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**BASIC PROCEDURAL MANUAL**  
**FOR ASYLUM REPRESENTATION**  
**AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS**

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National Immigrant Justice Center

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**Please Note:** This manual is a brief guide to asylum practice and does not purport to discuss all aspects of immigration practice related to asylum proceedings. Additional sources should be consulted when more complex questions regarding current law and procedure arise. Many of these resources are referenced in this manual. In addition, NIJC maintains an extensive library of immigration law materials, and *pro bono* attorneys are encouraged to consult these materials at any time.

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National Immigrant Justice Center

# ACRONYMS AND TERMS

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<b>AEDPA</b>	Antiterrorism and Effective Death Penalty Act
<b>AG</b>	Attorney General
<b>AO</b>	Asylum Officer
<b>APSO</b>	Asylum Pre-Screening Officer
<b>BIA</b>	Board of Immigration Appeals
<b>ICE</b>	Immigration and Customs Enforcement
<b>CAT</b>	Convention Against Torture
<b>DED</b>	Deferred Enforced Departure
<b>DHS</b>	Department of Homeland Security
<b>EOIR</b>	Executive Office for Immigration Review
<b>FOIA</b>	Freedom of Information Act
<b>IIRIRA</b>	Illegal Immigration Reform and Immigrant Responsibility Act
<b>IJ</b>	Immigration Judge
<b>INA</b>	Immigration and Nationality Act
<b>INS</b>	Immigration and Naturalization Service
<b>LPR</b>	Lawful Permanent Resident
<b>NACARA</b>	Nicaraguan Adjustment and Central American Relief Act
<b>NOID</b>	Notice of Intent to Deny
<b>NTA</b>	Notice to Appear
<b>SSA</b>	Social Security Administration
<b>TA</b>	Trial Attorney
<b>TPS</b>	Temporary Protected Status
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>USC</b>	United States Citizen
<b>USCIS</b>	United States Citizenship & Immigration Services
<b>VAWA</b>	Violence Against Women Act

# INFORMATION ON THE *PRO BONO* PROGRAM

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## **The National Immigrant Justice Center**

The National Immigrant Justice Center (NIJC, formerly the Midwest Immigrant and Human Rights Center) is a program of Heartland Alliance for Human Needs & Human Rights, an organization that has helped immigrants and refugees find safety and opportunity in the United States since its inception in 1888. NIJC's asylum *pro bono* project was founded in 1985 and provides legal representation to low-income non-citizens seeking political asylum in the United States. The project is now one of the leading asylum defense programs in the country, handling hundreds of affirmative and defensive asylum cases every year.

NIJC's *pro bono* program relies almost entirely on volunteer attorneys, the great majority of whom have no previous experience in immigration or asylum law. NIJC assists its volunteers by providing training, materials, support services and consultation as needed. Largely as a result of the efforts of its volunteers, NIJC has helped thousands of non-citizens from more than 45 nations begin new lives in the United States and has become a national model for legal clinics providing immigration legal services.

## **Our Clients**

NIJC's asylum clients are non-citizens who have fled civil wars, violence and persecution around the globe and who are present in the United States without legal status. Many of NIJC's clients have survived state-sponsored torture and/or persecution. Other clients have been subjected to severe human rights abuses by non-state agents such as guerilla groups and private citizens, where the government is not able or willing to protect them from those who seek to inflict harm. Through NIJC's asylum project, *pro bono* attorneys have saved the lives of clients fearing political, racial, ethnic and religious persecution, gender-based violence, and extreme abuse and discrimination based on sexual orientation.

NIJC provides representation to asylum-seekers in affirmative and defensive proceedings. Most of NIJC's clients are already in removal proceedings at the Immigration Court - the last step before the United States government will deport them to their home countries. In these adversarial proceedings before an Immigration Judge, an individual who has an attorney has a far better chance of winning her case than an individual without representation.

## **What We Expect from Volunteer Attorneys**

NIJC clients' lives are quite literally at stake in affirmative and defensive asylum proceedings. For that reason, we treat every case very seriously and we ask that our volunteers to do the same.

We request that NIJC volunteers agree to stay with a case from start to finish—that is, through completion of the trial on the merits of the claim, and if necessary to continue to exhaust appeal remedies before the Board of Immigration Appeals (BIA) or federal court.

Because of our case volume, we ask that volunteers not agree to take a case if they are not sure whether they will be able to at least complete the trial on the merits of the claim. If, during the appeal process, the attorney must withdraw from the case, we ask that he/she attempt to obtain substitute counsel. If that is not possible, please advise NIJC as soon as possible so that we can try to find new counsel.

NIJC's clients are most often successful when their attorneys have spent a great deal of time preparing their cases and preparing them for testimony. Although it might seem that a three or four-hour hearing or an administrative interview before an Asylum Officer would not require enormous preparation time, the opposite is usually the case. A well-prepared asylum case often requires intensive pre-hearing preparation. Depending on the complexity of the case, some attorneys suggest a team approach with a partner, associate and a paralegal working together to prepare the case. Most volunteers spend between 50 to 200 hours preparing their cases.

NIJC volunteers are only asked to handle our client's asylum cases—not other legal matters or other immigration-related problems. Clients should be referred back to NIJC for any ancillary matters.

## **What Volunteers Can Expect from NIJC**

NIJC provides training, information on asylum law and practice and procedure, sample applications and other materials, documentation and other resources and consultation with experienced practitioners.

NIJC does not simply refer out cases. It remains “of counsel” in every case, and volunteers are strongly encouraged to call us when they have any questions or simply want to discuss case theories or trial strategies. NIJC knows that the great majority of our volunteers have no experience in immigration law, so it tries to provide as much support and assistance as possible.

Basic training courses are offered every few months. In addition, NIJC will set up a training session upon request. The basic course is three hours, and all training materials are provided.

NIJC carries comprehensive professional liability insurance, which specifically covers the *pro bono* volunteer attorneys.

Finally, NIJC's volunteers can expect that an asylum case will be one of the most fascinating and rewarding career experiences. NIJC cases are always interesting and compelling, reflecting realities discussed in the international news headlines. Many of NIJC's clients were human rights activists or community leaders whose activities have placed them at risk in their own countries. Nothing can match the satisfaction of winning an asylum grant for a client.

## Obtaining a Case

You can contact Megan Baumann, NIJC's *Pro Bono* Coordinator at (312) 660-1307 or [mbaumann@heartlandalliance.org](mailto:mbaumann@heartlandalliance.org) to obtain a case. Once a client has been assigned to you, NIJC will send you a copy of the client's file and contact information.

Further, you will be advised if the client has been referred for treatment to the Marjorie Kovler Center for the Treatment of Survivors of Torture. Alternatively, if your client is a survivor of torture, please let us know so that we can refer your client to the Kovler Center.

## First Steps

NIJC recommends that *pro bono* attorneys take the following steps upon receipt of a new case:

**Contact your client.** NIJC advises the client when his or her case has been assigned to a *pro bono* attorney. Often, clients have waited weeks for assignment to an attorney, and they are anxious to hear from their new lawyers.

**Review the file in full.** NIJC attempts to obtain relevant documentation from our clients prior to assigning a case to a *pro bono* attorney. You may have received copies of certain documents from your client, but you will need to discuss with your client whether the original documents are available.

**Review the Notice to Appear.** If your client is before the Immigration Court, the Judge will likely expect you and your client to respond and plead to the charging document known as the Notice to Appear (NTA) at an upcoming hearing. Be careful to review the allegations and charges with your client to ensure their accuracy. Any errors can be discussed with the Trial Attorney and the Judge at the hearing.

**Review any pre-existing asylum applications.** If your client applied affirmatively to the Asylum Office and was then referred to the Immigration Court, be sure to review the existing application carefully with your client. Often, language barriers have resulted in incorrect information or statements being presented in the first application, which may generate problems at the merits hearing since the Judge's file and the record will contain this version. Minor corrections can be made to the application and explained at the time of the merits hearing. If the original application contains significant errors, you should file a notice of amendments with the Court or you might consider requesting leave to file an amended application.

**Submit a FOIA request to obtain your client's full immigration file.** Particularly if your client was referred to the Court from the Asylum Office or was subject to a Credible Fear Determination upon entry to the United States, you should request a copy of your client's file through the Freedom of Information Act (FOIA). Through a FOIA request, you might be able to obtain documents that DHS has in its file and intends to use for impeachment purposes during the merits hearing. If your client is in immigration proceedings, it may take about two months to receive a copy of your client's file. If your client is not in proceedings, it may take approximately one year to receive a copy of the file.

**Register with [www.asylumlaw.org](http://www.asylumlaw.org)**. If you are not already a registered user, NIJC encourages you to sign up for full access to [www.asylumlaw.org](http://www.asylumlaw.org) materials. While case support documents are available to non-registered users, registered users have additional access to a database of expert witnesses, lists of knowledgeable attorneys, and sample trial briefs.

**Review the Immigration Court Practice Manual**. If your client's case is before the immigration court, the Immigration Court Practice Manual, available at [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir), describes the procedures and requirements for immigration court practice. The Practice Manual is binding on all parties who appear before the immigration court, unless the immigration judge directs otherwise in a particular case.

# THE BASICS OF ASYLUM LAW

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## Background

Federal law provides that individuals who have suffered or fear persecution in their home countries based on their particular race, religion, nationality, political opinion or social group can apply for asylum in the United States. This most fundamental right is guaranteed by the 1951 United Nations Convention Relating to the Status of Refugees and implemented in the 1967 United Nations Protocol Relating to the Status of Refugees. US Congress codified refugee and asylee protection in 1980 through the Refugee Act.

To qualify for asylum, the alien must be physically present in the United States. The Attorney General may grant asylum to an applicant who can establish past persecution or a “well-founded fear” of future persecution in the home country on account of race, religion, nationality, political opinion, or membership in a particular social group. Asylum, however, is discretionary, which means an applicant may not be entitled to it even when eligible. In exercising her discretion, the Judge can take into account a number of negative factors, including violations of immigration law (e.g. use of fraudulent documents) or criminal law (e.g. commission of a crime).

Obtaining asylum grants significant benefits to the recipient. An asylee cannot be removed from the United States unless the government can show that there has been a “fundamental change in circumstances [in the home country] relating to the original claim...” such that he/she may no longer be in danger upon return. 8 C.F.R. §208.24. An asylee may also obtain work authorization and may apply to adjust his/her status to lawful permanent resident one year after the grant of asylum. Further, an asylee is able to petition for and provide asylee status to his or her spouse and unmarried children under 21.

The Attorney General, acting through the former Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR), had been charged with interpreting and applying asylum protections. On March 1, 2003, the INS ceased to exist as an independent entity and was transferred from the Department of Justice to the Department of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2178. Consequently, the DHS, through its United States Citizenship & Immigration Services (USCIS), now adjudicates all affirmative requests for asylum. The Attorney General maintains jurisdiction over asylum applications filed with the Immigration Court.

## AGENCIES INVOLVED IN THE ASYLUM PROCESS

### Department of Homeland Security (DHS)

- United States Citizenship and Immigration Services (USCIS)
- Office of Asylum (AO)
- Immigration and Customs Enforcement (ICE)
- Customs and Border Patrol (CBP)

### Department of Justice (DOJ)

- Executive Office for Immigration Review (EOIR)
- Board of Immigration Appeals (BIA)
- Office of Immigration Litigation (OIL)

## Ways to Apply for Asylum

Within the United States, individuals fleeing persecution can apply for asylum either affirmatively or defensively. Persons applying for asylum affirmatively are those who came to the United States either legally or illegally and have not been placed in removal proceedings by the DHS. The Asylum Office within the USCIS branch of the Department of Homeland Security adjudicates all affirmative applications. By contrast, if an individual is arrested by the DHS or otherwise placed in removal proceedings, he/she may apply for asylum, withholding or removal and/or relief under the UN Convention Against Torture as a defense to removal. Defensive applications are heard before an Immigration Judge.

## Legal Test for Asylum/Refugee Protection

The Immigration and Nationality Act (INA) sets forth the legal test for asylum eligibility. A person may qualify for asylum if he/she meets the international definition of a refugee. A refugee is defined as:

*Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*

INA §101(a)(42)(A); 8 U.S.C. §1101(a)(42)(a). Accordingly, individuals who can demonstrate that they have suffered past persecution or have a “well-founded fear of persecution” based on one of the five enumerated grounds can qualify for asylum protection.

### Definition of Persecution

Neither the INA nor accompanying regulations define persecution. Federal courts and the BIA have broadly defined persecution as “the infliction of suffering or harm upon those who differ ... in a way that is regarded as offensive.” *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). Threats to life or freedom are uniformly found to be persecution. Physical abuse, even when not life-threatening, will also generally constitute persecution. The suffering or harm experienced, however, must amount to more than mere

harassment. *Balazoski v. INS*, 932 F.2d 638, 642 (7th Cir. 1991). Additionally, being subjected to various types of harm that in and of themselves do not amount to persecution, may be considered persecution when taken in aggregate. Such harms might include:

1. arbitrary interference with a person's privacy, family, home or correspondence;
2. relegation to substandard dwellings;
3. exclusion from institutions of higher learning;
4. enforced social or civil inactivity;
5. passport denial;
6. constant surveillance; and/or
7. pressure to become an informer.

The persecution must be either by the government or a group that the government cannot or will not control. It can include, for example, groups such as guerrilla forces, death squads, paramilitary groups, clans, or society at large in cases of severe racial, gender or sexual orientation discrimination.

### **Legal Test For Well-Founded Fear**

In order to establish a "well-founded fear" of persecution, an asylum applicant need only show a *reasonable possibility* that he/she will be persecuted. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The U.S. Supreme Court has stated that the following is sufficient to establish a well-founded fear:

1. "having a fear of an event happening when there is less than a 50% chance that it will take place, and
2. "establishing a 10% chance of being shot, tortured, or [being] otherwise persecuted."  
*Id.*

In order to demonstrate well-founded fear, it is necessary to demonstrate both a *subjective and objective* component. *Id.* In order to satisfy the subjective component, a person must show that he/she actually has a fear of returning to his/her country of origin. In order to satisfy the objective component, a person must do two things:

1. present specific facts through objective evidence or through persuasive, credible testimony; and
2. show that given evidence presented, a reasonable person would experience a fear of persecution.  
*Matter of Mogharrabi*, 19 I&N Dec. 439, 441 (BIA 1987).

In *Matter of Mogharrabi*, the Board set forth the following four elements which an applicant for asylum must show in order to establish a well-founded fear of persecution: (1) the applicant possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the applicant possesses this belief or characteristic; (3) the persecutor has the capability of punishing the applicant; and (4) the persecutor has the inclination to punish the applicant. *Matter of Mogharrabi*, 19 I&N Dec. at 446; *INS v. Elias-Zacarias*, 112 U.S. 812 (1992).

## **Past Persecution**

It is important to determine the existence of past persecution as well. If an applicant can establish that he/she was persecuted in the past, there is a presumption of future persecution. 8 C.F.R. §208.13(b)(1); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). The presumption relates only to fear of harm based on the claim that gave rise to the original persecution, e.g., persecution on account of religion or political opinion. *Matter of A-T-*, 24 I&N Dec. 617, 622 (A.G. 2008); 8 C.F.R. §208.13(b)(1). The government then has the burden of rebutting the presumption. The government may do this by establishing by a preponderance of the evidence that conditions in the home country have changed to the extent that the applicant no longer has a well-founded fear, or that by moving to another part of his or her country the applicant could avoid the persecution and that it would be reasonable to expect him or her to do so. 8 C.F.R. §208.13(b)(1)(i).

If the government succeeds in establishing changed country conditions or the reasonableness of internal relocation, the applicant may still be afforded asylum protection if he/she can demonstrate compelling reasons for being unwilling or unable to return arising out of the severity of the past persecution or a reasonable possibility of suffering other serious harm. *See* 8 C.F.R. §208.13(b)(1)(iii). “Serious harm” does not have to be based on one of the five enumerated grounds. *Id.*

## **Internal Relocation**

The government may defeat a finding of well-founded fear of persecution if the applicant could avoid the persecution by relocating to another part of the home country and that it would be reasonable to do so. 8 C.F.R. §208.13(b)(2)(ii). In determining whether the applicant could relocate, the Court or Asylum Office should consider ongoing civil strife; strength or weakness of government infrastructures; geographical limitations; and social or cultural constraints. 8 C.F.R. §208.13(b)(3). If the feared persecutor is the government or if past persecution has been shown, the burden to establish the reasonableness of internal relocation falls on the government. *See* 8 C.F.R. §208.13(b)(3)(ii). The government bears the burden to overcome the presumptions by a preponderance of the evidence, even in the context of an Asylum Office adjudication.

## **The Nexus and the Five Protected Grounds for Asylum**

In order to establish asylum eligibility, the applicant must show a nexus between past or feared future persecution and one of the protected grounds of asylum: race, religion, nationality, political opinion, and membership in a particular social group. In addition, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion “was or will be *at least one central reason* for persecuting the applicant.” INA § 208(b)(1)(B)(i).<sup>1</sup> To meet this “one central reason” requirement, applicants should demonstrate a clear nexus between the persecution and the protected ground, and should take care to consider and highlight all direct and circumstantial evidence in the case which demonstrates nexus.

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<sup>1</sup> The REAL ID Act (P.L. 109-13) added the “one central reason” burden of proof to asylum claims. Therefore, this burden only applies to asylum applications filed on or after May 11, 2005.

The first three protected grounds of asylum (race, religion, and nationality) have fairly well-accepted definitions. The latter two protected grounds (membership in a particular social group and political opinion) are more expansive and controversial in application.

### **1. RACE**

The term “race” includes “all kinds of ethnic groups that are referred to as ‘races’ in common usage.” United Nations High Commissioner on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 68 (1992) (UNHCR Handbook). For example, ethnic Albanians and Chechens would qualify as “races” under this definition.

### **2. RELIGION**

Persecution on account of religion can include the prohibition of public or private worship, membership in a particular religious community, or religious instruction. UNHCR Handbook ¶ 72. Serious discrimination towards a person because of his/her membership in a particular religion or religious community may also constitute persecution on account of religion. *Id.* Mere membership in a particular religious community, on the other hand, will not in most cases be enough to establish an asylum claim. *Refahiyat v. INS*, 29 F.3d 553, 557 (10th Cir. 1994).

### **3. NATIONALITY**

The term "nationality" includes citizenship or membership in an ethnic or linguistic group and oftentimes overlaps with "race." UNHCR Handbook ¶ 74.

### **4. POLITICAL OPINION**

An applicant’s *actual* political opinion may serve as a basis for persecution. Further, a political opinion *imputed* to the applicant may also serve as a basis for persecution. An “imputed opinion” is defined as an opinion that the persecutor believes the applicant to have.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, INA §101 (a)(42)(B), 8 USC §1101 (a)(42)(B)) changed the definition of refugee by specifying that persecution on account of political opinion includes persons persecuted due to *coercive population control programs*, such as forced abortion, forced sterilization, or fear of persecution because of refusal to participate in program of forced population control.

### **5. SOCIAL GROUP**

“Social group” is a very broad concept. According to the UNHCR, a social group is constituted by “persons of similar background, habit or social status.” UNHCR Handbook ¶ 72. Generally, it is understood as a group of people who share or are defined by certain characteristics such as age, geographic location, class background, ethnic background, family ties (e.g., an African clan), gender, and sexual orientation.

The Board of Immigration Appeals has said that members of a particular social group must share a “*common immutable characteristic.*” *Matter of Acosta*, 19 I&N Dec.211, 222 (BIA 1985). That characteristic should be something the group cannot change or should not be required to change.

*Id.* In several recent precedent decisions, the Board of Immigration Appeals has narrowed the kinds of groups that can constitute particular social groups for asylum purposes by requiring that the groups have both “social visibility” and “particularity.” See *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of A-M-E- & J-G-U*, 24 I&N Dec. 69 (BIA 2007); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). Attorneys who wish to argue that their client has a well-founded fear of persecution on account of his or her membership in a particular social group should make sure to read these cases to determine the best way to define their client’s social group.

A number of groups have been defined to fall within the meaning of “social group.” For example, persecution on account of *sexual orientation* has been held to fall within this category. Additionally, *some gender-based claims* have been held to fall within the meaning of social group. The law has recognized the practice of female genital mutilation (FGM) as persecution on account of gender. See *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008); *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), and *Abankwah v. INS* 185 F.3d 18 (2nd Cir.) for a discussion on FGM.

## *Asylum Claims Involving Victims of Domestic Violence*

A critical advance in the area of women's rights has been the recognition that women's rights are human rights. Women often experience human rights abuses that are particular to their gender, including rape, molestation, domestic violence, sexual harassment and sexual slavery. Furthermore, many of the serious harms faced by women are not inflicted in a public forum, but occur instead in the private realm of the home and family. Consequently, it remains a challenge for many adjudicators to recognize these claims as falling within the definition of a refugee, even under the most compelling circumstances. Some still tend to see domestic violence as a private family matter outside the scope of refugee protection.

In 1995, the INS (now USCIS) adopted Considerations for Asylum Officers Adjudicating Asylum Claims from Women. These guidelines recognize that women often experience types of persecution different from those faced by men, and cite domestic violence as one form of gender-related persecution that can be the basis for an asylum claim. Although these guidelines apply to Asylum Officers, they have had a persuasive impact on many immigration and federal court judges around the country. Following issuance of the INS Gender Guidelines, a growing number of Asylum Officers and Immigration Judges began to grant asylum claims based on domestic violence.

For years, practitioners have awaited a definitive ruling from the Board of Immigration Appeals (BIA) on whether domestic violence constitutes grounds for an asylum claim. When the Board's decision in *Matter of RA-*, 22 I&N Dec. 906 (BIA 1999) was issued, it was far worse than advocates could have imagined. Respondent Rodi Alvarado had fled Guatemala and applied for asylum in the United States in 1995, after suffering ten years of horrific domestic abuse. Her husband, a Guatemalan Army soldier, raped her repeatedly, dislocated her jaw, tried to cut her hands off with a machete, kicked her in the vagina, used her head to break windows and attempted to abort their second child by kicking her in the spine. He terrified her by bragging about his power to kill innocent civilians with impunity, including infants. Ms. Alvarado sought and was refused assistance from the Guatemalan police and the courts. Although the Board found that Rodi Alvarado had been persecuted and that her government had failed to provide adequate protection, it determined that she was not persecuted based on a protected ground.

The decision was appealed to the Ninth Circuit Federal Court of Appeals, and on December 7, 2000, U.S. Attorney General Janet Reno and the INS issued rules that provided guidance in adjudicating asylum claims based on domestic violence. The proposed rules called into serious question much of the Board's reasoning in *Matter of RA-*. On January 19, 2001, Janet Reno vacated *Matter of RA-*, sending it back to the Board for reconsideration in light of the proposed rules.

In March 2003, Attorney General John Ashcroft certified the case to himself, and in February 2004, the Department of Homeland Security (DHS) submitted a brief to Attorney General Ashcroft articulating its position on Ms. Alvarado's eligibility for relief. The brief sets forth that a victim of domestic violence may be able to establish a valid claim for asylum based on a well-founded fear of persecution on account of membership in a particular social group, e.g. "married women in Guatemala who are unable to leave the relationship." In May 2004, it was announced that the position taken by DHS in this brief represented DHS's official position and should be followed in related asylum cases. However, the government still intended to issue further regulations regarding these cases.

In his last days as Attorney General, John Ashcroft remanded Rodi Alvarado's case back to the BIA for decision and directed the BIA to reconsider its decision "in light of the final rule," which had not yet been published. As a result, *Matter of R-A-* remained stayed at the BIA level and the majority of domestic violence-based asylum claims that had reached the BIA level were stayed as well. On September 25, 2008, former Attorney General Michael B. Mukasey certified the case to himself and then lifted the stay and remanded *Matter of R-A-* back to the Board for further proceedings. The proposed rules still have not been finalized and it is unclear how the BIA will now decide *Matter of R-A-*.

## Bars To Eligibility For Asylum

The following persons are not eligible for asylum:

1. Aliens who are *persecutors* of others, i.e. if the applicant has subjected someone else to harm on account of one of the protected grounds (INA §208(b)(2)(A)(i));
2. Aliens who are *firmly resettled* within the meaning of 8 C.F.R. §208.15 (INA §208(b)(2)(A)(vi));
3. Aliens who *previously filed for asylum* and were denied (INA §208(a)(2)(C));
4. Aliens who *did not file for asylum within one year* of arrival in the U.S., unless they can show changed or extraordinary circumstances that lead to their late filing (INA §208(a)(2)(B), 8 C.F.R. §§208.4, 208.34);
5. Aliens convicted of an *aggravated felony*, as defined by immigration law. *See* INA §208(a)(2)(B)(i). An aggravated felony includes many crimes. For a complete list see INA §101(a)(43). The most commonly invoked are:
  - a. drug trafficking—any crime involving distribution, importation or sale of drugs, no matter the amount or the sentence;
  - b. the crime of theft, robbery or burglary with one-year sentence whether imposed or suspended; and
  - c. the crime of violence with a one-year sentence whether imposed or suspended.
6. Aliens convicted of a “*particularly serious crime.*” Most of the crimes that are considered particularly serious are aggravated felonies under immigration law. A particularly serious crime usually involves violence against persons, or risk of violence to persons. Occasionally, the government may argue that a crime is particularly serious, even though it is not defined as an aggravated felony under immigration law, such as assault with a deadly weapon or robbery with less than a year sentence (INA §208(a)(2)(A)(ii));
7. Aliens who *pose a danger to the security of the United States* (INA §208(a)(2)(A)(iv));
8. Aliens who are described in INA § 212(a)(3)(B)(i)(I)-(IV), or (VI), or § 237(a)(4)(B) – relating to terrorist activity;
9. Aliens who committed a “*serious nonpolitical crime*” (INA §208(a)(2)(A)(iii)); and
10. Aliens who *may be removed pursuant to a bilateral or multilateral agreement to a safe third country*, unless the Attorney General finds it in the national interest to grant asylum. *See* INA §208(a)(2)(A).

If any of these conditions are identified in your case, please contact NIJC staff.

**\*\*\*Impact of the Material Support to Terrorism Bar\*\*\***

In recent years, Congress has enacted several pieces of legislation that attempt to keep terrorists from gaining immigration status in the United States as refugees or asylees but, in practice, result in the denial of asylum to many victims of terrorist activity. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. No. 107-56, 115 Stat. 272 and the REAL ID Act of 2005, Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (Pub. L. No. 109-13, 119 Stat. 231) amended the INA to expand the definition of a terrorist organization and, in turn, dramatically broadened the class of people who are barred for admission for having provided material support to terrorists. *See* INA §212(a)(3)(B).

Terrorist Organizations and Activity Defined

A collection of people may now be considered a terrorist organization if they are a “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” terrorist activities. INA §212(a)(3)(B)(vi)(III). Terrorist activity includes any “threat, attempt, or conspiracy” to use “any...explosive, firearm, or other weapon or dangerous device (other than for mere personal or monetary gain), with intent to endanger...the safety of one or more individuals or to cause substantial damage to property.” INA §212(a)(3)(B)(iii)(V). A group’s activity is terrorist activity if it is “unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).” INA §212(a)(3)(B)(iii).

Impact of the Expanded Definitions

Under this framework, pro-democracy groups who struggle against dictatorships are considered terrorist groups because the actions they take against the regime oppressing them are against the law in the place where the actions they take. For example, government attorneys have admitted that under this definition, U.S. Marines operating in Iraq before the fall of Saddam Hussein would have qualified as a terrorist organization. *Matter of S-K-*, 23 I&N Dec. 935 (BIA 2006), Oral Argument Transcript at 25.

Material Support

People who in any way support organizations considered terrorist groups are barred from receiving asylum. This material support bar gives rise to absurd legal ends. In 2006, the BIA found that a Burmese woman who provided financial support to pro-democracy freedom fighters was barred from receiving asylum because she provided material support to a terrorist organization. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). Thus far, the courts have found no defenses to this bar. Duress, infancy, self-defense and mental incapacity do not excuse material support. Moreover, there is no de minimus exception. Providing a meal for a rebel fighter could trigger the bar. Being held hostage in one’s home while members of a guerilla group lodge for the night could trigger the bar. Paying a fee to keep terrorists from killing your family could trigger the bar. The statutory language is, as one BIA Board member observed, “breathtaking in its scope.” *S-K* at 948. (Osuna, J., concurring). Although it is possible to obtain a waiver from the Department of Homeland Security for certain types of material support given to certain kinds of “terrorist” groups, these waivers are extremely difficult to obtain and are completely within the discretion of the DHS.

When These Issues Arise...

It is important that attorneys representing asylum-seekers keep these expanded definitions of terrorist groups and material support in mind as they prepare their clients’ asylum claims. Facts that previously would have bolstered applicants’ claims for asylum and demonstrated persecution can now make them ineligible for asylum. If you are working with a client who presents facts that might cause him or her to be denied asylum based on these bars, please contact NIJC immediately so we can offer assistance in the preparation of your case.

# ALTERNATIVES TO ASYLUM

\* \* \*

## Withholding of Removal

Another type of protection available to individuals fleeing persecution, though not as beneficial as asylum, is withholding of removal. INA §241(b)(3), 8 U.S.C. §1231(b)(3). Withholding is usually sought if: 1) the client has committed an aggravated felony, making him/her ineligible for asylum; 2) there are negative factors in the client's past such as a criminal history that are not felonious but which make discretionary grant of asylum questionable; or 3) if the client is ineligible for asylum because of other factors, commonly filing past the one-year deadline. Unlike asylum, withholding is not subject to a one-year deadline. In addition, withholding is a mandatory form of relief; it is not discretionary as is relief under asylum. Accordingly, 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 be removed from the United States to the country from which he/she was fleeing persecution, but can be removed to a third country if one is available. The individual can obtain work authorization, but may not petition to bring over his or her spouse and children. Furthermore, the individual may not adjust his/her status to legal permanent residency or apply for citizenship.

### Test for Withholding of Removal

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). This is a more difficult burden (P>50%) to meet than that for asylum. As in asylum law, however, if the individual can show that he/she suffered persecution in the past, then that individual will receive the benefit of a presumption of a well-founded fear of future persecution. Further, withholding of removal is mandatory if the individual meets the above clear probability test and establishes that he/she is not barred from eligibility (see below).

### Bars to Eligibility for Withholding of Removal

An individual is not eligible for withholding of removal if he/she:

1. Is a *persecutor*;
2. Has committed a serious nonpolitical crime outside the United States;
3. There are reasonable grounds to believe that the alien is a danger to the security of the United States, including an alien described in INA § 237(a)(4)(B) (relating to terrorist activity); or

4. Has been convicted of a *particularly serious crime*. *Matter of S-S-*, 22 I&N Dec. 458 (BIA 1999) (overruled in part by *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002)) and *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). An aggravated felony conviction does not automatically bar an applicant from withholding of removal unless he/she received a five-year or more sentence, imposed or suspended. An aggravated felony is presumed to be “particularly serious.” See INA §241(b)(3)(B). Again, other crimes not rising to the level of an aggravated felony may also bar an individual from withholding of removal if found to be particularly serious.

In determining whether a crime is particularly serious, the court will look at:

- a. the nature of the crime, i.e. was it against a person or property;
- b. the circumstances surrounding the crime;
- c. the length of the sentence; and
- d. whether the crime indicates dangerousness to community.

*Matter of S-S-*, *supra*; *Matter of Frentescu*, *supra*.

## Convention Against Torture

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)<sup>2</sup> prohibits the return of a person to another country where substantial grounds exist for believing that he/she would be in danger of being subjected to torture if returned. *Matter of Y-L-A-G-, R-S-R-*, 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 only recently made a part of U.S. domestic law. See Pub. L. No.105-277, §2242. A CAT claim may be raised even after a final order of removal/deportation has been issued.

The advantage of CAT is that there are no bars to eligibility. Therefore, 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, an applicant is not required to establish her fear if torture is on account of race, religion, nationality, political opinion, or membership in a social group.

Recently enacted regulations create two separate types of protection under CAT. See 8 C.F.R. §§ 208.16, 208.17. The first type of protection is a new form of withholding of removal under CAT. Withholding under CAT prohibits the return of an individual to his or her home country. It can only be terminated if the individual’s case is reopened and the DHS establishes that the individual is no longer likely to be tortured in his or her home country.

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 his or

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<sup>2</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature February 4, 1985, G.A. Res. 39/46, U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708(1984), reprinted in 23 I.L.M.1027 (1984), modified in 24 I.L.M. 535 (1985).

her home country. Additionally, if an individual were granted deferral of removal under CAT, the DHS would still be able to detain an individual already subject to detention.

Like withholding of removal, the benefits of CAT are limited. An individual who is successful under a CAT claim cannot be removed from the United States to the country from which he/she fled persecution, but can be removed to a third country if one is available. The individual may not adjust his/her status to legal permanent residency, but can obtain work authorization.

## **Definition of Torture**

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he 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. Recently, the Board of Immigration Appeals interpreted the definition of torture and found that torture “is an extreme form of cruel and inhuman punishment and 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 Board also found that indefinite detention, without further proof of torture does not constitute torture under this definition. *Id.*

The torture feared must be carried out by their government or someone acting with the acquiescence of the government. Acquiescence has been narrowly defined and must include awareness of the torture and failure to intervene thereby breaching a legal responsibility. *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

## **Proof of Torture**

The standard of proof under the CAT is higher than the standard for asylum. The alien must prove that it is “more likely than not” that he/she 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. All relevant considerations are to be taken into account, including, where applicable, the existence in the State concerned of a “consistent pattern of gross, flagrant or mass violations of human rights.” *S-V-*, 22 I&N Dec. at 1313.

## **Procedure for Raising CAT Claims**

Individuals seeking relief under the CAT must bring their claims before an Immigration Judge. The procedure for filing a claim under the CAT will differ depending on certain factors, including the status of an individual’s case. If your client is filing for asylum, she should request relief under withholding of removal and CAT in his/her I-589 asylum application and should include the following information:

- The type of torture she is likely to experience if forced to return to his/her country;
- Any past instances of torture that she has experienced;
- Any past instances of torture experienced by close family members and associates; and

- Documentary support showing related human rights abuses by the government of her country, such as the U.S. State Department's Human Rights Country Reports, Amnesty International Reports, Human Rights Watch reports, and reports from other human rights monitoring groups.

If your client has already filed for asylum, but did not mention withholding of removal and CAT, she should supplement the application with the above information.

Remember that relief under the Convention Against Torture is not as beneficial as asylum. Thus, we recommend that you include a CAT claim in the alternative while seeking asylum. If you believe that your client has a potential CAT claim, please contact NIJC for further information.

## **Voluntary Departure**

Voluntary departure permits an individual, who is otherwise removable, to depart from the country at his/her own expense within a designated amount of time in order to avoid a final order of departure.<sup>3</sup> INA § 240B. However, voluntary departure is not available in all cases. INA § 240B(c).

Voluntary departure is preferable to a removal order for a number of reasons. If an individual is issued a removal order s/he may be barred from reentering the United States for up to ten years and may be subject to civil and criminal penalties if he/she reenters without proper authorization. In addition, an individual with a removal order is barred for ten years from applying for cancellation of removal, adjustment of status and other immigration benefits. However, if the individual voluntarily departs within the time ordered by the court, he/she will not be barred from legally reentering in the future and does not face the bars to relief that an individual with a removal order would face.

An individual may apply for voluntary departure either prior to the master calendar hearing or at the conclusion of proceedings, provided that the individual meets the necessary requirements.

### **Master Calendar Hearing**

If the application for voluntary departure is prior to, or at the master calendar hearing, the individual must show that he/she:

1. Waives or withdraws all other requests for relief;
2. Concedes removability;
3. Waives appeal of all issues;
4. Has not been convicted of an aggravated felony and is not a security risk;
5. Shows clear and convincing evidence that he/she intends and has the financial ability to depart; and
6. Presents to the DHS a valid passport or other travel document sufficient to show lawful entry into his/her country, unless such document is already in the possession of the DHS or is not needed in order to return to his/her country

If the individual is able to meet these requirements, then the Immigration Judge may grant a voluntary departure period of up to 120 days at the time of the Master Calendar hearing. *See* INA § 240B(a), 8 C.F.R. § 1240.26. The Judge may not grant voluntary departure beyond 30 days after the

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<sup>3</sup> We do not recommend seeking this relief unless your client no longer fears persecution or seeks to return home.

Master Calendar at which the case is initially scheduled, except pursuant to a stipulation from the DHS. 8 C.F.R. § 1240.26(b)(E)(ii).

### **Conclusion of the Merits Hearing**

An individual may also apply for voluntary departure after the conclusion of proceedings, provided that the individual meets the following requirements:

1. Shows physical presence for one year prior to the date the Notice to Appear is issued;
2. Shows good moral character for five years prior to the application;
3. Has not been convicted of an aggravated felony and is not a security risk;
4. Shows clear and convincing evidence that he/she intends and has the financial ability to depart;
5. Pays the bond required by the Judge (of at least \$500); and
6. Presents to the DHS a valid passport or other travel document sufficient to show lawful entry into his/her country, unless such document is already in the possession of the DHS or is not needed in order to return to his/her country.

8 C.F.R. § 1240.26(c). If the alien establishes these requirements, the Immigration Judge may grant voluntary departure for a period of up to 60 days. *See* INA § 240B(b); 8 C.F.R. §1240.26(e).

### **Temporary Protected Status**

Temporary Protected Status (TPS) is available for individuals whose home countries the U.S. Attorney General has designated as too dangerous to return to, provided that they were in the United States on or before the date that the Attorney General made the designation. Individuals with TPS are permitted to work in the United States and may not be deported during the period of protection. Those who qualify for TPS must register with the government every year in order to receive such status. The government can deny TPS status to anyone failing to register.

Temporary Protected Status is, as the name indicates, temporary. The Attorney General designates the amount of time, anywhere from 6 to 18 months, that individuals from particular countries will be afforded protection. TPS designation may be renewed for a particular country by the Attorney General if he/she is convinced that unsafe conditions in the country persist. At the end of TPS programs, the applicant may receive a Notice to Appear from the DHS and be placed in deportation proceedings. The attorney and client must therefore weigh the risks and benefits of applying for TPS.

Because TPS is granted for short periods of time, you should consult Interpreter Releases or the USCIS web site at [http://uscis.gov/graphics/services/tps\\_inter.htm](http://uscis.gov/graphics/services/tps_inter.htm) to verify which countries are currently designated for TPS. As of **May 2009**, the following countries are designated for TPS:

Burundi <sup>4</sup>	Honduras	Nicaragua	Sudan
El Salvador	Liberia <sup>5</sup>	Somalia	

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<sup>4</sup> The designation of Burundi for TPS has been terminated effective 12:01 a.m. May 2, 2009.

If you have a client from any of the above named countries, check the USCIS website for eligibility requirements.

### **Applying for a TPS Extension**

To obtain an extension, Form I-821 (Application for Temporary Protected Status) and Form I-765 (Application for Employment Authorization) must be submitted. The I-765 is used for information gathering purposes, and must accompany the TPS application, regardless of whether work authorization is actually sought. If work authorization is not sought, or if employment has already been authorized, no fee is required for the employment authorization form. If work authorization is sought, then the \$340 fee - or fee waiver request with affidavit in accordance with 8 C.F.R. § 244.20 - must be submitted with the I-765. Two identification photographs should be sent to the District having jurisdiction over the client's residence. In addition to the USCIS forms and photographs, each application must include the other information specified in the instructions for the USCIS forms and/or under 8 C.F.R. §244.9, including evidence of nationality and proof of residence.

### **Registration under TPS Redesignation**

To register for TPS under the redesignation, Form I-821 (Application for Temporary Protected Status) and Form I-765 (Application for Employment Authorization) must be submitted. A \$50 fee must be submitted with Form I-821, and an \$80 fingerprinting fee must also be submitted. If work authorization is sought, then a \$340 fee must also be submitted with the I-765. Fee waiver requests may be submitted in place of these fees.

Along with the USCIS forms and photographs, each application must include the other information specified in the instructions for the USCIS forms and/or under 8 C.F.R. §244.9, including evidence of nationality and proof of residence.

The I-765 and I-821 can be filed electronically or by regular mail. If you file by regular mail, two passport-style photographs must also be included with the paper forms, which should be sent to the District having jurisdiction over the client's residence. If you file electronically, standard photographs are not required, but your client must make an appointment at a local Application Support Center for the electronic capture of their photograph, fingerprints and signature. For more information regarding photograph requirements, see <http://uscis.gov/graphics/formsfee/forms/e-photo.htm>.

## **“T” Visas for Victims of Human Trafficking**

In October 2000, Congress signed into law the Victims of Trafficking and Violence Protection Act (VTVPA). This law created a new “T” visa, which intends to protect victims of “severe forms of trafficking.” This includes victims of sex trafficking, defined as recruitment, harboring or transportation of a person for the purpose of commercial sex acts such as prostitution. It may also include the recruitment, harboring or transportation of a person for labor services,

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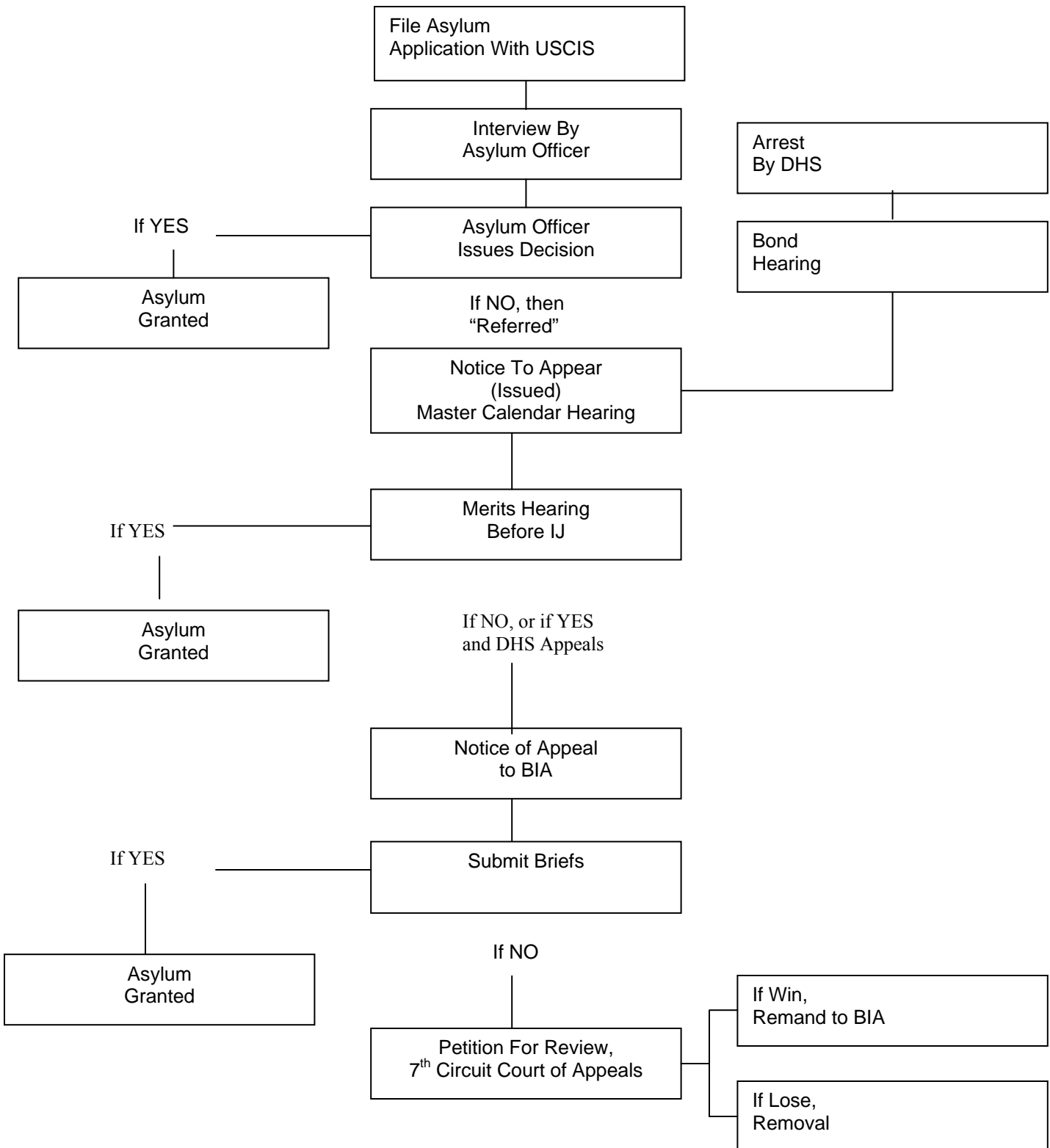
<sup>5</sup> The designation of Liberia for TPS was terminated on October 1, 2007, however, qualified Liberians who had been granted TPS as of September 30, 2007 are provided Deferred Enforced Departure (DED) through March 31, 2010.

involuntary servitude, slavery or debt bondage through the use of force, fraud or coercion. To be eligible for a “T” visa the applicant must show the following: (1) the applicant is or has been a victim of a severe form of trafficking; (2) the applicant is present in the United States on account of such trafficking; (3) the applicant has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or has not attained 15 years of age; and (4) the applicant would suffer extreme hardship involving unusual and severe harm if removed from the United States. The VTVPA provides for 5000 “T” visas to be awarded each year.

The VTVPA also provides that victims of trafficking who are detained should be housed in appropriate facilities, not in correctional facilities. It also mandates the DHS to provide the necessary medical care and protection from the traffickers. Victims of severe forms of trafficking need not have obtained a “T” visa to be eligible for certain public benefits. However, they must be certified as “victims of a severe form of trafficking” by the Office of Refugee Resettlement.

Please contact NIJC if you believe your client is a victim of trafficking.

# FLOW CHART: STEPS IN THE ASYLUM PROCESS



# THE ASYLUM PROCESS

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## The Application

There are two ways to apply for asylum: affirmatively and defensively<sup>6</sup>. A person who is physically present in the United States can affirmatively request asylum in the United States by filing an application administratively with the USCIS. An individual who is already in removal proceedings may file an asylum request defensively before the Immigration Court.

### The One-Year Filing Deadline

All applicants must file their asylum applications within one year of their entry into the United States. For those who entered prior to April 1, 1997, the deadline for applying was April 1, 1998. Applicants must prove by clear and convincing evidence that they are filing their asylum application within one year since their arrival in the United States or to the satisfaction of the Asylum Officer or Immigration Judge that the applicant qualifies for an exception. *See* 8 C.F.R. § 208.4(2)(A) Regulations provide that the one-year deadline assessment should be made on a case by case basis by the Immigration Judge or the Asylum Officer. *See* 8 C.F.R. § 208.4(a)(2) and (a)(5). The one-year deadline is extremely harsh, but there are some exceptions, as follows:

1. If there are “changed circumstances” or circumstances materially affecting the applicant’s eligibility for asylum, for example:
  - a. changes in the applicant’s country; or
  - b. changes in the applicant’s circumstances, e.g., changes in U.S. law or conversion to another religion.

The applicant must file the application within a reasonable time after the applicant becomes aware of the change in circumstances.

2. If there are “extraordinary circumstances” that the applicant had no control over that kept the applicant from filing for asylum within a year of entry into the United States. For example:
  - a. serious illness;
  - b. a long period of mental or physical problems, including those due to violence against the applicant or persecution suffered;
  - c. the applicant is under age 18 and living without parent or legal guardian; *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002)

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<sup>6</sup> On December 23, 2008, President Bush signed into law the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which changed the process by which “unaccompanied alien children” apply for asylum. “Unaccompanied alien children” refers to children who do not have lawful immigration status in the United States, who have not attained 18 years of age, and who do not have a parent or legal guardian in the United States. 6 U.S.C. § 279(g)(2). Pursuant to the TVPRA, USCIS (and the Asylum Office) has initial jurisdiction over all asylum applications filed by unaccompanied alien children, even if the child is already in immigration proceedings. The TVPRA went into effect on March 23, 2009. More information regarding the TVPRA can be found in appendix Z of this manual. If you think your client is an unaccompanied alien child and that USCIS has initial jurisdiction over your client’s asylum application, please contact NIJC.

- d. ineffective assistance of counsel, i.e., the applicant had a lawyer but the lawyer did not provide notice of the one-year deadline;
- e. the application was filed within one year of arriving, but was returned for some reason and soon filed again.

The burden is on the applicant to prove extraordinary circumstances. The circumstances must be directly related to the applicant's failure to file the application within one year.

See 8 C.F.R. §208.4(a)(4).

### **CALCULATING THE ONE-YEAR DEADLINE**

For affirmative applications filed directly with the USCIS, the USCIS will consider the date it receives the application as the filing date for purposes of determining whether the application was filed within one year. However, if the applicant can show by clear and convincing evidence that he/she mailed the application within one year, the mailing date shall be considered the filing date. See 8 C.F.R. §208.4(a)(2)(ii).

For defensive applications filed with the Immigration Court, the day the application is received by the court will be considered the filing date.

Applications received the day before the date of entry, in the following year will be considered timely. For example an applicant who enters on February 1 must make sure his application is received by January 31. Applications received on February 1 will not be considered timely.

### **Documentary Requirements**

A complete application for asylum, filed affirmatively or defensively, includes the following:

1. Either a DHS *Notice of Appearance* (Form G-28) or, if before the Immigration Court, an EOIR Notice of Appearance (Form E-28);
2. *Application for Asylum* (Form I-589), completely filled out and signed by the client;
3. A detailed *affidavit* attached to the I-589 in which your client explains his or her case in the greatest detail possible. If the client does not read English, a translator's certificate should be attached at the end of the affidavit;
4. An *Index of Documents*, with quotations or summaries of attached documents, as appropriate;
5. *Evidence and documentation supporting the client's claim*, including State Department country reports, Amnesty International and Human Rights Watch reports, newspaper articles, and other documents the client has regarding his or her personal situation, with translations;
6. *Expert Affidavits*. These affidavits can be from individuals such as academics or human rights activists who have knowledge regarding country conditions. Expert affidavits can also be from physicians, counselors, or therapists who have treated your client or have expertise pertinent to the case;
7. *Any Evidence of Claimed Relationship* for all family members included in the application, such as marriage or birth certificates.
8. *Signature* of the applicant and anyone, other than an immediate relative, who helped in preparing the application under penalty of perjury; and

9. *One passport-style photographs* of every individual included in the application;
10. *Certificate of Service* upon the DHS Office of Chief Counsel for cases in removal proceedings.

The I-589 and supporting documentation must be submitted in *triplicate* (this includes the original plus two copies), as well as an additional copy of the applicant's I-589 for each dependent included in the application.

## 1. FINGERPRINTS<sup>7</sup>

The process for fingerprints will differ depending on whether an individual is filing for asylum affirmatively or defensively. If an individual is filing affirmatively, upon submission of the I-589, the USCIS will contact the applicant to schedule an appointment to have his/her fingerprints taken at a particular Application Support Center (ASC). After the fingerprints are taken, the Asylum Office will then send the fingerprints to the FBI in order to obtain the applicant's record. We recommend that you advise your client of this process and have your client contact you when he/she receives a date for fingerprinting.

It may be advisable for the attorney and client to send a separate request to the FBI, so that they will know what is on the record. The cost for the record is \$18. In order to do this, the client must independently have his/her fingerprints taken. Many places that take immigration and passport photos also take fingerprints. Typically, unless the attorney feels that something in the record will make the client ineligible for asylum, it is not necessary to wait for the fingerprint results before going ahead with the application process.

If an individual is filing for asylum while in proceedings, he/she must send a copy of the instructions for providing biometric and biographic information (located at Appendix D) with the first three pages of the I-589 and an E-28 to the Nebraska Service Center. The Service Center will issue an appointment notice directing the applicant to appear to be fingerprinted at the ASC closest to his/her home address.

If the individual submitted the I-589 prior to April 1, 2005, a fingerprint appointment may be obtained by submitting a fingerprint request form (located at Appendix D), proof of a filed I-589 (i.e. receipt notice or date stamped I-589), notice of the next hearing, and a completed E-28 to the USCIS at 101 W. Congress Parkway, Chicago, IL 60605. This request must be submitted in person. The USCIS will issue an appointment notice for fingerprinting when you submit your request. Please be aware that the wait time to obtain a fingerprint appointment from the USCIS using this procedure generally takes about an hour. Please also be aware that the Chicago USCIS can only issue fingerprint appointments scheduled at Chicago area ASCs.

We recommend that you send a letter to the Trial Attorney and a copy of the letter to the Judge confirming submission of the fingerprint request form and requesting that the fingerprint report be completed by the date of the hearing. If your client is detained, DHS is responsible for fingerprinting him/her.

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<sup>7</sup> Appendix Y and the "Attorney" section of NIJC's website, [www.immigrantjustice.org](http://www.immigrantjustice.org), contain answers to frequently asked questions regarding fingerprint appointments. Please see the appendix or website for quick answers to your fingerprint appointment questions.

Fingerprints remain current for a period of 15 months. If a merits hearing has been scheduled for your client, you must make sure that your client's fingerprints will be current as of the date of the hearing. Because it often takes two or three requests to the Nebraska Service Center before the Center will issue your client a fingerprint appointment, we strongly recommend that you file a fingerprint request for your client six months prior to the merits hearing. **If your client's fingerprints are not current at the time of the merits hearing, the Immigration Judge will consider the case abandoned and deny your client asylum.**

## **2. DOCUMENTS IN A FOREIGN LANGUAGE**

Please note that all documents in a foreign language must be accompanied by a translation of the document in English. The translation should be properly certified. Certification can be accomplished by attaching a signed "Certificate of Translation" which affirms that the translator was fluent in both English and the original language and translated the documents to the best of their ability (*see* Appendix Q.)

## **3. ORIGINAL DOCUMENTS**

For affirmative proceedings, bring original documents such as birth certificates, travel documents and marriage certificates to the asylum interview. The asylum officer may wish to inspect them.

If your client is in removal proceedings, all original documents that will be submitted in support of the asylum application should be made available to the Trial Attorney, along with translations if the original documents are in a foreign language. DHS may wish to submit these documents to the FBI Forensics Document Lab for evaluation. Currently, Immigration Judges at the Chicago Immigration Court often require that attorneys submit all original documents to the Trial Attorney before the Immigration Judge will set the case for a merits hearing. Please contact NIJC to determine your Judge's policy regarding original documents. Please see page 52 of this manual for additional important information regarding the forensic examination of documents.

## **Filing Applications Affirmatively**

Once an application has been submitted to the USCIS Service Center, the applicant will receive a notice to be fingerprinted. Subsequently, the applicant will receive notice scheduling an interview with an asylum officer, who will approve or deny his/her case. The Chicago Asylum office approves approximately 30% of the asylum applications reviewed. Asylum applications that are not approved are referred to an Immigration Judge.

## **THE ASYLUM INTERVIEW**

The attorney should accompany his/her client to the interview; however, attorneys have very limited roles. The Asylum officer will question the client regarding the veracity of the contents of the application and his/her claim for asylum. At the end of the interview, the attorney will be allowed to present a short closing argument on behalf of his/her client.

The interview with the asylum officer is informal and usually occurs behind a desk. If the client is not fluent in English, he/she must bring her own interpreter. The USCIS will not provide an

interpreter. The applicant's attorney may not serve as the interpreter. In addition, it is strongly suggested that family members do not serve as interpreters during these interviews.

Normally, the asylum officer first tries to make the applicant feel comfortable and will confirm that that information obtained during the interview is confidential with the U.S. government. The officer reviews the asylum application with the applicant to ensure that all the information is correct and accurate. If any information on the application requires changes or updates, the attorney should raise the changes before the asylum officer begins the review process.

The asylum officer will ask the client questions which most often will come directly from her affidavit regarding her experiences and the reasons she fears returning to her home country. Sometimes the questions are open-ended, i.e., "why are you afraid to return to Kenya?" Other times, the questions are specific, i.e., "what happened to you on October 6, 1999?" Most asylum interviews last anywhere from 1 ½ to 2 ½ hours. In most cases, at the end of the interview, the asylum officer will request that the applicant return in approximately ten (10) days to pick up her decision. At that time, the applicant and attorney will pick up the decision at the window and will not be received by an asylum officer. The applicant must bring with him/her a photo ID and the notice given to her by the asylum officer after her interview indicating the time and date the decision will be ready for pick up.

The role of the attorney during the asylum interview is very limited. The attorney may interrupt the interview if she feels that the applicant did not understand the question or if a question is inappropriate. The attorney should ask to stop the interview and speak to a supervisor if the interviewing officer's behavior is inappropriate or offensive. At the end of the interview, the attorney will be asked to make a short closing statement on behalf of the applicant. During the closing statement, it is important that the attorney explain to the asylum officer why the client is eligible for asylum and what are the enumerated grounds applicable to the client's claim. It is important for the attorney to direct the asylum officer to any document that is particularly supportive of the applicant's case or that the attorney believes should be given particular attention.

### **Filing Applications While In Proceedings**

Filing for asylum while in removal proceedings involves a three-step process.<sup>8</sup>

1. The client must appear at a master calendar hearing (preliminary hearing) at which removability is formally admitted and established, and the applicant requests asylum.
2. The client is given a deadline for submitting an asylum application (or a supplemental application if one was previously filed) or additional affidavits and documentation in support of the case. If this is the first time the client is seeking asylum, the client must submit the information identified above. The originals and a copy, along with a certificate of service,

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<sup>8</sup> The Executive Office for Immigration Review has published an Immigration Court Practice Manual, which can be found at [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir). The Practice Manual went into effect on July 1, 2008 and is binding on all parties who appear before the Immigration Court, unless the Immigration Judge directs otherwise in a particular case. Since the effective date of the Practice Manual, the Court's Local Operating Procedures are no longer used.

The Practice Manual includes extensive information regarding the Court's requirements for filing documents, appearing before the Court, and other Immigration Court procedure, and should be reviewed by all *pro bono* attorneys.

are to be provided to the Judge; one copy with certificate of service is to be provided to the Trial Attorney. (Remember to maintain copies of all submissions for your files). Please note that if this is the first time the client is seeking asylum, he/she needs to submit the application in open court within one year of his/her arrival in the United States or the client will not be eligible for asylum.

3. The client is scheduled for a hearing on the merits of his/her case before an Immigration Judge. The asylum merits hearings are generally 3-4 hours long.

Because Immigration Judges have very crowded dockets, if you waive your right to an expedited removal hearing, the full asylum trial may be scheduled no less than eight to twelve months after the master calendar hearing.

Under current law, asylum applicants' claims must be adjudicated within 180 days from the date the asylum application is received by either the USCIS Nebraska Service Center or the Immigration Court (if applicant did not previously file with the USCIS). INA § 208(d)(5)(A)(iii). If a client opts for an expedited hearing, the attorney must accept any date given to him/her by the Immigration Judge for the final removal hearing. Oftentimes, Judges will give the applicant a date that does not allow the attorney to fully prepare for the case, such as a merits hearing date within one or two months. In those circumstances, it is important that the client understand that it is important to be fully prepared for asylum hearings and that the attorney recommend to the client that she waive her right to an expedited hearing. If the client waives her right to an expedited hearing, the client will NOT be eligible for employment authorization, although she may have to wait eight months to one year to have her case heard before the Court. It is very important that the attorney discuss these possibilities with the client BEFORE the hearing so that the client is prepared at the time of the master calendar hearing.

## **The Master Calendar Hearing**

The preliminary hearing at which the person pleads to the charges on the Notice to Appear (NTA) and formally requests asylum is called the "Master Calendar" hearing. It functions much like an arraignment in criminal proceedings. Unless there are complications in the case, the Master Calendar hearing is normally a routine proceeding that usually takes less than one hour to complete.

### **Notice of the Hearing**

Clients (or their attorneys, if an appearance has been filed) receive written notice of the date and time for the Master Calendar hearing. Because of the nature of NIJC's cases, volunteer attorneys sometimes have short notice of these hearings, but little or no preparation is required.

### **When and Where**

For non-detained clients, master calendar hearings are held at the Immigration Court located at 55 E. Monroe St., Ste. 1900, Chicago, IL (312) 353-7313. For detained clients, the Immigration Judge will either hold hearings by televideo conference at the Immigration Court, or with your client present at the DHS Building at 10 W. Jackson, Chicago, IL in the basement.

## **The Immigration Judge**

Currently all Immigration Judges conduct the calendar on a rotating basis. The Judge who presides over client's master calendar hearing will also be the Judge who conducts the hearing on the merits and decides all motions. It should be noted that your hearing strategies and your client's chances of success depend in large part on which Judge hears your case. In Chicago, there are currently seven Immigration Judges, each with a different personality, attitude toward asylum seekers, and "track record." After appearing at a master calendar hearing, you should confer with your consulting attorney or NIJC staff about the Judge who has your case.

## **Attendance of the Client**

Please note that the client must be at all hearings before the immigration court, including the master calendar hearings; the attorney cannot appear alone. Your client can be ordered removed *in absentia*, if he/she fails to appear. Also, every person who has been issued an NTA must attend. This applies to small children as well; their parents cannot attend for them. You may ask the immigration Judge to waive the presence of the child at future hearings as long as he/she is represented, but it is discretionary and not routinely or automatically granted. If there is a compelling reason why a client cannot appear in person, the attorney can file a motion to waive appearance in advance of the hearing, but there is no guarantee that such a motion will be granted. It is not advisable to do so, except perhaps in the case of children.

## **Interpreters**

In Chicago, the court clerks act as interpreters where the person's language is Spanish. For other languages or dialects, the court must hire contract interpreters, whose quality and reliability is highly variable. If an interpreter is required for a Master Calendar hearing, the Immigration Judge will call the AT&T phone interpretation service via speakerphone. If interpretation is impossible in Court for the Master Calendar hearing and necessary for your client, you may request a continued hearing. At the Master Calendar hearing, you should state for the record whether you will require an interpreter at the Individual Merits Hearing. At all times, if a contract interpreter is clearly not making himself understood to the client, you can request a continuance on that basis.

## **Arriving at the Court**

To appear for your master calendar hearing for a non-detained client, bring your client to Room 1900 at 55 E. Monroe Street, Chicago, Illinois (312) 353-7313 at least a few minutes before your scheduled time. On the bulletin board in the waiting room a list will be posted containing your name, your client's name, and his/her "A-Number." You must sign your name and your client's name and A-Number on the sign-in sheet on the bulletin board. We also recommend that you check in with the clerk at the window. The Judge's clerk will call you and escort you to the Judge's courtroom. We recommend that you arrive early to Court to be among the first to sign up for the calendar call; this will ensure that you minimize your waiting time in Court.<sup>9</sup>

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<sup>9</sup> Fortunately for NIJC volunteers, persons represented by counsel are called to appear before the Court first; unrepresented people are heard afterwards.

If you have not already filed an appearance, do so now, by obtaining two copies of form E-28 from the clerk's window or from the Judge's clerk, filling them out, and serving one on the Trial Attorney and giving the other to the Judge.<sup>10</sup>

## **The Master Calendar Hearing Process**

### **1. THE BEGINNING OF THE HEARING**

When your case is called, the Immigration Judge is likely to talk with you off the record to determine your intentions and to straighten out any procedural problems. At that time, you can advise the Judge that you are a NIJC *pro bono* attorney. On the record, through an interpreter where necessary (the government will provide the interpreter at its own expense, no matter what the language), the Judge will state the nature of the proceedings and ask your client if she understands what is happening.

### **2. DETERMINING REPRESENTATION BY COUNSEL**

The client will first be asked if the attorney is his/her representative. If an individual appears without counsel, the Judge will usually ask the individual if he/she would like a continuance in order to seek legal counsel.

### **3. ESTABLISHING RECEIPT OF THE NOTICE TO APPEAR**

The attorney or the client will be asked if the client has received a copy of the NTA. If not, he/she should say so and ask for a copy. The Judge will often grant continuances so that the attorney can go over the NTA with the client to determine whether the charges are correct—and if there is any question, even remotely, about their accuracy, then a continuance should be sought.

### **4. ADMITTING OR DENYING THE CHARGES AND CONCEDED REMOVABILITY**

If the attorney has the NTA, the client will be asked to either admit or deny the specific charges in the NTA—namely, that he/she entered without inspection on a certain date and is removable.<sup>11</sup> The attorney will also be asked to either contest or concede removability as charged on

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<sup>10</sup> The multiplicity of forms in immigration practice is staggering. The E-28, a green form, is similar in content to the E-27, a yellow form. Form G-28 is only for use in DHS administrative proceedings, not in the immigration courts. The form E-28 must be filed in proceedings before the immigration judge. And the form E-27 must be filed in appeal proceedings before the BIA—even if the same attorney has a form E-28 on file in the same case.

<sup>11</sup> Often, NIJC clients were first arrested in Texas or California, and as part of changing venue to Chicago, they have already pleaded to the charges in the NTA, admitted to removability, and submitted a written asylum application. In such cases, appearance at the local Master Calendar will involve nothing more than simply setting a trial date and, occasionally, a deadline for submission of supplementary documentation with the asylum application. In these types of cases, the attorney should clarify with the Judge whether the original application was ever submitted to the State Department, Bureau of Human Rights and Humanitarian Affairs (BHRHA). Sometimes the immigration courts in Texas do not bother to do so when the application is part of a motion to change venue. If the application was not sent to the State Department, then the attorney should request a deadline to submit a complete new application. Even if the previous application was submitted to the State Department, if upon examination, it is clearly inadequate or likely to be inaccurate, you may request permission to prepare a new application and ask that it be resubmitted to the State Department BHRHA.

the NTA. In order to be eligible to apply for asylum, the client, through the attorney, must admit removability under one of the grounds. However, if there is more than one charge of removability, discuss it with your client and with NIJC staff.<sup>12</sup>

## **5. DESIGNATING A COUNTRY OF REMOVAL**

Next, the Judge will ask if the client wishes to designate a country of removal. In asylum cases, the attorney should state that she does not wish to do so. The Judge will then identify the client's home country as the country of removal.

If the Trial Attorney or Judge designates a country other than the one from which your client is seeking asylum, you should register your opposition on the record and request leave to designate the country from which asylum is sought.

## **6. STATING THE CLIENT'S DESIRE TO APPLY FOR ASYLUM**

The attorney or the client will then state for the record that the client wishes to apply for asylum. Alternate grounds of relief, such as withholding of removal and/or CAT should also be stated.

## **7. SETTING A DATE FOR SUBMISSIONS OF THE WRITTEN ASYLUM APPLICATION**

If your client has not yet filed an asylum application, the Judge will usually set a date for submission of the completed written asylum application. In Chicago, Judges generally grant 30 to 45 days to submit the written application. NIJC volunteers are urged to ask for extra time (an additional 15-30 days), stating that they are *pro bono* volunteers with busy caseloads. It is generally relatively easy to get 45 days instead of 30.

If your client, however, was referred from the Asylum Office, the Judge will have a copy of the I-589 application from the Asylum Office already in the Court file. If your client is renewing her request for asylum, withholding of removal, and protection under the Convention Against Torture, the Judge will likely indicate that any amendments to the I-589 asylum application should be tendered to the Court at the same time as other pre-trial submissions prior to a merits hearing.

## **8. SETTING THE DATE AND AMOUNT OF TIME FOR THE MERITS HEARING**

The date of the hearing on the merits of the claim will generally be several months distant. The Immigration Judge may ask whether you would like an expedited hearing date. If you accept the expedited date, your case could be heard in a matter of weeks. It is usually not advisable to accept the expedited date since most cases take, at minimum, a few months to prepare. You should be aware, however, that declining the expedited date will likely impact your client's ability to apply for

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<sup>12</sup> Clients who have reasonable grounds to challenge deportability are unlikely to become NIJC clients under the asylum project; rather, they would be referred to other projects within NIJC or other agencies. However, if in the course of interviewing the client some fact is revealed that may impact on deportability, the NIJC volunteer should talk with her consulting attorney or NIJC staff.

employment authorization while the case is pending. (See “Additional Information” at the end of the manual.)

The Judge usually asks how much time will be necessary to complete the hearing. Volunteers should ask for at least three or four hours, and do not hesitate to ask for more time if you really think you need it. You will find that three is the bare minimum for presenting a thorough case. Unfortunately, the Judges are rather hesitant to schedule more than four hours for a hearing. Once the hearing date is set, the Master Calendar is adjourned.

If your client is detained, you will receive an expedited hearing date. Mostly, detained individuals have their final hearing date set for one or two months in advance.

## **Preparing for the Hearing on the Merits**

Asylum hearings are generally quite simple and straightforward compared to civil trials. The typical NIJC asylum hearing consists of the testimony of the client, additional testimony from an expert witness, and brief opening and closing statements. Additional witnesses are valuable if they can be obtained, but often there are simply none available. Despite the fact that the hearing itself is generally straightforward, asylum hearings do, in fact, require a great deal of preparation.

We strongly recommend that you begin preparation by reading background material on the recent history of their client's country. You will save yourself a lot of time and minimize the chances of confusion or error by having a basic understanding of the political and military conflicts in your client's country before beginning hearing preparation.

### **Interviewing The Client**

Many volunteer attorneys underestimate how much time with the client is necessary to adequately prepare. Interviewing the client, either in the process of preparing the I-589 and affidavit or in preparation for hearing testimony, is the most difficult and critical part of handling an asylum case. At the first interview, we recommend that you have your client sign a Freedom of Information Act request form and blanket release of records form.

In interviewing asylum clients, you may encounter problems you are not accustomed to in dealing with other sorts of cases. For example, clients in asylum cases rarely speak English and are sometimes uneducated or unsophisticated. Additionally, many clients suffer from post-traumatic stress disorder or other psychological and emotional problems that make it difficult for them to fully tell their story to anyone.

You should also be aware that a different style of interviewing than one may be accustomed to may be necessary when interviewing clients in asylum cases. Lawyers in this country often have a style of interviewing that can be threatening to NIJC clients. An intense, rapid-fire approach, bearing down hard on minor inconsistencies, however, may be very frightening to clients seeking asylum. As a result, a more gentle approach may be required.

#### **1. ESTABLISHING TRUST WITH YOUR CLIENT**

Establishing trust with your client is essential in asylum cases. The great majority of NIJC clients come from countries whose legal systems are corrupt and inept at best. As a result, they are generally unfamiliar and suspicious of the legal proceedings that they find themselves in. This suspicion makes it difficult for asylum seekers to trust their attorneys, let alone the Judge rendering a decision in their case. Part of your job is attempting to overcome this built-in distrust.

NIJC recommends that at least in initial sessions, you begin by helping the client relax and trust you. You should be as friendly as possible, explain things thoroughly, and urge the client to ask questions. It may be helpful in establishing trust with your client to share something about yourself. Sometimes the best way to begin a relationship with a NIJC client is to offer coffee or refreshments and simply sit and chat for a few minutes. Remember that as human beings, you have many mutual interests in common – family, friends, etc. Seek these out and state them.

## **2. OVERCOMING CULTURAL BARRIERS**

Cultural differences may also create challenges in the process of case preparation. For example, some NIJC clients are rural peasants and many are poor and have limited education. They frequently come from cultural settings in which, for example, calendars or clocks have little value. Clients frequently may not be able to remember what month an event happened--or even what year. Since such gaps can create serious credibility problems, you may have to be creative about establishing a foundation for specific testimony. For example, occurrences may need to be tied to whether or not it was the rainy season or other events to which the client can relate the occurrence.

Another cultural barrier is the client's natural reticence about answering questions fully and honestly. Often, a client's only experiences in dealing with well-dressed interrogators sitting behind desks in business offices have been unpleasant and threatening. They may withhold information at first or may modify their story, or concoct one completely, based on their assumptions about what you want or expect to hear. For example, many NIJC clients from Central America start out by telling staff and volunteers that they fear guerrilla persecution. While in many cases this is in fact true, in other cases it eventually becomes clear that the client invented the claim because he/she thought it was the one most palatable to North American ears. With patient interviewing and a careful building of trust, a different yet accurate and more credible story may emerge.

## **3. DEALING WITH PSYCHOLOGICAL BARRIERS**

Finally, a more difficult and surprisingly prevalent problem may be the presence of psychological barriers, which make case preparation and presentation difficult. A substantial percentage of NIJC clients have been found to be suffering from Post Traumatic Stress Disorder (PTSD) or other psychiatric disturbances, as a result of what they have witnessed or suffered in their home country.

From the lawyer's point of view, these problems may manifest themselves in a variety of ways. For example:

- The client may have difficulty describing traumatic events and may find the experience so distasteful that he/she simply does not show up at the next appointment or resists efforts to go over the story again;

- The client may display inappropriate behavior or affect while talking about things that happened to him/her. The most obvious and best-known example is the tendency of many people to relate horrifying events in a flat, seemingly emotionless voice; or
- The client may be suffering from other problems, such as depression or substance abuse, related to or stemming from PTSD or other psychological condition.

NIJC is associated with the Marjorie Kovler Center for Treatment of Survivors of Torture. Many NIJC clients are Kovler Center clients as well. Although the Kovler Center's files are confidential, you are encouraged to work with Kovler Center volunteers and staff, exchanging information and suggestions, where confidentiality permits.

NIJC strongly recommends that if you observe behavior in your clients that suggests the presence of emotional disturbances, NIJC staff should be alerted so that the client can be referred to the Kovler Center for evaluation and treatment if necessary. If you believe your client would benefit from the services of the Kovler Center, contact NIJC staff for information and a referral to Kovler, where appropriate.<sup>13</sup> The Kovler Center is located at 1331 W. Albion, Chicago, Illinois 60626, (773) 381-4070, fax (773) 381-4073.

#### **4. INTERVIEWING THROUGH AN INTERPRETER**

Interviewing a client through an interpreter is slow and time-consuming. Some standard legal expressions do not translate well into other language and some forms of expressions or questions may be misunderstood. Avoid using legal terms where possible. NIJC interpreters are volunteers too and may have little experience dealing with lawyers. In addition, if interpreters are likely to come from different countries than NIJC clients and differences in dialect or use of certain words can be very critical. Be sure that both the interpreter and the client understand the confidential nature of these interviews. The use of a confidentiality agreement for outside interpreters is recommended.

### **Obtaining Witnesses**

If possible, you should attempt to obtain additional witnesses besides the respondent (friends, family, cultural groups, churches).

#### **1. MATERIAL WITNESSES**

Material witnesses, such as friends, family members, or others who can corroborate some or all of your client's story, are very important. However, it is unusual to have such witnesses in asylum cases, either because the client knows no one in the area who can be a useful witness or those who could testify are fearful of doing so.

#### **2. EXPERT WITNESSES**

Expert witnesses, on the other hand, have been critical elements in many successful NIJC cases in the past and volunteers should make a strong effort to obtain such witnesses. Expert

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<sup>13</sup> The Kovler Center only accepts cases that deal with persecution based on political activities and political opinions. For other cases, please contact NIJC staff.

witnesses, however, should only be called if their testimony adds something new to the case and is not merely a summary of the documentary evidence and affidavits submitted previously.

The content of a witness' testimony should be carefully scrutinized. Testimony should focus on the specific elements of the respondent's claim. It is not enough that a witness offer general testimony. The witness must be able to specifically corroborate elements of the respondent's own testimony.

It has been our experience that such witnesses are most useful when they are truly experts, such as academics or professionals with substantial scholarly credentials, and when they are not blatantly partisan. Sometimes, attorneys offer as expert witnesses, people who have traveled extensively in your client's country or are active in political or advocacy organizations with a pronounced point of view about that particular country. Such witnesses' credentials as "experts" are often problematic. In the event that a witness' "expertise" is called into question at the hearing, you should be prepared to argue on behalf of his/her credentials or, if unsuccessful, to go forward effectively if the witness is not accepted. Even if the Trial Attorney does not object to a particular witness, the Immigration Judge may refuse to allow such testimony on his own motion. Additionally, sometimes, even if allowed to testify, a witness' political bias is so strong and so obvious that their testimony carries little weight with the Judge.

If your client is suffering from Post Traumatic Stress Disorder or other psychological problems that may affect the credibility of her testimony, you should consider having a psychologist testify at the hearing, or at a minimum, submit an affidavit from the psychologist describing the client's symptoms in detail. Similarly, it may be helpful to have a doctor or other qualified expert testify if your client has been tortured or beaten. You may wish to consider Kovler Center for assistance in obtaining an expert if your client has been tortured.

Most of the experts NIJC has called on in the past are registered with [www.asylumlaw.org](http://www.asylumlaw.org). If you cannot find experts for your case there, you are strongly urged to consult with NIJC staff about whether an expert witness should be called and suggestions on how to locate one.

### **Compiling Corroborative Evidence**

Asylum cases are often made more challenging by the paucity of evidence available to support the client's claim. The client generally has nothing in the way of documents or physical evidence to bolster his/her case, and even if there are friends or family members present who might be able to offer corroborating testimony, they are generally unwilling to do so because of their own fears or because they are themselves undocumented.

The client is largely responsible for persuading the Judge that he/she is credible and truthful. However, since corroborative evidence is increasingly being demanded by courts, it should be presented in order to provide general objective support for your client's testimony and bolster his/her asylum claim.<sup>14</sup> The following are general types of corroborative evidence:

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<sup>14</sup> Items in section 2 below may be authenticated by a U.S. Embassy or by other means available. The Trial Attorney will often ask that you submit any original foreign documents, such as police records, birth and death certificates, and medical records, to DHS for forensic analysis. In many cases, the Judge will not set a date for your client's merits hearing until such documents have been submitted for forensic analysis. Please see page 52 for more information.

1. the applicant's personal documents, such as evidence of particular race, religion, nationality, political party, ethnic or social group, or evidence that reveals facts about applicant, such as citizenship, education and status in society;
2. official records, letters and affidavits which support applicant's story, such as an arrest warrant, conviction document or other police records of arrest, documents showing detention or charges, affidavits from people with knowledge of persecution, medical records of injuries; and
3. documentation from newspapers or official reports of human rights organizations that speak to your client's particular situation.

Pursuant to the REAL ID Act (P.L. 109-13), an Immigration Judge may grant asylum based on the testimony of the applicant only, but only where the testimony is "credible, is persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee."<sup>15</sup> INA § 208(b)(1)(B)(ii); 8 USC § 1158(b)(1)(B)(ii). An Immigration Judge may require additional evidence to corroborate otherwise credible testimony "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."<sup>16</sup> *Id.* In addition, when determining whether the applicant has met his or her burden of proof, the Judge may weigh the credible testimony along with other evidence in the record. *Id.*

Based on these corroboration requirements, attorneys should be prepared to gather all corroborating evidence reasonably available to support a client's claim and, where unavailable, a clear explanation as to why the client is unable to obtain the evidence. Whenever possible, the unavailability of evidence should also be supported by corroborating evidence. For example, a client reports that she was arrested together with a close friend. The friend is still in Togo, but remains arbitrarily detained. The client should attempt to obtain a letter, affidavit, or news report that the friend remains in detention, which would explain why the friend's own affidavit is unavailable.

However, before filing any corroborating documents with the Court or the DHS, establish the documents' origin, chain of custody, and the ability to authenticate the documents. Your client should identify the document and explain how he/she obtained it. If you have any doubts about the reliability of a document, consult with NIJC prior to filing it with the Court. Any document presented to Court can and likely will be examined by the federal Forensic Document Lab.

Where an IJ requests specific corroborating evidence at a merits hearing, attorneys should consider requesting a continuance to allow the client opportunity to obtain the evidence for the Court.

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<sup>15</sup> These requirements for corroborating evidence were codified pursuant to the REAL ID Act and therefore apply only to asylum applications filed on or after May 11, 2005. For asylum applications filed before May 11, 2005, attorneys should see *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998); *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). For pre-May 11, 2005 applications, attorneys should also see *Gontcharova v. Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004) for the test used to review a denial of asylum based on a lack of corroborating evidence. Please note that the Seventh Circuit has explicitly held that the *Gontcharova* corroboration test no longer controls in REAL ID cases. See *Rapheal v. Mukasey*, 553 F.3d 521 (7th Cir. 2008).

<sup>16</sup> Pursuant to the REAL ID Act, an Immigration Judge finding regarding the availability of corroborating documents is a finding of fact. "No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in sections 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." INA § 242(b)(4); 8 USC § 1252(b)(4).

## **Preparing Your Pre-Hearing Brief**

Under federal regulations, 8 C.F.R. §1003.21(b), and Immigration Court Practice Manual Chapter 4.19, each party is directed to file a pre-hearing brief no later than 15 days prior to the hearing. The pre-hearing brief should include a statement of the facts, the applicable law, an analysis of the facts based on the law, and a conclusion, as well as copies of any affidavits and supporting documents, and a list of proposed witnesses. An index of supporting documents is critical. Such an index should set forth your case, highlighting the focus of the material that supports your argument. You may consider tabbing and organizing the index according to subheadings that support the arguments in your case and highlighting key evidence in your index in yellow, as this may be all that the Judge reads. In addition, the court may order any party to submit the following:

1. A list, together with copies, of all exhibits that may be offered;
2. A statement that the parties have communicated in good faith to stipulate to the fullest extent possible;
3. A statement of unresolved issues in the proceeding;
4. The estimated time required to present the case; and
5. An additional copy of all exhibits.

Please see Immigration Court Practice Manual Chapter 4.19 for additional requirements regarding the pre-hearing brief, and Chapter 3 for information regarding the proper way to index, paginate, and tab the pre-hearing brief. In addition, please note that Chapter 4.19(b) encourages parties to limit their briefs to 25 pages. The Court may also limit the total number of pages for all the documents you submit. Most Judges set a limit of 100 pages for all supporting documentation, including the brief.

(Please provide NIJC with a copy of your pre-trial brief.)

## **Contacting the Trial Attorney Prior to the Merits Hearing**

NIJC recommends that you attempt to contact the Trial Attorney at (312) 984-2400 a day or two in advance of the hearing to explore any pre-hearing agreements that might be reached, particularly if you have a strong or compelling case. This conversation will be helpful in determining what the Trial Attorney sees as the weakness in your case.

On occasion, NIJC volunteers have been successful in obtaining stipulations from Trial Attorneys that clients are eligible for asylum or other relief (although the Judges believe firmly they are not bound by agreement between the DHS and the respondent, and will often not accept such stipulations). Such situations are unlikely, because the Trial Attorney will be principally concerned with the issue of credibility and probably will not stipulate to anything until they have observed the client's testimony and conducted some cross-examination. However, in such cases, it may be useful to ask the Trial Attorney at the close of the hearing if he/she will stipulate to eligibility and not oppose asylum or, failing that, if he/she will waive appeal if the respondent wins, thus ending the case immediately.

## **Preparing Your Client To Testify**

It is important to explain the hearing process in detail to your clients, so that they understand what will occur and what is expected of them at the hearing, as well as the potential outcomes. You may wish to encourage your clients to dress nicely for the hearing.

Additionally, you should be aware that it is very common for witnesses to vary their testimony on the stand from what they have told you in your interviews. They often fail to testify about certain things, sometimes key elements, and/or may suddenly state new facts that you have never heard before. In addition, all witnesses, particularly respondents, are generally very nervous and thus likely to forget certain things. For example, clients often forget dates or even years in which events happened. Though this is quite normal human behavior, for some reason both Trial Attorneys and Immigration Judges tend to think that if a client cannot remember in which year an important event occurred, then the client is not credible.

Furthermore, as a result of the REAL ID Act, an Immigration Judge may consider the totality of the circumstances, and all relevant factors, to make a credibility determination based on:

- (1) Demeanor, candor or responsiveness of the applicant or witness
- (2) Inherent plausibility of the applicant or witness's account
- (3) Consistency between applicant's or witness's written or oral statements, whenever made and whether or not under oath, but considering the circumstances under which they were made
- (4) Internal consistency of each statement
- (5) Consistency of such statements with evidence of record and U.S. State Department Reports
- (6) Any inaccuracies or falsehoods contained in the statements, whether or not material to the asylum claim.

INA § 208(b)(1)(B)(iii); 8 USC § 1158(b)(1)(B)(iii)<sup>17</sup>

As a result of this credibility standard and the likelihood that your client's testimony may vary on the stand, you must try to convince the client in advance that it is very important to remember the details of his or her case and testify to them to the best of his/her recollection. We recommend that you run through a mock hearing with your client and practice some cross-examination questions with your client. After building trust with your client, it is important that you mentally prepare your client to face seemingly hostile questioning from the Trial Attorney and Judge.

In addition to preparing your client to face questioning from the Trial Attorney and Judge, there are several other things you can do to better prepare your client to meet the REAL ID credibility standard:

- (a) File a FOIA: If your case is in Immigration Court, file a FOIA request to obtain a copy of the DHS immigration file on your client. Please see page 52 for instructions regarding the FOIA request.
- (b) Review the Court file: Attorneys can request to review the Immigration Court's file and listen to any prior hearings. Note that the Immigration Court's file may be different from

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<sup>17</sup> This new standard for determining an applicant's credibility was codified by the REAL ID Act and therefore applies only to asylum applications filed on or after May 11, 2005.

Also, pursuant to the REAL ID Act, where an Immigration Judge failed to make an explicit credibility finding, the respondent and any witnesses enjoy a rebuttable presumption of credibility.

the DHS file, so it is wise to both review the Court file and request a FOIA of the DHS file.

- (c) Discuss and review prior asylum applications and affidavits: Particularly for attorneys coming into a case after the Asylum Office referred the client to Court, counsel should review the accuracy of preexisting asylum applications and/or client affidavits. Attorneys should inquire as to how past applications were prepared and whether the contents were reviewed with the client in their native language prior to submission. Attorneys should also discuss the use of and competency of any interpreters prior to representation.
- (d) Know and prepare witnesses: the Immigration Judge can consider witness behavior when determining your client's credibility. Before putting anyone on the stand, prepare the witness as you would your client.

## **The Merits Hearing**

Merits hearings in asylum cases are formal, adversarial, evidentiary hearings on the record. Trial Attorneys act as "prosecutors," attempting to disprove the applicant's eligibility for asylum. Witnesses are sworn, and both sides have the opportunity for direct and cross-examination. Immigration Judges are usually also very involved in questioning your client.

Removal hearings are excellent "training courses" for new litigators, since they are formal, contested trials, but at the same time there is minimal discovery or motion practice, and rules of evidence and procedure are relatively relaxed.

### **General Formalities Of The Hearing**

#### **1. RULES OF PROCEDURE**

Merits hearings in immigration court are comparable to administrative law proceedings in other federal or state agencies. However immigration proceedings are not governed by the Administrative Procedures Act (APA), and tend to be more informal than those governed by APA standards.

#### **2. RULES OF EVIDENCE**

Rules of evidence in asylum hearings are minimal and very casually observed. Formal presentation of evidence is generally not required. Judges will simply admit documents or physical evidence, sometimes permitting argument but rarely requiring formal authentication. Similarly, objections to evidence, particularly hearsay objections, are rarely made or upheld depending on the Trial Attorney and the Judge.

Generally, this very flexible view of the rules of evidence works to the advantage of your client. Asylum seekers are rarely able to offer evidence beyond their own testimony that would stand up to rigorous rules of evidence. For example, it is understood that producing a third-party declarant or formally authenticating a document is simply out of the question, particularly in the case of an asylum seeker who fled for his/her life. Thus, many kinds of evidence that would present difficult issues in other courts may be easily admissible in immigration court.

Respondents and other witnesses may testify freely about what other people told them. Letters from friends or family members may often be introduced with little difficulty (though not always), as long as they are accompanied by translations. Documentary evidence, such as newspaper articles and general treatises are routinely admitted without objection. Thus, volunteers should not shy away from attempting to admit any evidence as long as an argument can be made that it is probative of the client's claim in some fashion. Needless to say, however, the Immigration Judge will give all of the evidence the weight that he/she thinks it deserves. Particularly marginal evidence may be admitted by the Judge but viewed with a great deal of skepticism.

### **3. THE RECORD**

As with the Master Calendar hearings, the formal record of the case is made on a tape recorder, controlled by the Judge, who may stop and start the tape at will. Although it has not often been a problem in Chicago, attorneys should be alert for instances of Judges capriciously turning the tape recorder off during arguments over evidence or procedure. If necessary, you should be ready to restate objections on the record and clearly note that the Judge turned off the recorder inappropriately. Remember that the tape is the official record of what goes on in the courtroom. You are not permitted to bring your own stenographer or otherwise make your own record of the hearing.

It is always a good idea to make certain that names of people, places, and organizations are spelled clearly for the record. Transcriptions of hearing tapes are often of poor quality, and transcribers are apparently often completely unfamiliar with foreign languages or anything associated with other countries. For languages that do not use a Roman alphabet, such as Pushto, Farsi, or Chinese, phonetic spelling will have to be used. It should be noted for the record that the spelling is phonetic and approximate.

### **4. THE IMMIGRATION JUDGE**

Judges in asylum hearings play a very active role and almost always engage in extensive direct and cross-examination. Currently, there are seven (7) Immigration Judges in Chicago, although one Judge presides solely over detained cases. Each conducts hearings in his/her own particular style. Attorneys are strongly encouraged to attend a Merits hearing held before the Judge in their case, for purposes of gauging how he/she conducts proceedings. If it is not possible to attend a hearing before a particular Judge, you should, at a minimum, consult with NIJC and talk to another volunteer who has practiced before that Judge.

### **5. THE DHS TRIAL ATTORNEY**

The DHS is represented by one of the Trial Attorneys from the local office of the Chief Counsel. The DHS Trial Attorney represents the Government and generally plays an adversarial role. As previously indicated, we recommend that you contact the Chief Counsel's Office prior to the hearing to obtain the identity of the Trial Attorney assigned to your case on that date and to discuss the merits of your case.

### **6. INTERPRETERS**

If your client speaks Spanish, an Immigration Court clerk will act as the interpreter during your client's hearing. For other languages, the court uses part-time interpreters of varying quality, hired through a contract with the Berlitz School (be sure to inform the Judge of specific dialects).

For the hearing, you may wish to have your own interpreter or someone familiar with your client's language present to signal errors in translation that can be corrected during the proceedings.

## **7. GENERAL LOGISTICS OF THE HEARING**

The courtroom is generally arranged in traditional fashion, and the respondent and her lawyer sit at the table on the left side of the room (as you face the Judge's bench), while the Trial Attorney sits on the right. How testimony is conducted depends on the Judge. Some require the witnesses to take the witness stand next to the bench, while others permit the client to remain seated next to the attorney. Some Judges ask attorneys to conduct examinations from the podium, while others do not.

Removal hearings are open to the public, although there are almost never any spectators other than the persons connected with the case. However, asylum hearings can be closed to the public at the request of the Respondent. Witnesses in either kind of proceeding are virtually always excluded from the courtroom on the government's motion. They should be warned to bring along a good book to read while they wait in the hall!

### **The Hearing Process**

#### **1. ARRIVING AT THE COURT**

Asylum hearings usually begin promptly, so you and your client should arrive at 55 East Monroe Street, Suite 1900 well in advance of the scheduled time. If your client is detained, please contact the Immigration Court to confirm whether your merits hearing will be conducted at the detained courtroom in the basement at 101 W. Congress Parkway. At the Immigration Court in Suite 1900 of 55 E. Monroe St., you should first report to the clerk at the window to acknowledge that you and your client are present and ready to go for a hearing before a particular Judge. The clerk will ask you and your client to wait until the courtroom is opened.

#### **2. BEGINNING THE HEARING**

##### **a. Off the Record Formalities**

Before the start of the hearing, the Judge will generally engage in a substantial amount of off-the-record conversation, reviewing the file, identifying exhibits, and clarifying issues, such as the status of previously filed motions, or the number of witnesses the respondent will call.

##### **b. Correcting and Updating Information**

At the beginning of the hearing on the record, the respondent's attorney is generally given a chance to update or correct any information on the asylum application or other materials previously submitted. It is important to make certain that names, addresses, dates, A-numbers, etc. are up-to-date and correct. In addition, where the attorney knows there will be substantial or even minor inconsistencies between testimony and earlier submissions, such as statements given to a DHS officer

or statements made during the credible fear interview, an attempt should be made at this point to correct inaccuracies and to state clearly the reasons for the inaccuracies.

Oftentimes asylum seekers have submitted their own *pro se* applications before seeking NIJC assistance, and these may have substantial errors. For example, many clients have unwittingly filed boilerplate applications prepared by unethical "notarios" or others and signed applications whose contents they know nothing about. Additionally, some clients initially file applications containing asylum claims that they believe are more acceptable to U.S. Judges and lawyers, but which subsequently turn out to be fabrications. If this is the case, you should offer correct information and a strong explanation for the inconsistencies as early as possible--before the hearing by means of a detailed affidavit from the client if possible or at the outset of the hearing and affirmatively through the client's own testimony.

**c. Identifying and Admitting Exhibits**

Next the Judge will go through the process of admitting exhibits. Generally, the Notice to Appear and related materials have already been admitted as initial exhibits and the asylum application along with all attached materials will be identified and admitted as a group exhibit. The Judge will simply identify all offered exhibits and ask if there are any objections. There are generally no objections to this, but if the Trial Attorney does object to a particular piece of evidence, the Judge will usually permit brief arguments and rule quickly. Occasionally, specific items such as expert witness affidavits or *curriculum vitae*, or pieces of direct evidence, such as letters or documents, will draw objections that the Judge is not comfortable ruling on at that point. In the circumstances, the Judge may instead reserve his/her ruling until the attorney presents the evidence during the course the case.

**3. OPENING STATEMENTS**

Some Judges permit opening statements, while others do not. Some will not permit them if the attorney has filed a pre-hearing brief. You are encouraged to check with NIJC or to ask the Judge at Master Calendar what his/her preference is. Either a pre-hearing brief or an opening statement is a very good idea, as both are vehicles to briefly summarize the client's case and, in cases where it is not clear that the case falls within the boundaries of refugee law, to cite supporting case law and distinguish problematic case law. The Judge will review the file and read concise briefs a day or so before the hearing, and in most cases, will be prepared to issue his oral decision immediately after the close of the hearing. A good memorandum and opening statement, when permitted, can be critical.

**4. EXAMINATION OF WITNESSES**

Examination of witnesses is largely the same as in most courts. The respondent offers her case first, conducting direct examination, followed by cross-examination by the Trial Attorney, and then by redirect examination where necessary. If your expert is located in another part of the country or the world and the cost of obtaining the expert is prohibitive, most of the Immigration Judges allow telephonic testimony by expert witnesses.

**a. Direct Examination**

Attorneys should be well prepared for direct examination and the client should be well rehearsed in how to conduct himself/herself. The client should be advised to answer questions

succinctly without engaging in long narratives, and should state clearly when he/she does not understand a question.

Since asylum hearings are brief, typically scheduled for three or four hour time slots, direct examination should be prepared with an eye on the clock.<sup>18</sup> Preliminary information should be gotten out as quickly as possible. Duplicative information can and should be eliminated, where there is no particular reason to bring it out in testimony.

Leading questions are generally objected to, and the objections are generally sustained. To avoid time-consuming arguments, you should simply prepare the client in advance on how to answer non-leading questions. It may be helpful to prepare a written question and answer sheet with the client, reviewing for accuracy. Check it against the written asylum application and the client's affidavit (as well as corroborated evidence.) However, do not have your client memorize a prepared direct examination because it can make the real direct examination sound scripted and your client seem less credible.

**b. Cross-Examination**

After direct examination, the Trial Attorney will conduct cross-examination, generally focusing on credibility. Again, though there are essentially no rules of procedure or evidence, you should raise objections when the questioning is inappropriate. Generally, the Trial Attorney's cross-examination is minimal. Redirect is permissible and strongly recommended where cross-examination has raised damaging issues.

**c. Examination by the Immigration Judge**

All the Immigration Judges will usually conduct his/her own extensive examination, generally after both direct and cross are completed by the attorneys. Some Judges, however, will interrupt direct and cross-examination repeatedly and extensively, which can disrupt the flow of the attorney's questions and rattle the client. The Judge's examination can present serious problems, since very often the questions are such that, if they were asked by an attorney in any other court proceeding, they would be subject to strong objections. However, since the Judge is doing the questioning, and typically believes he/she has a duty to actively question the respondent, there may be little you can do about it. Where questions are inappropriate or offensive, you should attempt to state your objections on the record and make note of the issue for purposes of a Notice of Appeal, if necessary. In extreme cases, you might wish to attempt to instruct your client, on the record, not to answer a particular question, most likely based on the Fifth Amendment right against self-incrimination. However, the Judge is nonetheless likely to insist that the question is answered anyway, and you must weigh the value of such aggressive tactics against the probability that it might affect the Judge's decision negatively.

Sometimes the Judge's questions are not inappropriate or offensive, but may simply be confusing. Questions previously asked may elicit inconsistent, incoherent, or non-responsive answers. One remedy may be to respectfully suggest to the Judge a different manner of wording the

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<sup>18</sup> Some Judges are willing to schedule additional hearing time at a later date if it becomes clear that testimony will not be completed by the end of the allocated time period. Other Judges, however, will absolutely not continue the hearing and will instead close the case and issue their decision regardless of how incomplete the evidence. You should consult with NIJC staff or consulting attorneys about the practices of individual Judges.

question or to simply suggest to the Judge that the client is confused or may not have understood the translation of the question. Another remedy may be to request an opportunity to conduct a brief additional redirect after the Judge has completed his questioning, in order to clarify any confusion or explain any inconsistencies or issues affecting the Judge's estimate of the witness' credibility.

## **5. CLOSING STATEMENTS**

Most Judges permit closing statements, though they will rely on pre-hearing briefs and their notes of your client's testimony. Where testimony in the hearing has raised specific questions of law or fact, you may wish to ask for the opportunity to address them very briefly on the record.

### **The Decision Of The Immigration Judge**

Typically, the Judge will issue his/her oral decision immediately at the close of the case. He may simply discuss what his decision would be and on what grounds he has decided, or he may recess the hearing for half an hour and return with a decision which will be read into the record. Other times, the Immigration Judge may continue the case for a period of time in order to produce a written decision--generally, when a novel or highly debatable point of law is at issue. However, this is less common. When the Immigration Judge issues his decision, whether favorable or unfavorable, the respondent receives only a minute order form filled out and signed by the Judge.

When the Judge is orally rendering his decision, the attorney should pay careful attention and make note of the bases for the decision, and any areas where the Judge misstates, misinterprets, or overlooks evidence or matters of law. If the respondent loses, the Notice to Appeal that is filed must state specific grounds justifying the appeal, not just a general statement of boilerplate language.

After the decision has been issued orally, each side will be asked whether they choose to reserve appeal. If you win, the Chief Counsel will in most cases reserve appeal--and on many occasions, they actually do file a Notice of Appeal.

(After the hearing on the merits, please notify NIJC of the outcome and provide NIJC with a copy of the order.)

## **The Appeal To The BIA**

An unsuccessful applicant may appeal to the Board of Immigration Appeals (BIA), an administrative body in Falls Church, Virginia, close to Washington, DC. The appeal requires a simple Notice of Appeal, articulating the grounds for appeal, that must be filed within 30 days of an oral decision or mailing of a written decision, and a \$110 filing fee. A certificate of service must also be included in your brief, stating that service was made in the Office of the Chief Counsel. All correspondence to the BIA must include a certificate of service to the Office of the Chief Counsel. It should also be sent by certified mail return receipt requested.

Some months after the filing of the Notice of Appeal, the BIA will send a transcript and briefing schedule. A written brief is filed after the transcript is received. It is normally due within 21 days of receipt of the transcript. An extension of 21 days may be requested prior to the expiration of this due date. Please provide NIJC with a draft of your brief prior to filing with the BIA at least five

business days before you intend to file. Please also send us a copy of the final product that you file. Once the appeal to the BIA is decided, please notify and provide NIJC with a copy of the opinion.

Under regulations that became effective on September 25, 2002, the BIA has limited fact-finding ability on appeal, which heightens the need for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); *Matter of Villanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969) and *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (BIA 1967), *superseded by Matter of S-H-*.

## **Federal Court Review**

If the BIA has decided against your client, he/she may be entitled to file a petition for review before the Court of Appeals in the circuit in which the case was originally tried, i.e. the Seventh Circuit for cases tried in Chicago's Immigration Court.

Petitions for review of BIA decisions must be filed within 30 days of the issuance of the BIA decision. However, where there is an earlier deadline that may affect deportability, such as a shorter period of voluntary departure, the petition should be filed prior to that time.

The filing of an appeal with the Court of Appeals does not automatically stay the deportation. We therefore request that *pro bono* attorneys handling petitions for review contact NIJC staff to discuss the timing and strategy of filing motions for a stay of removal. It is not unheard of for the deportation branch of Immigration & Customs Enforcement (ICE) to move to deport people. Keep your eyes out for what is called a "bag-and-baggage" letter requesting that your client report to ICE

NIJC's policy is that, where a client's appeal has been denied by the BIA, if there is any reasonable and non-frivolous ground for appeal, it should be pursued by the volunteer attorney. It is NIJC practice to serve as co-counsel on all Seventh Circuit appeals. Please consult with us when you are considering appealing beyond the BIA.

# ADDITIONAL INFORMATION

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## Obtaining Employment Authorization<sup>19</sup>

Although employment authorization is not an asylum applicant's automatic right, an asylum applicant may be authorized to work. *See* INA §208(d)(2); 8 USC §1158(d)(2). Employment authorization may NOT be granted before 180 days after asylum application filing date. If an application for asylum is denied within the first 180 days, the applicant is generally ineligible for employment authorization.

It is important to know that if you ask for a continuance or if your client has asked for a continuance of his/her case in the past, the "clock" will be or has been stopped, and your client may not be eligible for employment authorization because the 180 days required will not be reached. Please be aware that declining an expedited hearing date offered by the Immigration Judge at a Master Calendar hearing is considered a case delay caused by the applicant and stops the asylum clock.

For persons granted asylum, it is not necessary to obtain employment authorization. Persons granted asylum will be able to obtain an unrestricted social security number which they can present as proof of status to work.

The following represents the law to be applied to individuals who have applied for asylum on or after January 4, 1995. If the applicant applied prior to January 4, 1995, the old law must be researched.

### **Eligibility**

Eligibility for employment authorization is defined in the negative. *See* 8 C.F.R. § 274a.12(c)(8), § 274a.13(a), § 208.7. An asylum applicant must demonstrate all of the following:

1. That he/she has NOT been convicted of an "aggravated felony." *See* 8 C.F.R. § 208.7(a)(1).
2. That he/she has NOT failed to appear for an asylum interview or a hearing before an Immigration Judge (unless the applicant demonstrates exceptional circumstances for having failed to appear). *See* 8 C.F.R. § 208.7(a)(4).
3. That he/she has NOT had his/her asylum application denied by an asylum officer or by an Immigration Judge within 150 days after applying for asylum. *See* 8 C.F.R. § 208.7(a)(1).

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<sup>19</sup> Appendix X and the "Attorney" section of NIJC's website, [www.immigrantjustice.org](http://www.immigrantjustice.org), contain answers to frequently asked questions regarding employment authorization. Please see the appendix or website for quick answers to your employment authorization questions.

4. That he/she has NOT asked for a continuance in Immigration Court before 180 days since the filing of the application. *See* 8 C.F.R. § 208.7(a)(2).

### **When To File**

The applicant should file “no earlier” than 150 days after the date when his/her completed asylum application was filed. *See* 8 C.F.R. § 208.7(a) and § 274a.12(c)(8). If the USCIS returns the asylum application as incomplete, the 150-day period does not begin to accrue until the USCIS receives a completed application. *See* 8 C.F.R. § 208.7(a). One exception to the 150-day requirement does exist: an applicant who has been recommended for approval by the Asylum Office may apply for employment authorization when he/she receives notice of the recommended approval. *See* 8 C.F.R. § 208.7(a).

### **What To File**

#### **1. APPLICATION**

To apply for work authorization, a client will need to file an Application for Employment Authorization (Form I-765). Note that each family member living in the United States who is included on the applicant’s asylum application may submit an I-765. This means that even if the applicant’s child is not of legal age to work, an application may be filed on that child’s behalf so that he/she may get a social security number for future income tax reporting purposes.

On May 29, 2003, the USCIS made electronic filing of I-765 forms available. For eligibility and instructions, visit <http://uscis.gov/graphics/formsfee/forms/eFiling.htm>.

#### **2. PROOF OF PENDING ASYLUM APPLICATION**

Along with the form I-765, the applicant must submit proof that the asylum application has been filed with the USCIS or Immigration Judge, or that it is pending before BIA or federal court.

#### **3. FEE AND FEE WAIVER**

There is no fee required for the applicant’s first application for employment authorization. After the first application and for renewing employment authorization, the filing fee is \$340.00. If the applicant can demonstrate an “inability to pay” the filing fee, then he/she may file a fee waiver request. *See* 8 C.F.R. §103.7(c). The applicant should submit an affidavit or declaration asking for the waiver, stating why he/she merits employment authorization, and demonstrating the reasons for his/her “inability to pay.” *Id.*

#### **4. PHOTOS**

The applicant must also submit 2 color, passport style photographs. The applicant’s head should be bare and the photo should not be larger than 1 ½ x 1 ½ inches. Further, the applicant’s name and “A” number should be lightly printed on the back of both photos in pencil. In addition, the photographs should be inserted into a sealed envelope and paper-clipped to the I-765 application.

Clients who choose to file electronically are not required to submit standard photographs, but must make an appointment at a local Application Support Center for the electronic capture of their photograph, fingerprints and signature. For more information, visit <http://uscis.gov/graphics/formsfee/forms/e-photo.htm>.

## **Where to File**

The I-765 application must be filed at the appropriate USCIS Service Center (i.e. the Service Center with jurisdiction over the residence of the applicant). For applicants living in Illinois, Indiana, and Wisconsin, the appropriate USCIS Service Center is:

Nebraska Service Center  
United States Citizenship and Immigration Services  
Department of Homeland Security  
P.O. Box 87765  
Lincoln, Nebraska 68501-7765

## **Timeline for Adjudication**

It usually takes 90 days for an applicant to get an employment authorization card issued. The applicant will first receive a Notice of Receipt of the I-765 application. Once his/her I-765 application is approved, then the applicant will receive a Notice of Approval.

## **Renewals**

Employment authorization is valid for one year. It is renewable while the asylum application is being decided and, sometimes until the completion of any administrative or judicial review of the asylum application. *See* 8 C.F.R. §208.7(b). However, the renewal application must be filed 90 days before the previously issued employment authorization expires or employment authorization will not be renewed before it expires.

To renew, the applicant must file an I-765 form with the \$340.00 filing fee (unless he/she is filing a fee waiver request) along with proof that the applicant continues to pursue his/her asylum application. Such proof depends upon the stage of the applicant's asylum application. A copy of the following may be appropriate proof:

1. For proceedings before Immigration Judge:  
The asylum denial, referral notice, or charging document and the most recent hearing notice; OR
2. For applications pending at the Board of Immigration Appeals (BIA):  
A BIA receipt of timely appeal; OR
3. For claims pending in federal court:  
The petition for review or *habeas corpus* date stamped by the appropriate court.

## **When Employment Authorization Terminates**

Employment authorization terminates after the applicant's asylum application is denied. The following represents when employment authorization terminates, depending upon who terminated the asylum application.

### **1. AFTER DENIAL BY AN ASYLUM OFFICER**

The employment authorization shall terminate either at the expiration of the employment authorization document OR 60 days after the denial of asylum, whichever is longer. *See* 8 C.F.R. §208.7(b)(1).

### **2. AFTER DENIAL BY AN IJ, THE BIA, OR A FEDERAL COURT**

The employment authorization terminates upon the expiration of the EAD, unless the applicant has filed an appropriate request for administrative or judicial review. *See* 8 C.F.R. §208.7(b)(2).

## Freedom of Information Act Requests

In some cases, we suggest that you file a Freedom of Information Act (FOIA) request with the DHS to obtain copies of your client's file. If your client is in removal proceedings, you can ask that the DHS place your client's FOIA request on "Track Three." It generally takes DHS a few months to respond to a Track Three FOIA request and DHS generally responds more quickly if you fax the request. Depending on the time frame of your case, you may need to file the request as soon as you are assigned the case. If your client is not in removal proceedings, it will likely take DHS about one year to respond to your FOIA request.

All FOIA Requests should be sent to:

FOIA Officer  
Department Of Homeland Security  
National Records Center  
P.O. Box 648010  
Lee's Summit MO 64064-8010

The fax number for Track Three requests is: 816-350-5785

It is important to obtain a copy of your client's file because the DHS may have documents that your client does not or that your client has forgotten. For example, if DHS stopped your client at the border, DHS may have documents regarding statements your client made at that time, which contradict statements he/she makes during the hearing. Likewise, your client may have previously filed for some other immigration benefit, but neglected to tell you. Without the FOIA request, you will not know about these documents until the Trial Attorney uses them for impeachment purposes during your client's merits hearing.

## Forensic Examination of Documents

If your client is in removal proceedings, all original documents that will be submitted in support of the asylum application should be made available to the Trial Attorney, along with translations if the original documents are in a foreign language. DHS may wish to submit these documents to the FBI Forensics Document Lab for evaluation. Currently, Immigration Judges at the Chicago Immigration Court often require that attorneys submit all original documents to the Trial Attorney before the Immigration Judge will set the case for a merits hearing. Please contact NIJC to determine your Judge's policy regarding original documents. If your Judge requires that DHS receive all the original documents before the Court will set a merits hearing, we recommend that attorneys bring all original documents, with translations, to their client's first Master Calendar hearing if the client has all the original documents by that time.

In other cases, the Trial Attorney may not ask for original documents until the merits hearing, but may ask the Judge for a continuance in order to obtain the results of the forensic analysis. If the continuance is unreasonable or if you feel the Judge has continued your case for an excessive period of time to obtain the forensic results, we suggest that you oppose the continuance as inappropriate or as create a significant hardship for your client.

Please note that attorneys should not submit a client's passport to DHS as an original document unless the Judge or Trial Attorney has specifically requested the passport. Often, the passport is a client's only form of identification and once DHS obtains the client's passport, DHS will not return it to the client until proceedings have ended.

Attorneys should contact the Chief Counsel's Office regarding the submission of original documents well before the merits hearing to avoid any unnecessary delay in the proceedings that may be caused by a forensic review. If not submitted to DHS, original documents should also be available during the merits hearing for the Judge's inspection.

For concerns about the confidentiality of the asylum application and supporting documents and procedures for overseas investigations, see Bo Cooper, INS Memorandum: Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information (June 21, 2001).

# ADVISING YOUR CLIENT AFTER ASYLUM IS GRANTED

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When asylum is granted, it means that the asylee has the opportunity to live and work legally in the United States and will eventually have the opportunity to apply for lawful permanent residence and citizenship. However, the Department of Homeland Security can, at any time, reopen the case and attempt to terminate asylum and seek the removal of the asylee if it is determined that any one of a number of conditions are met: that country conditions have fundamentally changed such that that the asylee no longer need fear persecution; that the asylee participated in the persecution of others; that the asylee committed a particularly serious crime and constitutes a danger to the community; that the asylee committed a serious non-political crime outside of the United States; that the asylee poses a threat to the security of the United States; that the asylee was firmly resettled outside the United States prior to her arrival; that the asylee may be removed pursuant to a bi-lateral agreement to a safe third country that will provide protections; that the asylee has voluntarily returned to her home country; or, that the asylee has acquired a new nationality.<sup>20</sup>

Practically speaking, attempts to revoke asylum are rare without new evidence that the asylee has committed a serious crime in the United States or fraudulently obtained asylum. It is important to note, however, that asylum *is not* a permanent, guaranteed status for life in the United States. For that reason, it is essential to encourage all asylees to consult an immigration professional and begin the process of applying for lawful permanent residence one year from the date on which they were granted asylum.<sup>21</sup>

## Derivative Asylum for Spouse and Children

Immediate family members present in the United States and included in the original asylum application automatically receive asylum together with the principal applicant. “Immediate family members” include the asylee's spouse and unmarried children under 21 years of age. If the client and his/her spouse have a common-law marriage, which is very common in many countries, they should be strongly encouraged to be legally married in the United States prior to the date on which your client’s claim is adjudicated. Only those formal relationships that exist on the date on which asylum is granted entitle spouses and children to derivative benefits.

If immediate family members are present in the United States, but were not included in the asylum application, an asylee can file an I-730 Refugee/Asylee Relative Adjustment Petition with USCIS and do a one-step adjustment of status after asylum is granted.

If immediate family members are outside the United States, a client must file an I-730 form with the USCIS, which should approve it and then forward it to the U.S. Consulate in the country in which the family members reside. These petitions currently take about one year to adjudicate before being forwarded to the Consulate. The U.S. Consulate then processes the application and issues visas for qualifying relatives. The length of time consumed by this part of the process varies from Consulate to Consulate throughout the world. The spouse and/or children will be admitted into the

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<sup>20</sup> 8 C.F.R. §208.24

<sup>21</sup> See INA §209, 8 U.S.C. §1159 and 8 C.F.R. §§209.1, 209.2.

United States as asylees with benefits and rights similar to those of the principal asylee, often including the right to apply for legal permanent residence and eventually, citizenship.

The asylee must petition for immediate relatives within a two-year period after being granted asylum. This period may be extended for humanitarian reasons. NIJC offers clinics and intake sessions where NIJC attorneys and paralegals help asylees file I-730 petitions for their spouses and children. NIJC strongly recommends that *pro bono* attorneys do not file the I-730 petitions themselves, but instead refer the asylees to our clinics and/or intake sessions.

### ***The Child Status Protection Act***

In late 2002, Congress enacted the Child Status Protection Act (CSPA), which provides limited protections to persons who “age-out” of immigration benefits, that is, attain the age of 21 while awaiting the processing of an immigration petition or application for which their eligibility is contingent upon being *under* 21.

Under the CSPA, a number of protections are afforded specifically to children of asylum applicants. Children who are under 21 at the time an asylum application is filed by their parent are entitled to asylum status if they turn 21 before the application is adjudicated.

Please take into account, if possible, the age of an asylum applicant’s children when you prepare to file an application, and consult NIJC staff for advice.

## **Eligibility for Employment and a Social Security Number**

As an asylee, your client is automatically eligible to work in the United States and DOES NOT need an Employment Authorization Document (EAD). Your client is eligible for an *unrestricted* social security card that along with proof of identity is sufficient to establish that he/she is eligible to work in the United States. Unrestricted social security cards are obtained by applying with the Social Security Administration (SSA). Asylees will need to bring the **original** grant of asylum to the SSA, along with other proof of identity and signature. This card is only available following a final grant of asylum, and will not be issued if the Department of Homeland Security has reserved appeal. Asylees with final grants should wait approximately ten days to two weeks following a grant to request an unrestricted card, and applicants will receive the cards in the mail roughly two weeks after they have applied. SSA will provide a letter detailing this process upon application, and this letter will be sufficient for applying for public benefits as an asylee.

While no asylee is required to possess an EAD, many asylees do not possess sufficient proof of identity to easily obtain identity documents, including state IDs or Driver’s Licenses. Accordingly, many asylees who do not possess a valid passport or other government-issued picture/signature identity card *choose* to apply for an EAD. An EAD, valid for one year, is offered free of charge to asylees upon initial application, but subject to a fee for subsequent renewal applications.

Congress has recognized that asylees often need an identity document immediately to begin their lives in the United States, and last year required that EADs would be automatically provided to persons granted asylum at the Asylum Office. The Chicago Asylum Office has been complying with this requirement.

It should be noted that an EAD should not be used as a substitute for an unrestricted social security card and a state-issued ID card. The latter two documents should be used, as soon as they are

available, as proof of eligibility to accept employment in the United States when completing an I-9 form with a potential employer.

Some potential employers *illegally* require that asylees present an EAD as proof of employment eligibility. Such a demand is document abuse, and should be reported to the Office of Special Counsel for Immigration-Related Unfair Employment Practices. NIJC will be happy to assist you in making a complaint on behalf of your client.

## **Public Benefits**

Asylees are entitled to certain public benefits. For the first seven years after being granted asylum, asylees are eligible for Social Security Income, Medicaid, and Food Stamps, and a variety of other benefits and services. Eligibility for many of these programs may extend past the first seven years. However, most of these programs themselves are time-limited, and individuals may only be able to receive benefits for periods of three months to a year, depending on the programs. Other programs may be available continuously.

Asylees who would like to access public benefits should speak to a qualified public benefits counselor as soon as possible upon their final grant of asylum. Clients with cases on appeal or who possess a conditional approval or a recommended approval are not eligible for benefits until the appeal is complete or a final approval is granted.

Some benefits programs administered through the Office for Refugee Resettlement provide benefits available only to asylees, refugees, and victims of human trafficking. Such programs include refugee cash and medical assistance, and should be accessed through a licensed refugee resettlement agency. NIJC will provide referrals throughout the Chicago metropolitan area. Other clients should contact the CLINIC Asylee Hotline at 1-800-354-0365 to be placed with a refugee resettlement agency. In addition to administering benefits programs and providing general public benefits counseling, these agencies often provide English classes, employment training and placement programs, mental health programs, youth and elderly services, and referrals to other social service agencies as necessary.

## **Taxes**

Asylees are required to report all income earned in the United States to the Internal Revenue Service (IRS) and to pay taxes on that income. Asylees must therefore submit yearly income tax reports to the IRS.

## **Right To Travel**

An asylee is eligible to travel outside the United States. Before leaving the United States, asylees must obtain advance permission to re-enter the country. A client can receive such authorization by applying for a Refugee Travel Document (Form I-131).

It is essential that the asylee not return to his or her home country until he/she has become a lawful permanent resident. If the asylee does return to his or her home country, DHS could refuse to allow

that individual to reenter the United States on the grounds that he/she implicitly no longer fears persecution. NIJC discourages foreign travel of any kind until clients become LPRs.

## **Lawful Permanent Residence Status**

One year from the date of the asylum grant, the asylee is eligible to submit an application for adjustment of status to become a lawful permanent resident. To apply, asylees use the application for adjustment (Form I-485). Because nearly 20,000 aliens are granted asylum in the United States each year, there is a significant backlog of pending adjustment applications for asylees. In the past, new asylees waited between 6 and 8 years to adjust to LPR status after filing an application. Even though a recent class-action settlement and change in the statute eliminated an annual cap, which restricted the processing of adjustment of status applications for asylees and led to the prolonged delay and backlog, it still takes approximately one year for asylees to gain LPR status after they file their applications.

The grant of LPR status is discretionary. The Immigration Act of 1990 added language to the asylee adjustment statute that allows the USCIS to deny adjustment for a number of reasons; particularly if it is believed that the asylee no longer meets the definition of a “refugee.” This could occur in a case where conditions in the asylee's home country have improved such that he/she no longer fears persecution. The USCIS has stated that asylees from certain countries where the political climate has dramatically improved may not be automatically adjusted, but will be evaluated based on the specifics of the applicant's case. In practice, this provision is rarely invoked; for most asylees, adjustment is virtually automatic.

Derivative spouses and unmarried children under 21 are also eligible for adjustment of status to lawful permanent residence as long as they can demonstrate that the relationship through which they received derivative status (i.e. spouse or unmarried, minor child) continues through such time as their application for adjustment is granted.

Unfortunately, this means that derivative asylees do not always have the right to lawful permanent residency. If the relationship has been severed, by, for instance, a divorce, the spouse who has derivative status is not eligible for adjustment of status.

## **Citizenship**

Five years after an asylee receives permanent residence (“green card” status), she/he may apply to become a United States citizen. This status will afford the full protections under the law, and permanent, virtually irrevocable status in the United States. This final step in the immigration process may well be 15 years or more from the date your client files an asylum application. Advising your client of the ongoing nature of proceedings with the Department of Homeland Security is imperative to the success of a new life in the United States.

## **Selective Service Registration**

All males in the United States between 18 and 26 years of age are required to register for the draft. Asylees and asylum seekers are not exempt. Failure to register may have implications for your

client when he applies to become a U.S. citizen. Information about the Selective Service can be found at <http://www.sss.gov>.

# CONTACT INFORMATION

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Fax: 312.660.1505  
Email: [mbaumann@heartlandalliance.org](mailto:mbaumann@heartlandalliance.org)

# IMPORTANT PHONE NUMBERS AND ADDRESSES

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## **Chicago Office of Asylum**

Department of Homeland Security  
U.S. Citizenship and Immigration Services  
401 S. LaSalle St., 8<sup>th</sup> Fl.  
Chicago, IL 60605  
Phone: 312-353-9607  
Fax: 312-886-0204

## **DHS Chief Counsel**

55 E. Monroe St., 17<sup>th</sup> Floor  
Chicago, IL 60603  
Phone: 312-984-2400

## **Executive Office for Immigration Review**

55 E. Monroe St., Ste. 1900  
Chicago, IL 60603  
Phone: 312-353-7313

## Immigration Judges

Judge Glen Bower  
Judge Carlos Cuevas  
Judge James Fujimoto  
Judge Jennie L. Giambastiani  
Judge George Katsivalis (Detained Cases Only)  
Judge Robert D. Vinikoor  
Judge Craig Zerbe

## **Nebraska Service Center**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Nebraska Service Center  
P.O. Box (Insert Correct Box Number)  
Lincoln, NE (Insert Correct Zip Code)

## Overnight/Courier Mail:

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Nebraska Service Center  
850 S Street  
P.O. Box (Insert Correct P.O. Box Number)  
Lincoln, NE 68508

Box Number for Asylum: 87589  
Zip Code for Asylum: 68501-7589

## **Board of Immigration Appeals**

Office of the Clerk  
P.O. Box 8530  
Fall Church, VA 22041  
Phone: 703-605-1007

## Overnight/ Courier Mail:

Board of Immigration Appeals  
5107 Leesburg Pike, Suite 2000  
Falls Church, VA 22041

## **Important Websites**

Online applications: [www.uscis.gov](http://www.uscis.gov)  
<http://www.usdoj.gov/eoir/>  
<http://www.ca7.uscourts.gov/>

## **EOIR Automated Information Line**

**1-800-898-7180**

(For information regarding your client's hearing  
and his/her employment authorization clock)

# LEGAL RESOURCE MATERIALS

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## Sources For Case Preparation

### For Asylum and Withholding Cases:

AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law & Procedure (5th ed.), written by Regina Germain, published by AILA (American Immigration Lawyer's Association), 1400 I Street N.W., Suite 1200, Washington, DC 20005, tel. (202) 371-9377, fax (202) 371-9449.

Law of Asylum in the United States (3<sup>rd</sup> ed.), written by Deborah Anker, published by The Refugee Law Center, c/o Boston Book Co., 705 Centre Street, Suite 200, Boston, MA 02130, tel. (617) 522-8400, fax (617) 524-8400.

Winning Asylum Cases, written by Mark Silverman, Robert Jobe, and Larry Katzman, published by Immigrant Legal Resource Center, 1663 Mission Street #602, San Francisco, CA 94103, tel. (415) 255-9499.

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), available from the UNHCR, 1775 K Street, N.W., Third Floor, Washington, D.C. 20006; tel. (202) 296-5191.

[www.asylumlaw.org](http://www.asylumlaw.org)

### For CAT Cases:

World Organization Against Torture USA, 1015 18<sup>th</sup> Street N.W., Suite 400, Washington, D.C. 20036, tel. (202) 861-6494. e-mail: [msklar@igc.atc.org](mailto:msklar@igc.atc.org). Contact person: Morton Sklar.

## Sources For Documentation

Amnesty International, Refugee Office, 500 Sansome St., Ste. 615, San Francisco, CA 94111; tel. (415) 291-0601; fax (415) 291-8722.

Human Rights Watch, Publications Dept. 485 5<sup>th</sup> Ave. New York, NY 10017-6104, tel.(212) 986-1980.

United Nations High Commissioner for Refugees, 1775 K Street, N.W., Third Floor, Washington, D.C. 20006; tel. (202) 296-5191. (Might be able to do advisory opinion on your particular case.)<sup>22</sup>

[www.asylumlaw.org](http://www.asylumlaw.org)

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<sup>22</sup> Get release of documentation from client.

# GLOSSARY OF IMMIGRATION TERMS

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## A

- “A” Number:** An eight digit number (or nine digits, if the first number is a zero) beginning with the letter "A" that the DHS gives to some non-citizens. (Please note that EOIR now requires all A Numbers to be submitted as nine digit numbers. If your client’s A Number only has eight digits, add a “0” to the beginning of the number.)
- Adjustment of Status:** A process by which a non-citizen in the United States becomes a lawful permanent resident without having to leave the U.S.
- Admission:** The decision of the DHS to allow a non-citizen at the United States border or international airport or seaport to enter the United States.
- Admissible:** A non-citizen who may enter the U.S. because he/she is not among the classes of aliens who are ineligible for admission or has a waiver of inadmissibility.
- Affidavit of Support:** A form (I-134) filed by a U.S. citizen or lawful permanent resident for a non-citizen seeking lawful permanent residence.
- Aggravated Felon:** One convicted of numerous crimes set forth at INA § 101(a)(43). An aggravated felony includes many crimes, but the most common are: (1) drug trafficking--any crime involving distribution, importation or sale of drugs, no matter the amount or the sentence; (2) the crime of theft, robbery or burglary with one year sentence whether imposed or suspended; and (3) the crime of violence with a one year sentence whether imposed or suspended.
- Alien:** A person who is not a citizen or national of the United States.
- Alien Registration Receipt Card:** The technical name for a "green card," which identifies an immigrant as having permanent resident status.
- Aliens Previously Removed:** Ground of inadmissibility, for persons previously removed for anywhere from five years to twenty years depending on prior circumstances.
- Aliens Unlawfully Present:** Ground of inadmissibility for three years for an individual unlawfully present in the U.S. for more than 180 days but less than one year commencing April 1, 1997 or for ten years if unlawfully present for one year or more.

**Asylee:** A person who is granted asylum in the United States.

**Asylum:** A legal status granted to a person who has suffered harm or who fears harm because of his/her race, religion, nationality, political opinion or membership in a particular social group.

## **B**

**Beneficiary:** A person who will gain legal status in the United States as a result of a visa petition approved by the DHS.

## **C**

**Cancellation of Removal:** Discretionary remedy for an LPR who has been a permanent resident for at least five years and has resided continuously in the United States for at least seven years after having been admitted in any status and has not been convicted of an aggravated felony, or anyone physically present in the United States for a continuous period of not less than ten years, who has been a person of good moral character during such period, has not been convicted of certain offenses and who establishes that removal would result in “exceptional and extremely unusual hardship” to the U.S. citizen or LPR spouse, parent, or child.

**Child:** The term "child" means an unmarried person under twenty-one years of age who is: (1) a legitimated child; (2) a stepchild; (3) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile; (4) an illegitimate child; (5) a child adopted while under the age of sixteen; and (6) a child who is an orphan. There is a significant amount of case law interpreting these categories.

**Citizen (USC):** Any person born in the fifty United States, Guam, Puerto Rico, or the U.S. Virgin Islands; or a person who has naturalized to become a U.S. citizen. Some people born abroad are also citizens if their parents were citizens.

**Conditional Permanent Resident Status:** A person who received lawful permanent residency based on a marriage to a U.S. citizen, which was less than two years old at the time. Conditional residents must file a second petition with the U.S. within two years of receiving their conditional resident status in order to retain their U.S. residency.

**Consular Processing:** The process by which a person outside the United States obtains an immigrant visa at a U.S. consulate in order to travel to the U.S. and enter as a lawful permanent resident.

**Conviction:** Formal judgment of guilt entered by a court or, if adjudication of guilt was withheld, if a judge or jury has found the person guilty or the person has entered a plea of guilty or *nolo contendere* and has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty or restraint.

**Credible Fear Interview:** An interview which takes place if an alien who arrives in the United States with false documents or no documents, and is therefore subject to expedited removal, expresses a fear of persecution or a desire for asylum. The purpose of the interview is to determine if the alien can show that there is a significant possibility that he/she can satisfy the qualifications for asylum.

## D

**Department of Homeland Security (DHS):** The federal department charged, in part, with implementing and enforcing immigration law and policy.

**Deportable:** Being subject to ejection from the U.S. for violating an immigration law, such as entering without inspection, overstaying a temporary visa, or being convicted of certain crimes.

**Deportation:** The ejection of a non-citizen from the United States. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), non-citizens were ejected from the United States through deportation proceedings. IIRIRA combined what were formerly known as deportation proceedings and exclusions proceedings into once single removal procedure.

**Detention:** Asylum seekers who enter the U.S. without documentation may be detained at a DHS detention facility until they pass a credible fear interview or until the completion of their asylum hearing.

## E

**Entry:** Being physically present in the U.S. after inspection by the DHS or after entering without inspection.

**Entry Without Inspection (EWI):** Entering the United States without being inspected by the DHS, such as a person who runs across the border between the U.S. and Mexico or Canada. This is a violation of the immigration laws.

**Employment Authorization Document (EAD):** The I-688 card that the DHS issues to a person granted permission to work in the U.S. The EAD is a plastic, wallet-sized card.

**Excludable:** Being inadmissible to the U.S. for violating an immigration law, such as for not possessing a valid passport or visa, or for having been convicted of certain crimes.

**Exclusion:** The ejection of a non-citizen who has never gained legal admission to the U.S. (however, the person may have been physically present in the U.S.). Prior to IIRIRA, non-citizens who had never gained legal admission to the U.S. were ejected through exclusion proceedings. IIRIRA combined what were formerly known as deportation proceedings and exclusions proceedings into once single removal procedure

**Executive Office for Immigration Review (EOIR):** The Immigration Court, the Board of Immigration Appeals, and one other agency within the Department of Justice that decides immigration cases.

**Expedited Removal:** An abbreviated removal procedure applied to aliens who arrive in the United States with false documents or no documents.

## I

**I-94 Card:** A small white paper card issued by the DHS to most non-citizens who do not have green cards upon entry to the U.S. It is usually stapled to a page of the non-citizen's passport. The DHS may also issue I-94 cards in other circumstances.

**Illegal Alien:** See "Undocumented".

**Immigration and Customs Enforcement (ICE):** The agency within the Department of Homeland Security responsible for overseeing detention and release of immigrants and the investigation of immigration-related administrative and criminal violations.

**Immediate Relative:** The spouse, parent, or unmarried child under 21 of a U.S. citizen. Generally speaking, the immigration laws treat immediate relatives better than other relatives of citizens or legal permanent residents.

**Immigrant:** A person who has the intention to reside permanently in the United States; usually a lawful permanent resident.

**Immigrant Visa:** A document required by the INA and required and properly issued by a consular office outside of the United States to an eligible immigrant under the provisions of the INA. An immigrant visa has six months validity.

**Immigration and Nationality**

**Act (INA):** The immigration law that Congress originally enacted in 1952 and has modified repeatedly.

**Immigration and**

**Naturalization Service (INS):** Former branch of the United States Department of Justice charged with enforcing the immigration laws. On March 1, 2003, the INS ceased to exist. Responsibility for immigration policy and immigration functions is now shared between the Department of Justice and the Department of Homeland Security.

**Immigration Judge:** Presides over removal proceedings.

**Inspection:** The DHS process of inspecting a person's travel documents at the U.S. border or international airport or seaport.

**L****Lawful Permanent Resident (LPR):**

A person who has received a "green card" and whom the DHS has decided may live permanently in the U.S. LPRs eventually may become citizens, but if they do not, they could be deported from the U.S. for certain activities, such as drug convictions and certain other crimes.

**N**

**Native:** A person born in a specific country.

**National:** A person owing permanent allegiance to a particular country.

**Naturalization:** The process by which an LPR becomes a United States citizen. A person must ordinarily have been an LPR for five years before applying for naturalization. A person who became an LPR through marriage to a U.S. citizen and is still married to that person in most cases may apply for naturalization after three years as an LPR.

**Nicaraguan Adjustment and Central American Relief Act (NACARA):**

Legislation passed by Congress in 1997 to restore the opportunity for certain individuals present in the U.S. to adjust to permanent resident status. The legislation covers Cubans and Nicaraguans, Guatemalans, Salvadorans, and certain East Europeans of Former Soviet Bloc Countries. Under the legislation, different requirements apply to each group.

**Non-citizen:** Any person who is not a citizen of the U.S., whether legal or undocumented. Referred to in the INA as an "alien."

**Nonimmigrant:** A person who plans to be in the U.S. only temporarily, such as a person with a tourist or student visa. A nonimmigrant will ordinarily have a visa stamp in his/her passport, and an I-94 card which states how long the person can stay in the U.S.

**Nonimmigrant Visa:** A document issued by a consular officer signifying that the officer believes that the alien is eligible to apply for admission to the US for specific limited purposes and does not intend to remain permanently in the US. Nonimmigrant visas are temporary.

**Notice to Appear:** Document issued to commence removal proceedings, effective April 1, 1997.

## O

**Order to Show Cause:** Document issued to commence deportation proceedings prior to April 1, 1997.

**Overstay:** To fail to leave the U.S. by the time permitted by the DHS on the nonimmigrant visa (as ordinarily indicated on the I-94 card), or to fail to arrange other legal status by that time.

## P

**Parole:** To permit a person to come into the U.S. who may not actually be eligible to enter, often granted for humanitarian reasons, or to release a person from DHS detention. A person paroled in is known as a "parolee."

**Petitioner:** A U.S. citizen or LPR who files a visa petition with the DHS so that his/her family member may immigrate.

**Priority Registration Date (PRD):**

Everyone who files an I-130 Petition For Alien Relative receives a priority registration date. Once a person's PRD becomes current, meaning that a visa is available, he/she can apply for LPR status. This may take a long time, as visa numbers often are not available for many years after the I-130 is approved.

## R

**Refugee:** A person who is granted permission while outside the U.S. to enter the U.S. legally because of harm or feared harm due to his/her race, religion, nationality, political opinion or membership in a particular social group.

<b>Relief:</b>	Term used for a variety of grounds to avoid deportation or exclusion.
<b>Removal:</b>	Proceedings to enforce departure of persons seeking admission to the US who are inadmissible or persons who have been admitted but are removable. After IIRIRA, aliens are placed into removal proceedings instead of deportation or exclusion proceedings.
<b>Rescission:</b>	Cancellation of prior adjustment to permanent resident status.
<b>Residence:</b>	The principal and actual place of dwelling.
<b>Respondent:</b>	The term used for the person in removal proceedings.

## S

<b>Service Centers:</b>	Offices of the DHS that decide most visa petitions. There are four regional Service Centers for the entire U.S.: the Vermont Service Center (VSC); the Nebraska Service Center (NSC); the Texas Service Center (TSC); and the California Service Center (CSC).
<b>Stowaway:</b>	One who obtains transportation on a vessel or aircraft without consent through concealment.
<b>Suspension of Deportation:</b>	Commonly referred to as "Suspension." A way for a non-citizen to become a lawful permanent resident. Historically, suspension has only been available to a person who is in deportation proceedings. The non-citizen usually must show that he/she has resided continuously in the United States for at least seven years, is a person of good moral character, and either he/she or his/her U.S. citizen or LPR relative will suffer extreme hardship if he/she is deported. In the Violence Against Women Act, Congress created a new "suspension of deportation" for spouses and children of U.S. citizens or LPRs who can show that they have been victims of domestic violence or sexual abuse. These persons need only prove three years of continuous residence in the U.S.

## T

<b>Temporary Protected Status (TPS):</b>	A status allowing residence and employment authorization to the nationals of foreign states, for a period of not less than six months or more than eighteen months, when such state (or states) has been appropriately designated by the Attorney General because of extraordinary and temporary conditions in such state (or states).
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## U

**Undocumented:** A non-citizen whose presence in the U.S. is not known to the DHS and who is residing here without legal immigration status. Undocumented persons include those who originally entered the U.S. legally for a temporary stay and overstayed or worked without DHS permission, and those who entered without inspection. Often referred to as "illegal aliens."

**United States Citizenship And Immigration Services (USCIS):** The agency within the Department of Homeland Security responsible for adjudicating all applications for immigration benefits.

**U-Visa** A non-immigrant visa that allows non-citizen victims of crime to stay in the U.S. and obtain employment authorization. After three years in U-visa status, the non-citizen may be able to adjust status to obtain lawful permanent residency. Certain family members of the U-visa holder may also be eligible for derivative U-visa status.

## V

**Violence Against Women Act (VAWA):** Legislation passed by Congress in 1994, which contained certain immigration provisions. The immigration law provisions allow a spouse and children, or parents of children, who have been abused or subject to extreme cruelty by their legal permanent resident or United States citizen spouse or parent to immigrate without the assistance of the LPR or USC spouse or parent, provided that they meet certain conditions.

**Visa:** A document (or a stamp placed in a person's passport) issued by a United States consulate abroad to a non-citizen to allow that person to enter the U.S. Visas are either nonimmigrant or immigrant visas.

**Visa Petition:** A form (or series of forms) filed with the DHS by a petitioner, so that the DHS will determine a non-citizen's eligibility to immigrate.

**Voluntary Departure:** Permission granted to a non-citizen to leave the U.S. voluntarily. The person must have good moral character and must leave the U.S. at his/her own expense, within a specified time. A non-citizen granted voluntary departure can reenter the U.S. legally in the future.

## W

**Waiver:** The excusing of a ground of inadmissibility by the DHS or the Immigration Court.

**Work Permit:** There is no single document in U.S. immigration law that is a "work permit." Citizens, nationals, and lawful permanent residents are

authorized to be employed in the U.S. Certain nonimmigrant visa categories include employment in the U.S. Other aliens in the U.S. may have the right to apply for an Employment Authorization Document (EAD).

# SAMPLE FORMS AND DOCUMENTS

\* \* \*

## Sample Forms and Letters

Instructions and Sample Application for Asylum and Withholding of Removal (I-589) A

Filing Checklist

<http://uscis.gov/graphics/formsfee/forms/i-589.htm>

Notices of Appearance as Attorney B

For DHS (G-28): <http://uscis.gov/graphics/formsfee/forms/g-28.htm> (blue paper)

For Court (EOIR-28): <http://www.usdoj.gov/eoir/eoirforms/instru28.htm> (green paper)

For the BIA (E-27): <http://www.usdoj.gov/eoir/eoirforms/instru27.htm> (beige paper)

Request to Review Record of Proceeding or Hearing Tape C

Fingerprint Request Forms D

Fingerprint Appointment Instructions for Asylum Applications Filed Post-April 1, 2005

Fingerprint Appointment Instructions for Asylum Applications Filed Pre-April 1, 2005

FOIA Request Form (G-639) E

Sample Cover Letter for Track Three Request

<http://uscis.gov/graphics/formsfee/forms/g-639.htm>

\*If your client is not eligible for Track Three (see page 52), please contact NIJC for information regarding your FOIA request

Application for Employment Authorization (Form I-765) F

Sample Cover Letter

<http://uscis.gov/graphics/formsfee/forms/i-765.htm>

Change of Address Forms G

For Court and the BIA: (EOIR-33):

<http://www.usdoj.gov/eoir/eoirforms/eoir33/ICadr33.htm>

<http://www.usdoj.gov/eoir/eoirforms/eoir33/eoir33bia2.pdf>

For DHS: (AR-11)

<http://uscis.gov/graphics/formsfee/forms/ar-11.htm>

Notice of Appeal to the BIA (E-26) H

<http://www.usdoj.gov/eoir/eoirforms/2instru26.htm> (blue paper)

## Sample Documents

Notice to Appear I

Sample Cover Letter to Asylum Office J

<http://www.asylumlaw.org>

Sample Brief/Trial Memorandum <a href="http://www.asylumlaw.org">http://www.asylumlaw.org</a>	K
Sample Index of Exhibits	L
Sample Client Affidavits	M
Sample Expert Affidavit	N
Sample Psychologist Affidavit	O
Translation Templates for Birth, Marriage, and Death Certificates	P
Sample Certificate of Translator’s Competence	Q
Sample Certificate of Service	R
Sample Motion to Allow Expert Witness to Testify Telephonically	S
<b>Resources for Case Preparation</b>	
The Immigration Court Practice Manual (Table of Contents)	T
Guidelines for Immigration Lawyers Working With Interpreters	U
Guidelines for Immigration Court Cases Involving Unaccompanied Immigrant Children	V
Guidelines for Facilitating <i>Pro Bono</i> Legal Services	W
Employment Authorization for Asylum Applicants: Frequently Asked Questions	X
Obtaining a Fingerprint Appointment For Your Asylum Client: Frequently Asked Questions	Y
Memoranda and Guidance Regarding the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)	Z
<ul style="list-style-type: none"> <li>▪ Instruction Sheet for an Unaccompanied Alien Child in Immigration Court to Submit an I-589 Asylum Application to U.S. Citizenship and Immigration Services (USCIS).</li> <li>▪ “Memorandum: Implementation of the Trafficking Victims Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance),” Executive Office for Immigration Review, March 20, 2009.</li> <li>▪ “Memorandum: Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children,” U.S. Citizenship and Immigration Services, March 25, 2009.</li> <li>▪ “Questions and Answers USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum,” U.S. Citizenship and Immigration Services, March 25, 2009.</li> </ul>	

