2.A.2, *supra*, discussing government protection, the decision explicitly does not bar all survivors of domestic violence from seeking asylum. Moreover, in numerous cases decided since *Matter of A-B-*, federal courts have read the holding of the decision narrowly. *See, e.g., Quintanilla-Miranda v. Barr*, No. 18-60613, 2019 WL 3437658, at *1 n.1 (5th Cir. July 31, 2019) (“Nor do we express any opinion regarding other aspects of asylum law discussed in A-B- ... but not necessary to the BIA’s decision in this case.”); *Lopez v. Sessions*, 744 F. App’x 574 (10th Cir. 2018) (focusing only on the requirements of recognizability and non-circularity for particular social group formulations from *Matter of A-B-*); *Aguilar-Gonzalez v. Barr*, No. 18-3891, 2019 WL 2896442, at *3 (6th Cir. July 5, 2019) (avoiding a per se rejection of the PSG formulation of “indigenous Guatemalan women who cannot leave a relationship”). Many adjudicators throughout the country have granted protection to domestic violence survivors following the *Matter of A-B-* decision, including asylum officers and immigration judges reviewing applications of asylum seekers residing in Minnesota and the Dakotas. Domestic violence survivors seeking asylum following *Matter of A-B-* must assert other proposed particular social groups other than the group previously recognized in *Matter of A-R-C-G-* in order to receive protection. Recently, Attorney General Barr issued a decision, *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), which makes similarly problematic statements regarding domestic violence and child abuse based claims in its dicta, while not changing the law for asylum seekers. However, given that the similar dicta in *Matter of A-B-* has caused confusion for adjudicators since the decision was issued, advocates for asylum seekers will need to prepare to address *Matter of A-C-A-A-* when representing survivors of domestic violence, child abuse, and other gender- or family-status-based violence.



COMMENT

The Advocates for Human Rights has a Practice Supplement for attorneys representing domestic violence survivors in the Eighth Circuit after the decision in *Matter of A-B-* that discusses post-*Matter of A-B-* asylum claims in detail. The guide can be found at the Advocates for Human Rights website, <www.theadvocatesforhumanrights.org/Publications/Index?id=7>.

Another case that may be helpful in the context of family violence survivors is the Eighth Circuit decision in *Hui*, which affirms the validity of the PSG “Chinese daughters [who are] viewed as property by virtue of their position within a domestic relationship,” but denied relief on other grounds. *Hui v. Holder*, 769 F.3d 984, 985 (8th Cir. 2014). Lawyers for asylum seekers pursuing protection based on domestic violence may want to review helpful case law for survivors of domestic violence issues prior to *Matter of A-R-C-G-*, such as the BIA’s decision in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), and the Eighth Circuit’s decisions in *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) and *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008). Attorneys representing domestic violence survivors may also look to the Department of Homeland Security’s brief to the BIA in *Matter of L-R-*, available at the Center for Gender & Refugee Studies website, <<https://cgrs.uchastings.edu/our-work/matter-l-r>>. In its brief to the BIA in this matter, the DHS recognized domestic violence survivors as potentially eligible for asylum and suggested two potential particular social group formulations that the DHS believed would be cognizable, based on the facts in *Matter of L-R-*: (1) Mexican women who are viewed as property by virtue of their position in a domestic relationship; and (2) Mexican woman unable to leave a domestic relationship. The second particular social group formulation was recognized in *Matter A-R-C-G-*, but later overturned in *Matter of A-B-*. As of the date this Deskbook was updated, there has been no negative, controlling case law casting doubt on the first particular social group formulation. It is also worth noting that the BIA, in several unpublished decisions issued for domestic violence survivors in 2018 and 2019, has upheld social groups based on the applicant’s gender plus nationality, such as “Mexican women,” “Salvadoran females,” “Guatemalan women,” and “young Honduran women.” See, e.g., *A-B-S-P-*, AXXX XXX 561 (BIA Dec. 19, 2019) (*Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018) “does not preclude all domestic violence claims without exception in the asylum context”); *E-E-G-R-*, AXXX XXX 363 (BIA Nov. 14, 2019) (remands to consider asylum claim predicated on membership in PSG of “Guatemalan women”); *S-R-P-O-*, AXXX XXX 056 (BIA Dec. 20, 2018) (remands for further consideration of whether “Mexican women” is a valid particular social group); *H-A-C-S-*, AXXX XXX 247 (BIA May 22, 2018) (remands for further consideration of whether “young women in Honduras” is a cognizable particular social group). These unpublished BIA decisions are available at the Immigrant and Refugee Appellate Center Website, <www.irac.net/unpublished/>.



COMMENT

Decision copies can be obtained via the Immigrant and Refugee Appellate Center unpublished BIA case index, available here: <<http://www.irac.net/unpublished/>>.

In a second recent decision, the Attorney General overturned the BIA’s 2017 decision recognizing the immediate family of the applicant’s father as a social group in the context of a claim for protection by a Mexican survivor of cartel violence against a family business. *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). Although the *Matter of L-E-A-* decision also contained substantial dicta, its holding was also narrow and consisted of rescinding the BIA’s decision in *Matter of L-E-A-*. Like in *Matter of A-B-*, the AG critiqued the BIA’s acceptance of DHS stipulations that the respondent met certain aspects of the refugee definition, and stated that the BIA should have conducted a fact-based inquiry on all issues instead of permitting stipulations. *Id.* at 586. The AG explicitly stated that he did not seek to foreclose all asylum claims based on family relationship, and reiterated the principle laid out in numerous previous BIA cases that asylum eligibility determinations must be made based on a case-by-case adjudication. *Id.* at 588–89. Instead, the AG reiterated that all particular social groups must be immutable, particular, and socially distinct. *Id.* at 588. The AG seems to suggest that a heightened social distinction requirement must be imposed on groups defined by family relationship, and that applicants must not only show that meaningful distinctions are made based on family relationship in their country of origin, but they must also show that their particular family is somehow

viewed distinctly from other families in their society of origin. *Id.* at 592–93. This interpretation is explicitly inconsistent with decades of BIA case law and case law from all circuit courts to have considered the question, recognizing family as a particular social group. Attorneys representing asylum seekers after the *Matter of L-E-A-* decision may wish to both argue that their clients meet the AG’s proposed heightened social distinction standard, and also argue that the proposed heightened social distinction standard is not part of the decision’s narrow holding and cannot be properly applied to their client.



COMMENT

Attorneys representing asylum seekers may also wish to reference the Practice Pointer on the decision prepared by the Catholic Legal Immigration Network, available at their website, <<https://cliniclegal.org/resources/asylum-and-refugee-law/practice-pointer-matter-l-e>>, and the *Template for Responding to Matter of L-E-A-*, created by the National Immigrant Justice Center, available at their website, <www.immigrantjustice.org/for-attorneys/legal-resources/file/template-responding-matter-l-e-asylum-office-and-immigration>.



PRACTICE TIP

The lawyer should be mindful that the adjudicators are required to apply a case-by-case analysis for each element of the asylum case. Just because a PSG was rejected in one case does not mean that the same group would be rejected in another case that may have a more supportive record. In the same way, all victims of domestic violence may not warrant receiving asylum. The lawyer should argue how the specific facts and supporting documentation in the case at hand meets the elements, even if case law includes a similar case that was denied.

6. Nexus

In addition to proving that the applicant possesses one of the protected grounds, the asylum seeker must also establish that the persecutor targeted them “on account of” that characteristic. More specifically, the applicant must establish that the characteristic was “one central reason” for being persecuted. INA § 208(b)(1)(B)(i). The courts have recognized that this standard explicitly permits asylum seekers to receive protection where persecutors have mixed motives, and that the asylum seeker need not show that persecution was or will be exclusively motivated by protected grounds. *Id.*; see also *Matter of J-B-N- and S-M-*, 24 I&N Dec. 208 (BIA 2007).

7. Government Protection

In asylum claims, the persecutor may be the government or a non-governmental actor whom the government cannot or will not control. If the persecutor is the government, it is obvious the government will not protect the applicant. If the persecutor is a non-governmental actor, in order to receive asylum, the applicant must establish that they sought protection from the government and the government failed to provide the applicant effective protec-

tion from the persecutor, or that it would have been futile to seek government protection. *See Ngengwe v. Mukasey*, 543 F.3d 1029, 1035–36 (8th Cir. 2008).

The Ninth Circuit issued a helpful en banc decision reaffirming the principal that an applicant for asylum may show lack of government protection by presenting sufficient evidence to demonstrate that it would be futile to report the persecution to law enforcement. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017). In finding that an applicant who had not reported his persecution to law enforcement could still be eligible for asylum, the Ninth Circuit observed that “[t]o determine whether private persecutors are individuals whom the government is unable or unwilling to control, we must examine all relevant evidence in the record, including [country] reports.” *Id.* at 1069. The Ninth Circuit further explained that “[l]ike all other circuits to consider the question, we do not deem the failure to report to authorities outcome determinative, and we consider all evidence in the record.” *Id.*

8. Bars to Asylum Relief

There are a variety of reasons that an asylum seeker may be ineligible for asylum. They include applicants who:

- are persecutors of others, INA § 208(b)(2)(A)(vi);
- firmly resettled as defined in 8 C.F.R. § 208.15;
- were previously denied asylum by an immigration judge or the BIA, INA § 208(a)(2)(C); 8 C.F.R. § 208.4(a)(3);
- did not file for asylum within one year of last entry to the United States INA § 208(a)(2)(B); 8 C.F.R. §§ 208.4 & 208.34 (potential exceptions to the one-year filing deadline are discussed further in section 8.1.D.1, *infra*);
- have been convicted of an aggravated felony, INA § 208(b)(2)(B)(i); INA § 101(a)(43);
- have been convicted of a particularly serious crime, INA § 208(a)(2)(A)(ii);
- pose a danger to the security of the United States, INA § 208(a)(2)(A)(iv);
- committed a serious nonpolitical crime, INA § 208(a)(2)(A)(iii);
- may be removed to a safe third country pursuant to a bilateral or multilateral agreement, INA § 208(a)(2)(A);
- are inadmissible on account of terrorist-related activity, INA § 208(a)(2)(A)(v); or
- provide material support to a terrorist group, INA § 208(a)(2)(A)(v).



PRACTICE TIP

The final rule entitled “Procedures for Asylum and Bars to Asylum Eligibility” was published on October 20, 2020. It is set to go in effect on November 20, 2020 and will have significant impact. The rule can be accessed here: <www.federalregister.gov/documents/2020/10/21/2020-23159/procedures-for-asylum-and-bars-to-asylum-eligibility>. The rule significantly impacts asylum seekers with criminal histories and immigration violations. When preparing asylum applications to be filed after Nov. 20, 2020, practitioners should review the rule and follow any related litigation that may impact its implementation.

B. Withholding of Removal

Withholding of removal is often an alternative form of relief for clients who are barred from receiving asylum for one of the reasons listed in the previous section. Like asylum, withholding of removal is designed to protect individuals from being persecuted in their country of origin. Though there are fewer bars to eligibility for those seeking withholding of removal, the standard of proof is significantly higher and the benefits are significantly lower than for asylum. Unlike asylum, withholding is not subject to a one-year filing deadline. In addition, withholding is a mandatory form of relief; it is not discretionary, as is the case with asylum. *See* INA § 241(b)(3); 8 U.S.C. § 1231(b)(3). That said, withholding has a higher standard for likelihood of harm.



PRACTICE TIP

If a client filed for asylum after the one-year deadline and does not appear to meet an exception, or the client has a significant criminal history or specifically an aggravated felony, the client may be eligible for withholding as an alternative to asylum. In order to preserve all potential forms of relief, withholding of removal should always be sought in the alternative when filing for asylum.

The benefits under withholding are limited. An individual who is granted withholding:

Cannot	Can
Be removed from the United States to the country from which the individual was fleeing persecution.	Be removed to a third country if one is available.

Cannot	Can
Adjust the individual’s status to legal permanent residency.	Obtain and renew work authorization under the (a)(10) category and is not required to pay the filing fee. (Note that final rules on USCIS fee hikes would add a fee for work permits for those granted withholding. The rule was enjoined as of publication of the 2020 Update to this Deskbook. See USCIS & DHS, <i>U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements</i> , RIN 1615-AC18 (Aug. 8, 2020), available at < https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-16389.pdf >.)
File for family members living abroad to reunify with them in the United States.	Receive some public benefits.
Travel outside the United States without securing advance parole and are not eligible for a refugee travel document.	



PRACTICE TIP

A grant of withholding of removal is country specific, and requires the immigration judge (IJ) to actually enter an order of removal if that is the only relief granted. *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008). Therefore, the order frequently is “Client is ordered removed to any country other than X (country of citizenship/nationality).” Typically, asylum seekers will decline to designate a country of removal during the pleadings phase of removal proceedings under the logic that an asylum seeker fears return to the country of nationality and therefore would not want to be removed there if no relief is available. See Chapter 6, An Overview of Minnesota’s Immigration Court, section 6.9.

1. Eligibility Standard for Withholding of Removal

a. “More Likely Than Not”

In order to satisfy the test for withholding of removal, an individual must show a clear probability of persecution by the government or a group the government cannot control on account of one of the protected grounds. *INS v. Stevic*, 467 U.S. 407 (1984). The applicant must show that it is “more likely than not” that they will be persecuted, which essentially means that there is a greater than 50-percent chance of persecution. Note that this requires a higher probability than asylum’s 10 percent.

b. Nexus Required

As with asylum, in order to receive withholding of removal protection, the applicant must show that past persecution or fear of future persecution is on account of one's race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.16(b).

c. Presumption If Persecuted in the Past

As in asylum, however, if the individual can show that they suffered persecution in the past, then that individual will receive the benefit of a presumption that their life or freedom would be threatened in the future.

2. Bars to Eligibility For Withholding of Removal

An individual is not eligible for withholding of removal if they:

- are a persecutor of others; or
- have been convicted of a particularly serious crime.

Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002). Unlike for asylum, an aggravated felony conviction does not automatically bar an applicant from withholding of removal unless the applicant received a sentence of five or more years, imposed or suspended. An aggravated felony with a sentence of less than five years is presumed to be “particularly serious” but requires individual examination of the nature of the conviction, sentence imposed, and circumstances and underlying facts of the conviction. *See* INA § 241(b)(3)(B).



PRACTICE TIP

In some cases, the government attorney may offer withholding of removal as a sort of “plea bargain” if the client is willing to forego the asylum relief. In preparation, it is important to discuss the benefits and drawbacks of withholding with the client in removal proceedings prior to the final hearing so that the client understands the difference between withholding and asylum. The drawbacks may be particularly significant if the client has family members overseas that the client may wish to petition to bring to the United States or if the client wants to travel outside the United States in the future. The lawyer should inquire with the government attorney about which elements of the asylum definition they believes are not sufficiently met. With local judges granting less than 30 percent of asylum claims, the lawyer should prepare the client for a potential appeal if the offer to stipulate to withholding of removal is not accepted.



PRACTICE TIP, CONTINUED

WITHHOLDING VERSUS ASYLUM		
	Asylum	Withholding
Work Authorization	No longer need to apply for EAD, but can under (a)(5) category. I-94 card is sufficient proof of work authorization incident to status.	Need to renew EAD annually, under (a)(10) category. No fee. (Note that final rules on USCIS fee hikes would add a fee for work permits for those granted withholding. The rule was enjoined as of publication of the 2020 Update to this Deskbook. See USCIS & DHS, <i>U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements</i> , RIN 1615-AC18 (Aug. 8, 2020), available at < https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-16389.pdf >.)
Public Benefits	Refugee cash assistance eligible non-citizen.	Eligible non-citizen.
Path to Permanent Status	Can apply for permanent residence one year after grant. Can apply for citizenship five years later.	No path to permanent status. Withholding can be revoked if country conditions change or if criminal activity bars withholding relief.
Travel Outside U.S.	Can travel to any country other than country of origin (where persecution is feared). Need to apply for refugee travel document.	No travel outside the U.S. Departure = self-deport.



PRACTICE TIP, CONTINUED

WITHHOLDING VERSUS ASYLUM		
	Asylum	Withholding
Family Reunification	Can apply for spouse and children who were 21 at the time asylum application was submitted.	No family reunification.
Release from Detention	Immediate	Immediate, though some individuals granted withholding have remained in detention for at least 90 days while DHS attempts to remove to a third country.

C. Convention Against Torture/Deferral of Removal

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the return of a person to another country where substantial grounds exist for believing that the person would be in danger of being subjected to torture if returned. *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002); *see also Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). The ability to raise a claim for relief from removal under the CAT was incorporated into United States domestic immigration law. *See* 8 U.S.C. § 1231 Note (2005); INA § 241 Note (2005); *see* Pub. L. No. 105-277, § 2242.

A CAT claim may be raised even after a final order of removal/deportation has been issued, for example if someone is apprehended after failing to depart after a removal order is issued. The advantage to CAT is that there are no bars to eligibility; however, the benefits are minimal. Since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, there is no nexus requirement, so an applicant is not required to establish their fear if torture is on account of any of the protected grounds that apply to asylum and withholding of removal relief.

There are two separate types of protection under CAT. *See* 8 C.F.R. §§ 208.16–208.17.

1. Withholding Under CAT

The first type of protection is a form of withholding under CAT. Withholding under CAT prohibits the return of an individual to their home country. It can only be terminated if the individual's case is reopened and the Department of Homeland Security (DHS) establishes that the individual is no longer likely to be tortured in their home country.

2. Deferral of Removal Under CAT

The second type of protection is called deferral of removal under CAT. Deferral of removal under CAT is a more temporary form of relief. Deferral of removal under CAT is appropriate for individuals who would likely

be subject to torture, but who are ineligible for withholding of removal, such as persecutors, terrorists, and certain criminals. It is terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to their home country. Additionally, if an individual were granted deferral of removal under CAT, the DHS would still be able to detain the individual if already subject to detention.

3. Benefits Under CAT Relief

Like withholding of removal, the benefits to CAT are limited. An individual who is successful under a CAT claim cannot be removed from the United States to the country from which the individual fled persecution, but can be removed to a third country if one is available. The individual may not adjust their status to legal permanent residency, but can obtain work authorization. Furthermore, a person granted relief under CAT has no opportunity for family reunification or travel outside the United States.

4. Eligibility Based on Future Fear of Torture

In order to be eligible for both forms of CAT relief, the client must show that it is more likely than not that she or he would be tortured if returned to the country of origin.

“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 the person or a third person information or a confession, punishing the person for an act they or a third person has committed or is suspected of having committed, or intimidating or coercing him 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 official capacity. CAT, Art. 1; 8 C.F.R. § 208.18. The BIA interpreted the definition of “torture” as “an extreme form of cruel and inhuman punishment and [that] does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment.” *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). The BIA also found that indefinite detention, without further proof of torture, does not constitute torture under this definition. *Id.* Beatings can constitute torture if they are sufficiently severe. *See Zewdie v. Ashcroft*, 381 F.3d 804, 808–10 (8th Cir. 2004) (severe beatings of applicant constituted torture); *Jean-Pierre v. U.S. Att’y Gen.*, 500 F.3d 1315, 1325–27 (11th Cir. 2007); *Kang v. U.S. Att’y Gen.*, 611 F.3d 157, 166–67 (3d Cir. 2010); *Namo v. Gonzales*, 401 F.3d 453, 455, 458 (6th Cir. 2005); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001). Additionally, imminent death threats have been found to constitute torture, even if the death threatened were a painless death. *Comollari v. Ashcroft*, 378 F.3d 694, 697 (7th Cir. 2004) (“Even if death itself is painless, moreover, the anticipation of it can be a source of acute mental anguish; if the threat of imminent albeit painless death were deliberately employed to cause such anguish, it would be a form of torture.”).

In addition to proving that the harm the applicant suffered and fears is sufficiently severe, they must show that the torturer would act with specific intent in harming them, for an illegitimate purpose such as those described above, and would either be a public official, or be acting with the consent or acquiescence of a public official, or other person acting in an official capacity. The Eighth Circuit has held that in order for a person to act in “official capacity” for the purposes of CAT relief, the person must act “under color of law.” *Ramirez-Peyro v. Holder*, 574 F.3d 893, 899 (8th Cir. 2009). The Eighth Circuit has explained that a public official “acts under color of law when he misuses power possessed by virtue of ... law and made possible only because he was clothed with the authority of ... law.” *Id.* at 900. In *Ramirez-Peyro*, the Eighth Circuit explained that the interpretation of this term does not require that the person be acting in compliance with the government’s official stated position.

Instead, the court in *Ramirez-Peyro* explained that “under ‘color’ of law means under ‘pretense’ of law,” and that “acts of officers who undertake to perform their official duties are included whether they hew to the line of

their authority or overstep it.” *Id.* (citing *Screws v. United States*, 325 U.S. 91 (1945)). The court further explained that:

[T]he rule does not require that the public official be executing official state policy or that the public official be the nation’s president or some other official at the upper echelons of power. Rather, as we and the Supreme Court have repeatedly held, the use of official authority by low-level officials, such as police officers, can work to place actions under the color of law even where they act without state sanction.

Id. at 901.

In 2019, the BIA issued a decision that was largely consistent with this precedent, except that it strained the legal standard expressed in *Ramirez-Peyro* and other consistent circuit court case law to find that Guatemalan police officers who tortured an applicant while in uniform and carrying police weapons and handcuffs did not act under color of law. The BIA held that, in order to demonstrate that they are more likely than not to suffer torture, an applicant must demonstrate that they would suffer harm that would be perpetrated by a public official acting under color of law. *Matter of O-F-A-S-*, 27 I &N Dec. 709 (BIA 2019). The BIA cited to *Ramirez-Peyro* to explain that an official acts under color of law when the official misuses power possessed by virtue of law and made possible because the official was clothed with the authority of law. *Id.* at 715. The court in *Matter of O-F-A-S-* created a non-exhaustive list of relevant factors in assessing whether an individual acted under color of law from some relevant circuit court precedent on the issue, including: (1) whether government connections provided the officer access to the victim, the victim’s whereabouts, or identifying information; (2) whether a law enforcement officer was on duty and in uniform at the time of their conduct; and (3) whether an officer threatened to retaliate through official channels if the victim reported their conduct to authorities. *Id.* at 715–17. The BIA further emphasized that “whether a public official’s actions are under color of law is a fact-intensive inquiry, and the Immigration Judge should assess both the direct and circumstantial evidence to make this determination.” *Id.* at 717. The BIA also explained that, even if an applicant was not tortured by a public official or person acting in an official capacity, the applicant can show eligibility for protection under the CAT if the applicant can demonstrate that a public official or person acting in an official capacity consented to or acquiesced to the torture. *Id.* at 718. Applicants who fear torture by police officers and other low-level government officials should carefully brief this decision.

The standard of proof under CAT is higher than the standard for asylum. Here, the alien must prove that it is “more likely than not” that they would be tortured if forced to return. *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002). The evidentiary proof for torture is very similar to the proof for asylum or withholding claims. In assessing likelihood of future torture, the adjudicator must consider, among other factors, “all evidence relevant to the possibility of future torture,” including, but not limited to: (1) evidence of past torture inflicted upon the applicant; (2) evidence of possibility of internal relocation; (3) evidence of “gross, flagrant or mass violations of human rights;” and (4) other relevant information regarding country conditions. 8 C.F.R. § 1208.16(c)(3).

D. Process

Applications for asylum can be filed affirmatively or defensively. Requests for withholding of removal and CAT relief can only be made defensively, but the lawyer should identify the claim during the affirmative process. Affirmative applications are filed with one of eight regional USCIS Asylum Offices (AO) and are initially processed by a USCIS service center depending upon where the client lives. Defensive applications are filed in open court. In 2016, the immigration court changed its rules to permit applicants to file asylum applications by mail or at the court window, in addition to filing them in court. See Michael C. McGoings, *Operating Policies and Procedures*

Memorandum 16-01: Filing Applications for Asylum (Sept. 14, 2016), available at <www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf>. Thus, asylum seekers must ensure that they file their applications within one year of entering the United States, regardless of whether they have a hearing before the court scheduled within a year of entering the country.

Key Procedural Differences Between Affirmative and Defensive Asylum Applications	
AFFIRMATIVE	DEFENSIVE
Non-adversarial (asylum office) office setting.	Adversarial (IJ, Office of the Principal Legal Advisor (OPLA) attorney) courtroom setting.
Applicant’s attorney plays a passive role during the interview stage with limited questioning capability and short closing statement at the end of the interview.	Applicant’s attorney plays an active role in all stages of the process.
AO controls questioning, with opportunity for the attorney to suggest additional questions at the end of the interview.	Attorneys and IJ control questioning.
Can not object to questions.	Can object to questions by OPLA attorney and IJ.
Typically, applicant testifies. There may be exceptions, particularly if the applicant is a child.	Applicant and other witnesses may testify.
Informal review of original documents.	Potential forensic evaluation of original documents.
AO takes notes, but no formal transcript.	Recorded and formal transcript generated if case goes on appeal.
Applicant must bring interpreter with him/her.	Court provides an interpreter. Applicant cannot object to interpretation from the stand, must bring an observing interpreter for this purpose.
Can apply for a work permit once case has been pending 150 days, so long as applicant does not cause delay (i.e., request to reschedule interview). New rules require a 365-day waiting period for the work permit, unless the applicant is a member of Asylum Seekers Advocacy Project (ASAP) or CASA Organization, pursuant to a preliminary court injunction in <i>Casa de Maryland Inc. v. Wolf</i> , Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Practitioners should review eligibility guidelines when determining whether their client can file for a work permit. See ASAP, <i>Work Permits for ASAP Members</i> (Oct. 27, 2020), available at < https://asylumadvocacy.org/work-permits-for-asap-members/ >.	Can apply for a work permit once case has been pending for 150 days, so long as applicant does not cause delay (i.e., not accept the first available individual hearing date). New rules require a 365-day waiting period for the work permit, unless the applicant is a member of Asylum Seekers Advocacy Project (ASAP) or CASA Organization, pursuant to a preliminary court injunction in <i>Casa de Maryland Inc. v. Wolf</i> , Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Practitioners should review eligibility guidelines when determining whether their client can file for a work permit. See ASAP, <i>Work Permits for ASAP Members</i> (Oct. 27, 2020), available at < https://asylumadvocacy.org/work-permits-for-asap-members/ >.

For affirmative applications, the lawyer must include an original and a full copy of the application packet. If filing the application in court, the lawyer must provide the original form (with original signatures and photograph(s)) to the immigration judge and a copy to the government. The lawyer should prepare a separate filing with supporting documentation and provide complete packets to the immigration judge and government. The lawyer should closely review “Chapter 3, Filing with the Immigration Court” in the Immigration Court Practice Manual (ICPM) for guidance on proper filing requirements, available at <www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm>. See also Chapter 6, An Overview of Minnesota’s Immigration Court, for coverage of the filing requirements in immigration court.



PRACTICE TIP

New rules have created new barriers to work permits for asylum seekers. Some, but not all, provisions have been temporarily enjoined for some members pending litigation. See *Casa de Maryland Inc. v. Wolf*, Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020).

Practitioners should review eligibility guidelines when determining whether their client can file for a work permit. See ASAP, *Work Permits for ASAP Members* (Oct. 27, 2020), available at <<https://asylumadvocacy.org/work-permits-for-asap-members/>>.

Rule/Change	Operative Date	Exceptions
30-day processing requirement	Eliminated for <i>initial</i> I-765s filed after 8/21/20	Rule never applied to renewals, but can file more than 90 days before current EAD expires.
365-day waiting period for EAD eligibility	<i>Initial</i> I-765s filed on or after 8/25/20	Rule does not apply to renewal applications.
1-year deadline bar	Ineligible for EAD if I-589 was filed after the 1-year-deadline and I-765 was filed on or after 8/25/20	<ul style="list-style-type: none"> • UACs • Determination from asylum officer or immigration judge that an exception applies. • Applications lodged with the immigration court before 8/25/20 (per I-765 instructions but not USCIS guidance)
Illegal Entry Bar	Entry or attempted entry other than port of entry on or after 8/25/20	Present to DHS official within 48 hours, claim a fear of persecution or torture, and establish “good cause” for entering between ports of entry.



PRACTICE TIP, CONTINUED

Rule/Change	Operative Date	Exceptions
Criminal Bars	Convicted of aggravated felony at any time on/after 8/25/20 Convicted of particularly serious crime Committed serious non-political crime outside the U.S.	N/A
EAD Termination	AO and IJ decisions on/after 8/25/20. Automatic termination if asylum is denied by AO, denied by IJ and no BIA appeal is filed, or upon BIA denial.	UACs “denied” by AO but referred back to the IJ.
Denial of EADs based on applicant-caused delays	Initial I-765s filed on or after 8/25/20 with unresolved delays at time of filing	Rule does not apply to renewal applications.

1. One Year Filing Deadline

Applications for asylum must be filed within one year of the client’s last date of entry to the United States. Some exceptions may apply, but the lawyer should take great care to verify the client’s last date of entry and ensure that the application is filed before the one-year mark. Note that pursuant to new rules, supplements filed less than 14 days before the asylum interview will be considered “applicant-caused delays” and may result in ineligibility for initial work authorization.



PRACTICE TIP

The one-year filing deadline applies to the client's *last date* of entry into the United States. While prior entries may be relevant if the client previously entered the United States after the past persecution occurred, one year from the date of the last entry is the date from which the one-year filing deadline is calculated.

In March 2018, a federal court in Seattle found that the failure to provide asylum seekers with notice of the one-year asylum application period violates congressional intent to ensure that asylum is available for those with legitimate claims of asylum. The court ruled that the Department of Homeland Security must provide all class members—defined as individuals who enter the United States, express a fear of return to their home countries, and then are released from immigration custody—with written notice of the one-year deadline, and the government must accept as timely filed any asylum application from a class member that is filed within one-year of adoption of the notice. The court also ordered the government to adopt, publicize, and implement uniform procedural mechanisms that will ensure class members are able to file their asylum applications.

The American Immigration Council's case decision summary and documents can be found on their website. See American Immigration Council, *Challenging Obstacles to Meeting the One Year Filing Deadline for Filing an Asylum Application*, available at <<https://www.americanimmigrationcouncil.org/litigation/challenging-obstacles-meeting-one-year-filing-deadline-filing-asylum-application>>.

If the client meets with the lawyer after having been in the United States for more than one year, the lawyer should carefully evaluate whether the client appears to meet an exception to the one-year filing deadline. While the client need not be in lawful status in order to file an affirmative asylum application, submitting the application will alert the immigration authorities that the client is in the United States. If the client is not in a lawful nonimmigrant status when the AO issues its decision, the client will be placed into removal proceedings if the asylum claim is not granted. The lawyer should fully explain these consequences before a client decides to file the application.

Exceptions to the one-year filing deadline include extraordinary circumstances that occurred during the one-year period and changed circumstances that occurred any time after the client entered the United States. See INA § 208(a); 8 C.F.R. § 208.4(a). In addition to showing that an exception applies, the client must also establish that the application was filed *within a reasonable period of time* after the extraordinary or changed circumstance occurred. See AOBTC Lesson Plan Overview, “One Year Filing Deadline” (Mar. 23, 2009), available at <www.aila.org/infonet/asylum-officer-basic-training-one-year-filing>.



PRACTICE TIP

The same application form is used for applications for asylum, withholding of removal, and relief under the CAT. Lawyers should preserve the argument for asylum eligibility for clients filing defensive claims in removal proceedings even if the client may only have a weak argument for an exception to the one-year filing deadline. Timelines for removal proceedings can often be unpredictable and exceptions to the one-year filing deadline can occur even after the application is filed. Lawyers should also preserve claims to relief under the CAT by ensuring that they check the boxes on pages 1 and 5 indicating that the client would like to pursue CAT relief in addition to asylum, and document any facts relevant to torture, such as evidence that the government is likely to torture the applicant or acquiescence to the applicant's torture if the applicant is returned, where the form requests the applicant to indicate if they fear torture in the future.

2. The Application Packet for Affirmative Filing

An affirmative asylum packet should include the following items:

- (1) **Form G-28, Notice of Entry of Appearance as Attorney (on blue paper for case).**
- (2) **Form I-589, Application for Asylum and Withholding of Removal (Be sure to use the most current one by checking the USCIS website at <https://www.uscis.gov/>).**
 - Note: there is no filing fee for an asylum application.
- (3) **One passport-style photograph** (stapled to the signature page of the I-589).
- (4) **Table of contents with supporting documentation.**
- (5) **Primary documentation:**
 - Detailed affidavit providing a narrative of the asylum claim.
 - Proof of identity and nationality (i.e., complete copy of passport or copy of applicant's birth certificate). (Note: all non-English documents submitted to the immigration service must be accompanied by an English translation and certification of translation.)
 - o NOTE: Applicants MUST submit a complete copy, plus one duplicate copy, with the asylum application.
 - Proof the client belongs to one of the protected classes (i.e., party card for political claims, baptism certificate for religious-based claims, etc.).
 - Documentation related to persecution (i.e., medical records, photographs, arrest warrants, expert statement from mental health examiner, affidavits from family and friends with knowledge of past harm or ongoing threats from persecutor, etc.).

(6) Secondary documentation

- Country condition documentation (i.e., United State Department of State Human Rights Report, news articles, reports by non-governmental organizations, etc.).
- Expert statements (i.e., academic experts on country conditions for the protected group in question).

(7) Legal brief

For defensive applications, the lawyer should file Form EOIR-28, Notice of Entry of Appearance as Attorney, electronically via the EOIR portal if not done previously (<https://portal.eoir.justice.gov/>). See Chapter 6, An Overview of Minnesota’s Immigration Court. The lawyer should file the following at filing window or at the master calendar hearing as three separate exhibits:

- (1) **Form I-589, Application for Asylum and Withholding of Removal**
- (2) **One passport-style photograph** (stapled to the signature page of Form I-589)
- (3) **Supporting documentation with table of contents**

**PRACTICE TIP**

The immigration court no longer requires that the asylum claim be filed at a master calendar hearing. The asylum claim can be filed at the immigration court filing window. See Michael C. McGoings, *Operating Policies and Procedures Memorandum 16-01: Filing Applications for Asylum* (Sept. 14, 2016), available at www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf. Respondents who were placed into removal proceedings prior to the issuance of this OPPM and filed their asylum claims after their one-year filing deadline should consider arguments for the judge to exercise discretion in finding an exception to the one-year filing deadline if they did not receive notice of the change. Further, lawyers should follow the pre-order instructions on filing I-589s that can be found in the OPPM appendix.

a. Legal Brief**PRACTICE TIP**

Even if the lawyer is filing an asylum claim affirmatively with the AO, it is wise to consider conforming the filing to the procedures regarding pagination as outlined in the Immigration Court Practice Manual (ICPM). The AO does not have strict filing requirements and complying with the ICPM will save time reformatting the filings in the event the case is referred to the immigration judge.

Additional documentation can be submitted after the initial filing, but at a minimum, the supporting documentation should include country conditions information such as the most current United States Department of State Human Rights Report.

b. Frivolous Findings and the Possibility of Detention

Anyone who files a frivolous asylum application is permanently ineligible for many benefits under the immigration laws. INA § 208(d)(6). In order to be found to have filed a frivolous application, the individual must have been advised of the consequences of filing a frivolous application. INA § 208(d)(4). This generally means the immigration judge will read the notice, and provide a written notice to the applicant at the master calendar hearing. A determination of frivolous filing will generally be made at the conclusion of proceedings.

Frivolous findings are not frequently made, but the lawyer should be aware of this possibility and discuss the standard consequences with the client prior to filing the asylum application.

3. Receipt and Biometrics

For affirmative applications, the USCIS AO that will adjudicate the case (the Chicago AO for applicants residing in Minnesota) mails the applicant and attorney a notice acknowledging receipt of the application. Any further correspondence about the case should be directed to the AO and not to the USCIS Service Center where the application was filed. The applicant will also receive an appointment notice to have biometrics taken (fingerprinting and photograph). The applicant must attend their biometrics appointment, or their application may be considered abandoned by the asylum office.

For defensive applications, the government attorney will provide instructions on submitting a request for a biometrics appointment at the master calendar hearing when the asylum application is filed. The lawyer will need to submit a request for biometrics to be taken prior to the final hearing by submitting a copy of the instruction sheet provided by the government attorney, a signed Form G-28, and copy of the first three pages of the Form I-589 to the USCIS processing center designated on the instruction sheet. If the attorney fails to timely request a biometrics appointment, the immigration judge may consider the application to be abandoned.



CAVEAT

The lawyer should calendar a reminder to ensure that biometrics are taken prior to the individual hearing by contacting the OPLA attorney to request that the biometrics be refreshed. If biometrics are not taken, the immigration judge may consider the application abandoned and pretermite the application for asylum. This risk is real and the lawyer must do everything possible to avoid this risk.

4. Supplementing the Record

Affirmative applications can be supplemented up until the AO makes a decision on the case. This includes mailing additional documentation into the asylum office after the applicant receives a receipt notice, submitting additional documentation at the asylum interview, or mailing documentation to the AO after the interview has taken place.

Defensive applications can be supplemented according to deadlines provided in the ICPM or as specified by the immigration judge. If amendments are needed to the Form I-589, a “red-lined” version should be submitted with a corresponding cover page that includes revisions made in red ink and changes numbered on the form. Any submissions made after the deadline should be accompanied by a “motion to accept untimely filing.”

5. Asylum Interview or Hearing

Timing for the client to be called for an affirmative asylum interview varies. Interviews for residents of Minnesota are held when officers from the Chicago AO make circuit rides to the Minneapolis-St. Paul USCIS Office to conduct interviews. The lawyer can inquire with the AO to find out when the next circuit ride is scheduled by emailing them at Chicago.Asylum@uscis.dhs.gov.

Interview notices are sent out approximately 21 days prior to the interview. Interviews are held at the USCIS Minneapolis office located at 250 S Marquette Ave #710, Minneapolis, MN 55401. Asylum interviews last approximately 90 minutes to three hours. Like most USCIS interviews, the applicant is responsible for bringing an interpreter; however, USCIS will have an interpreter monitor on the phone to verify the accuracy of the interpretation. The lawyer generally serves a passive role during an affirmative asylum interview. The lawyer is able to take notes, but cannot make formal objections to the officer’s questions. The lawyer should, however, request a break, provide clarification, or object if necessary. There is no recording or transcript of the interview and the asylum officer does not provide a copy of the interview notes; however, the lawyer can submit a Freedom of Information Act (FOIA) request to obtain a copy of the notes at a later date. The lawyer should take detailed notes during the interview, as they will have no other record of the asylum officer’s questions and their client’s response. The lawyer is allowed to make a closing statement when the asylum officer finishes questioning the client. The lawyer should have a written closing statement prepared that includes references to supporting documentation in the filing. The lawyer should direct the asylum officer to the supporting evidence during the closing statement. The lawyer can offer to submit the closing statement to the officer if it contains information not thoroughly covered in any legal brief submitted.



PRACTICE TIP

The AO accepts evidence from applicants up until a decision is issued on a case. If the lawyer identifies or encounters additional evidence after the asylum interview, this information can be submitted to the AO for consideration.

For defensive claims, the immigration judge will usually set a date for the individual merits hearing at the master calendar hearing when the asylum application is formally acknowledged by the court. The immigration court provides an interpreter for individual hearings. An interpreter is provided at the master calendar hearings. The attorney may have to specifically request an interpreter be called if the client speaks a less common language. A Spanish language interpreter will typically be present, and judges have capacity to call interpreters to interpret for the client in other languages.

Attorneys may wish to bring an interpreter to sit with them if they need to have a conversation with the client in the client’s best language during the hearing. The court’s interpreter is only available to interpret formal communications on the court record. Note that USCIS issued a temporary rule effective from Sept. 23, 2020 to Mar. 22, 2021 that requires asylum applicants who cannot proceed with the interview in English to use DHS-

provided telephonic interpreters. *See* 85 Fed. Reg. 59655 (Sept. 23, 2020), *available at* <www.federalregister.gov/documents/2020/09/23/2020-21073/asylum-interview-interpreter-requirement-modification-due-to-covid-19>.



PRACTICE TIP

If the lawyer is not fluent in the client's first language that will be used for the individual merits hearing, an interpreter fluent in that language should be present at the hearing. The lawyer may object if the court's interpreter is inaccurately interpreting testimony. Even if the client is proficient in English, the client may not object to interpretation of their own testimony.

At a defensive individual hearing the lawyer should prepare direct examination questions for the client as well as prepare the client for cross-examination by the government attorney. The immigration judges often ask questions of the client while on the witness stand as well. The attorney can—and should—prepare an opening and closing statement and be prepared to redirect if needed. The rules of evidence in immigration courts are different than the standard rules; however, attorneys should still take an active role to objecting and making arguments.



PRACTICE TIP

For a helpful practice advisory for attorneys regarding the rules of evidence applicable in immigration court, see CLINIC, *Practice Advisory: Rules of Evidence in Immigration Court Proceedings* (Mar. 13, 2020), *available at* <<https://cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings>>.

6. Decision

For affirmative applications for individuals residing in Minnesota, a decision is not provided at the end of the interview, rather it is mailed to the applicant and lawyer when a decision is made. Some asylum offices do require that an applicant come to the office to pick-up the decision; however, that has not been the practice for Minnesota-based applicants.

**PRACTICE TIP**

If the AO does not grant asylum to an individual who is not in a legal nonimmigrant status at the time of the decision, the individual will be placed into removal proceedings and the case will be referred to the immigration judge for de novo review. If the individual is in some lawful nonimmigrant status, such as a student, the AO issues a “Notice of Intent to Deny” and the lawyer or applicant will have an opportunity to respond before the AO makes its final decision. If it does not grant asylum, a denial notice will be sent out, but the individual will maintain their nonimmigrant status.

For defensive claims, the immigration judge may issue an oral decision from the bench on the day of the individual hearing. Alternatively, the judge may issue a written decision on a later date. If a written decision will be issued, the judge usually closes the proceedings and no further evidence may be submitted. An exception may be made if the judge allows for time for the parties to submit a written closing statement. The lawyer should have a written closing statement prepared for the day of the hearing. If time is allowed to submit a written closing statement, the lawyer should take the time to review and revise the statement as appropriate.

If the judge issues a decision on the day of the hearing, the parties will have an opportunity to indicate whether they will reserve appeal. If both parties waive appeal, the decision will be final. If asylum is granted, the client should receive an I-94 card in the mail indicating indefinite asylum status. If appeal is reserved, the parties have 30 days from the decision date to file an appeal with the BIA. If a written decision is issued, appeal is automatically reserved and the decision will not be final until the 30 days have elapsed.

E. Dependents

Legal spouses and children under the age of 21 at the time the asylum application is filed are eligible to be considered dependents on an asylum application. If the dependents are in the United States at the time the asylum application is filed, they can be included as part of the application by including a copy of the principal applicant’s asylum application and affixing a photograph of the dependent over the principal’s photo on the signature page of the application.

If dependents are outside of the United States at the time the spouse or parent is pursuing the asylum application, the principal must file a Form I-730 Refugee/Asylee Petition after asylum is granted.

**CAVEAT**

If the applicant is filing a defensive asylum application and qualifying dependents are in the United States, but not in removal proceedings, the immigration judge does not have jurisdiction to grant them asylum. The principal applicant will need to file a Form I-730 petition for those dependents after the immigration judge grants asylum.

Appendix A – Application Comparison Chart

	Asylum	SIJS	T-Visa
Adjudication Process	1 month to 5 year waiting period for interview. If UAC stripped, must pursue in adversarial proceeding before the immigration judge.	Family court adjudication separately from immigration. Immigration process requires filing forms/evidence. Processing times with USCIS are 1-2 years.	Personal affidavit required with application filing, evidence of LEA reporting and eligibility as victim of trafficking. Approximately 2 year waiting process; no in-person interview.
Adjudication Substance	USCIS interview focuses on asylum eligibility – often extensive questioning regarding past trauma.	USCIS interview which focuses on biographic information and admissibility, and not on abuse/neglect/abandonment (deference to state court).	Paper application with no interview.
Green card eligibility	Can apply for green card 1 year after grant.	Backlog means long wait for green card from certain countries. Can concurrently file with green card application, if from certain countries that do not have a backlog.	Eligible to file three years after T-Visa grant or if the investigation and prosecution of acts of trafficking are completed, as determined by the Attorney General. (Written statement included with adjustment application).
International Travel	Must apply for refugee travel document while in asylee and LPR status. Advisable not to return to home country even after green card granted.*	No restrictions on travel to home country, once green card granted.	May use valid T-Visa in your expired passport along with a new valid passport for travel and admission to the United States—must get T visa in passport; cannot use approval notice alone. Can apply for advance parole. Generally should not travel during pendency of T and investigation. Travel to home country not advised as it may undermine hardship arguments, resulting in revocation of T.
Public Benefits	Access to broad array of public benefits	Access to some public benefits	Extensive benefits

	Asylum	SIJS	T-Visa
Derivatives (Family Reunification) –Eligibility	Spouse and children <21 at time of filing.		Principal < 21: Parents, spouse, unmarried siblings under 18, unmarried children under 21; and children (any age) of other beneficiaries who face immediate danger due to trafficking. Principal > 21: Spouse, children (unmarried under 21); and children (any age) of other beneficiaries who face immediate danger due to trafficking.
Derivatives – Restrictions	Can apply for other family members after obtaining green card. After asylee obtains green card, and then U.S. citizenship, can sponsor parents and siblings for immigrant visa.	Cannot ever petition parents for an immigration benefit. (triggers at adjustment based on SIJS?).	Must be in T status to petition—cannot adjust before. Once adjusted, can petition for family members the same as any other green card holder (spouse, children) or citizen (parents, siblings, spouse and children).
Derivatives (Family Reunification) – Process	Can include spouse and children on application or apply for them within 2 years of grant.	Cannot include derivative beneficiaries in application, but as LPR, can sponsor spouse and children.	Can file at the same time as principal application or any time after grant, so long as unadjusted T. NOTE: IOM will help coordinate/pay for travel docs and travel for derivatives.