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**Midwest Immigrant & Human Rights Center**  
**BASIC PROCEDURAL MANUAL**  
**FOR ASYLUM REPRESENTATION**  
**AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS**

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# TABLE OF CONTENTS



ACRONYMS AND TERMS .....	3
INFORMATION ON THE <i>PRO BONO</i> PROGRAM.....	5
THE MIDWEST IMMIGRANT & HUMAN RIGHTS CENTER .....	5
OUR CLIENTS.....	5
WHAT WE EXPECT FROM VOLUNTEER ATTORNEYS .....	5
WHAT VOLUNTEERS CAN EXPECT FROM MIHRC .....	6
OBTAINING A CASE .....	6
FIRST STEPS.....	7
THE BASICS OF ASYLUM LAW .....	8
BACKGROUND.....	8
WAYS TO APPLY FOR ASYLUM .....	8
LEGAL TEST FOR ASYLUM/REFUGEE PROTECTION .....	9
BARS TO ELIGIBILITY FOR ASYLUM.....	14
ALTERNATIVES TO ASYLUM .....	15
WITHHOLDING OF REMOVAL.....	15
CONVENTION AGAINST TORTURE .....	16
VOLUNTARY DEPARTURE .....	18
TEMPORARY PROTECTED STATUS .....	19
"T" VISA FOR VICTIMS OF HUMAN TRAFFICKING.....	20
FLOW CHART: STEPS IN THE ASYLUM PROCESS.....	21
THE ASYLUM PROCESS.....	23
THE APPLICATION .....	23
THE MASTER CALENDAR HEARING.....	26
PREPARING FOR THE HEARING ON THE MERITS.....	29
THE MERITS HEARING.....	34
THE APPEAL TO THE BIA.....	39
FEDERAL COURT REVIEW .....	40
ADDITIONAL INFORMATION .....	41
OBTAINING EMPLOYMENT AUTHORIZATION.....	41
FREEDOM OF INFORMATION ACT REQUESTS .....	44
FORENSIC EXAMINATION OF DOCUMENTS .....	44
ADVISING YOUR CLIENT AFTER ASYLUM IS GRANTED .....	45
DERIVATIVE ASYLUM FOR SPOUSE AND CHILDREN .....	45
ELIGIBILITY FOR EMPLOYMENT AND A SOCIAL SECURITY NUMBER.....	46
PUBLIC BENEFITS.....	47
TAXES.....	47
RIGHT TO TRAVEL.....	47
LAWFUL PERMANENT RESIDENCY STATUS .....	48

CITIZENSHIP .....	48
DRAFT REGISTRATION .....	49
MIHRC CONTACT INFORMATION .....	50
IMPORTANT PHONE NUMBERS AND ADDRESSES .....	51
LEGAL RESOURCE MATERIALS .....	52
GLOSSARY OF IMMIGRATION TERMS.....	53
SAMPLE FORMS AND DOCUMENTS .....	61

**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, MIHRC 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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# ACRONYMS AND TERMS



<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>BCIS</b>	Bureau of Citizenship and Immigration Services
<b>BICE</b>	Bureau of Immigration and Customs Enforcement
<b>CAT</b>	Convention Against Torture
<b>DED</b>	Deferred Enforcement Departure
<b>DHS</b>	Department of Homeland Security
<b>EOIR</b>	Executive Office for Immigration Review
<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>TPS</b>	Temporary Protected Status
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>USC</b>	United States Citizen
<b>VAWA</b>	Violence Against Women Act



# INFORMATION ON THE *PRO BONO* PROGRAM



## **The Midwest Immigrant & Human Rights Center**

The Midwest Immigrant & Human Rights Center (MIHRC), a program of Heartland Alliance for Human Needs & Human Rights (formerly Travelers & Immigrants Aid), has helped immigrants and refugees find safety and opportunity in the United States since its inception in 1888. Founded in 1985, MIHRC's *pro bono* project provides legal representation to low-income refugees seeking political asylum in the United States. The project is now one of the leading asylum defense programs in the country, handling dozens of deportation and administrative asylum cases every year.

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

## **Our Clients**

MIHRC's asylum clients are refugees who have fled civil wars, violence and persecution around the globe and who are present in the United States without legal status as immigrants. Many of MIHRC's clients have survived state-sponsored torture and/or persecution. Other clients have been subject 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 the 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.

MIHRC provides representation to asylum-seekers in affirmative and defensive proceedings. Most of MIHRC's clients are already in removal proceedings at the Immigration Court - the last step before being deported by the United States government to their home countries. In these adversarial proceedings before an Immigration Judge, individuals who have attorneys have a far better chance of winning their case than those without representation.

## **What We Expect From Volunteer Attorneys**

MIHRC clients' lives are quite literally at stake in deportation or administrative proceedings. For that reason, every case is treated very seriously, and we ask our volunteers to do the same.

We request that MIHRC volunteers agree to stay with a case from start to finish—that is, throughout 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 and the relative difficulty of obtaining long continuances, 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 she attempt to obtain substitute counsel. If that is not possible, please advise MIHRC as soon as possible so that we can try to find new counsel.

MIHRC'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 trial or an administrative interview before an Asylum Officer would not require enormous preparation time, in fact 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 preparing the case. Most volunteers spend between 50 to 200 hours preparing their cases.

MIHRC 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 MIHRC for any ancillary matters.

## **What Volunteers Can Expect From MIHRC**

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

MIHRC 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. MIHRC 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, MIHRC will set up a training session upon request. The basic course is three hours, and all training materials are provided.

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

Finally, MIHRC's volunteers can expect that an asylum case will be one of the most fascinating and rewarding career experiences. MIHRC cases are always interesting and compelling, reflecting realities discussed in the international news headlines. Many of MIHRC'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 the staff at MIHRC at (312) 660-1370 or email us at [mirc@tia-mirc.org](mailto:mirc@tia-mirc.org) to obtain a case. Once a client has been assigned to you, MIHRC 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

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

**Contact your client.** MIHRC 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.** MIHRC attempts to obtain relevant documentation from our clients prior to assigning a case to a *pro bono* attorney. You will need to discuss with your client the availability of original documents, copies of which you may have received.

**Review the Notice to Appear.** If your client is before the Immigration Court, you and your client will likely be expected to respond and plea to the Notice to Appear (NTA), the charging document, 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 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 will be able to obtain interview notes and assessments prepared by Department of Homeland Security (DHS) officers. These documents will not be in the Judge's file, but may be used by DHS trial attorneys for purposes of impeachment during the merits hearing. It may take four to six months to receive a copy of your client's file.

**Register with [www.asylumlaw.org](http://www.asylumlaw.org).** If you are not already a registered user, MIHRC 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.

# THE BASICS OF ASYLUM LAW



## Background

Federal law provides that individuals who have suffered or fear persecution based on their particular race, religion, nationality, political opinion or social group in their home countries 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) when making a determination.

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 (2001). 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 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 Bureau of Citizenship and Immigration Services (BCIS), now adjudicated all affirmative requests for asylum. The Attorney General maintained jurisdiction over asylum applications filed with the Immigration Court.

## 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 Department of Homeland Security adjudicates all affirmative applications. By contrast, if an individual is arrested by the DHS or otherwise placed in removal proceedings, s/he 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 or 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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 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 or she was persecuted in the past, there is a presumption of future persecution. 8 C.F.R. §208.13(b)(1); *Matter of Chen*, Int. Dec. 3104 (1989). The presumption relates only to fear of harm based on facts that give rise to the original persecution. 8 C.F.R. §208.13(b)(1) (2001). The government then has the burden of rebutting the presumption. The government may do this, for example, 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) (2001).

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 or 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) (2001). "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) (2001). Factors to be considered include the following: ongoing civil strife; strength or weakness of government infrastructures; geographical limitations; and social or cultural constraints. 8 C.F.R. §208.13(b)(3) (2001). 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) (2001). 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 Five Categories**

In order to establish asylum eligibility, the applicant must show that the past or feared persecution is “on account of” five protected grounds – race, religion, nationality, political opinion, and membership in a particular social group. The first three categories have fairly well-accepted definitions while the latter two 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 (10<sup>th</sup> 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. Only 1000 persons may be granted refugee status on this basis every year.

### **5. SOCIAL GROUP**

“Social group” is a very broad phrase. 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.

Immigration courts have 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.*

A number of other groups have also 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 Kasinga*, 21 I&N Dec. 357 (BIA 1996) and *Abankwah v. INS* 1999 WL 476436 (2<sup>nd</sup> Cir.) for a discussion on FGM.

## **Asylum Claims Involving Victims of Domestic Violence**

A critical advance in the area of women's human 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, many adjudicators and policymakers did not recognize these claims as falling within the definition of refugee, even under the most compelling circumstances. They tended to see domestic violence as a private family matter outside their scope of refugee protection.

In 1995, the INS (now BCIS) 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 across the country began to grant asylum claims based on domestic violence.

For years, practitioners awaited a definitive ruling from the BIA on whether domestic violence constituted grounds for an asylum claim. When the Board's long-awaited decision in *Matter of R-A-*, Interim Decision 3403 (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, including infants, with impunity. 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, e.g., political opinion or membership in a particular social group. The decision, which was appealed to the Ninth Circuit Federal Court of Appeals, was immediately condemned by immigrant and domestic violence advocates across the country as contrary to established principles of human rights and U.S. asylum law. In January 2000, 100 *amici curiae* supported the request by Rodi Alvarado that the Attorney General certify and reverse *Matter of R-A-*.

On December 7, 2000, in the waning days of Clinton Administration, then U.S. Attorney General Janet Reno and the INS issued rules which 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 R-A-*. On January 19, 2001, Janet Reno vacated *Matter of R-A-*, sending it back to the Board for reconsideration in light of the proposed rules. It is unclear, however, what the future holds for these proposed rules. In March 2003, current Attorney General John Ashcroft certified the case to himself, and he may issue a new decision. He also intends to issue new regulations, which may have the effect of restricting gender based asylum claims.

## 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 U.S. (INA §208(a)(2)(A)(iv));
8. Aliens who *committed a serious nonpolitical crime* (INA §208(a)(2)(A)(iii); and
9. 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 MIHRC staff.

# 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; 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 may not adjust his/her status to legal permanent residency, but can obtain work authorization.

### 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*; or
2. Has been convicted of a *particularly serious crime*. *Matter of S-S-*, Int. Dec. 3374 (BIA 1999) and *Matter of Frentescu*, 19 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 5-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/Deferral of Removal**

The United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment ("CAT")<sup>1</sup> prohibits the return of a person to another country where substantial grounds exist for believing that he or 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-*, Interim Decision 3430 (BIA 2000). The ability to raise a claim for relief from removal under the CAT was only very 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&17. The first type of protection is a new form of withholding 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 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 to CAT are limited. An individual who is successful under a CAT claim cannot be removed from the United States to the country from which he or 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.

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<sup>1</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).

## **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) ID#3466. 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-*, Int. Dec. 3430 (May 9, 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) ID# 3471. 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.”

## **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 MIHRC 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>2</sup> INA §240B. However, this 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 he/she may be barred from reentering the United States for up to twenty years and may be subject to civil and criminal penalties if he/she enters without proper authorization. If the individual voluntarily departs within the time ordered by the court, he/she will not be barred from legally reentering in the future. In addition, an individual with a removal order is barred from applying for ten years for cancellation of removal, adjustment of status and other immigration benefits.

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; and
5. Shows clear and convincing evidence that he/she intends and has the financial ability to depart.

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. §240.25. The judge may not grant voluntary departure under 8 C.F.R. § 240.26(b)(E)(ii) beyond 30 days after the Master Calendar at which the case is initially scheduled, except pursuant to a stipulation.

### **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 clear and convincing evidence that he/she intends and has the financial ability to depart;
3. Pays bond (of at least \$500) if the Judge so requires;
4. Shows good moral character for five years prior to the application; and

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<sup>2</sup> We do not recommend seeking this relief unless your client no longer fears persecution or seeks to return home.

5. 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 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. §240.11(b).

## **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 however, 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 BCIS web site at [http://www.bcis.gov/graphics/services/tps\\_inter.htm](http://www.bcis.gov/graphics/services/tps_inter.htm) to verify which countries are currently designated for TPS. As of June 6, 2003, the following countries are designated for TPS:

Burundi	Nicaragua
El Salvador	Sierra Leone
Honduras	Somalia
Liberia	Sudan
Montserrat	

If you have a client from any of the above named countries, check the BCIS 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 \$120 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 BCIS forms and photographs, each application must include the other information specified in the instructions

for the BCIS 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 a \$50 fingerprinting fee must also be submitted. If work authorization is sought, then a \$120 fee must also be submitted with the I-765. Fee waiver requests may be submitted in place of these fees. Two ADIT identification photographs must also be included with the forms. The forms and photographs should be sent to the District having jurisdiction over the client's residence. Along with the BCIS forms and photographs, each application must include the other information specified in the instructions for the BCIS forms and/or under 8 C.F.R. §244.9, including evidence of nationality and proof of residence.

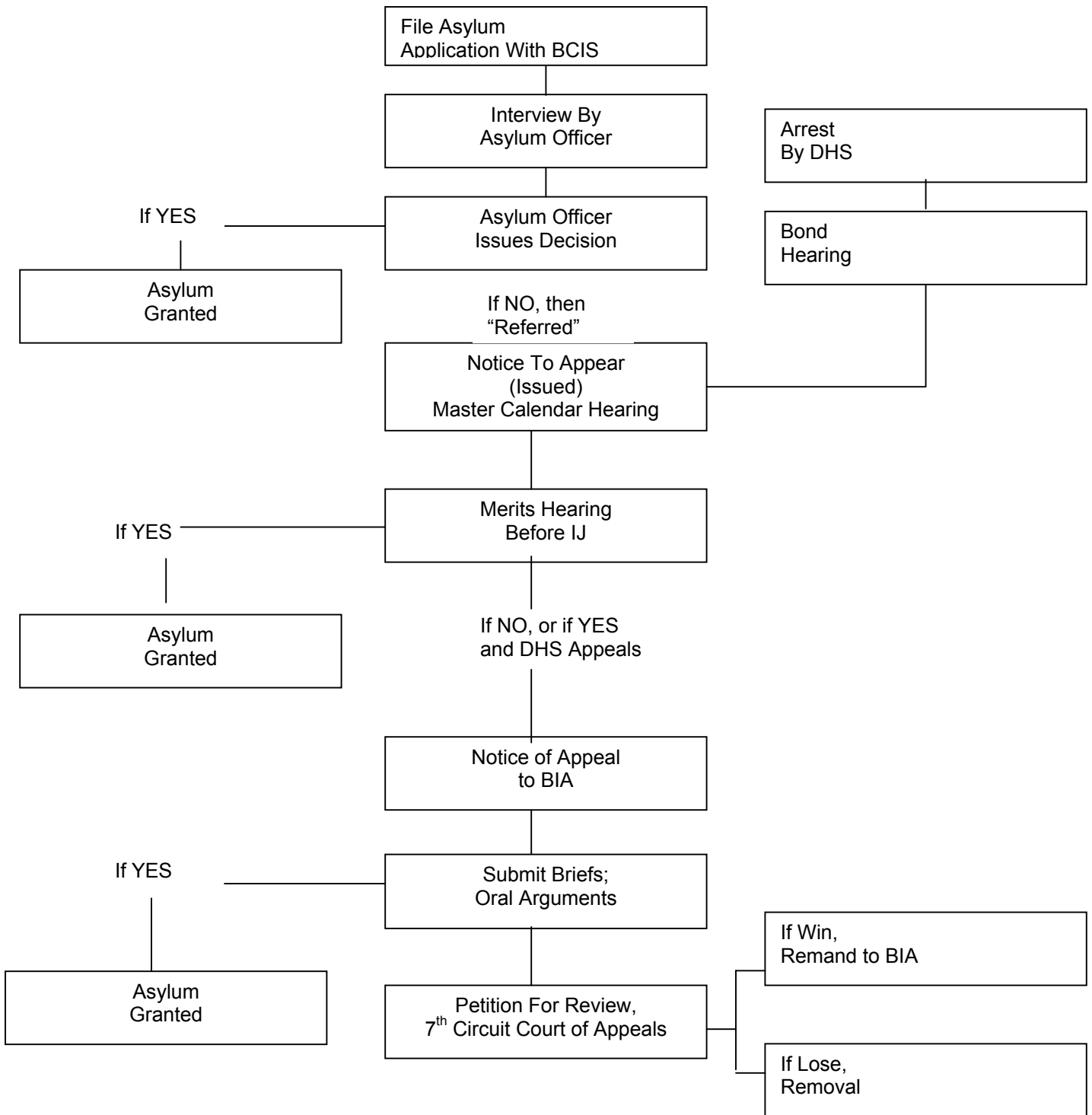
### **“T” Visas for Victims of Human Trafficking**

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, 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 a 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 the MIHRC if you believe your client is a victim of trafficking.

# FLOW CHART: STEPS IN THE ASYLUM PROCESS





# THE ASYLUM PROCESS



## The Application

There are two ways to apply for asylum: affirmatively and defensively. 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 BCIS. An individual who is already in removal or deportation 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 becoming 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, Int. Dec. 3465 (BIA 2002)
  - 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 BCIS, the date it is received will be considered in determining if 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) (2001).

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

## **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 case in the greatest detail possible. If the client does not read English, a translator's certificate may 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 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. *Two photographs* of every individual included in the application;
10. *Certificate of Service* upon the DHS Office of District 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**

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 BCIS 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.

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, s/he must fill out a fingerprint request form and submit the original and a copy, along with an attached copy of the asylum application, and a completed G-28 to the DHS District Counsel's office on the 17<sup>th</sup> floor of 55 E. Monroe St., Chicago, IL 60604 (312) 353-7317. We recommend taking an extra copy and requesting that it be stamped. However, since the DHS will usually not do this, it is important to 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.

Fingerprints remain current for a period of 15 months. If a merits hearing has been scheduled for your client, be certain to have current fingerprints submitted for the date of the hearing.

Your client will receive a notice from the BCIS scheduling a date and time for his/her fingerprints to be taken at a particular Application Support Center. We recommend that you advise your client of this process and have your client contact you when he/she receives a date for fingerprinting.

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

Please note that all documents in a foreign language are required to be accompanied by a translation of the document in English. The translation should be properly certified. Certification can be accomplished by attaching a "Certificate of Translation" which affirms that the translator was competent to perform the service.

## **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 government issued documents that will be submitted in support of the asylum application should be made available to the Trial Attorney. The DHS may wish to submit these documents to the FBI Forensics Lab for evaluation. Please be advised that you should contact the District Counsel's Office well before the merits hearing to avoid any unnecessary delay in the proceedings that may be caused by a forensic review. Original documents should also be available during the merits hearing for the Judge's inspection.

## **Filing Applications Affirmatively**

Once an application has been submitted to the BCIS 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 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 political 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, she must bring her own interpreter. The BCIS 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 sure that information obtained during the interview will not be shared with the applicant'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 only 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**

Removal proceedings involve a three-step process.

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 applicant 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 applicant must submit the information identified above. The originals and a copy, along with a certificate of service, 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).

3. The applicant is scheduled for a hearing on the merits of his/her case before an Immigration Judge. The asylum merits hearings are generally a 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 applicant's claims must be adjudicated within 180 days from the date the asylum application is received by either the BCIS Nebraska Service Center or the Immigration Court (if applicant did not previously file with the BCIS). 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 MIHRC'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 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 precedes 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 forthwith confer with your consulting attorney or MIHRC 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 a contract interpreter fails to appear for a Master Calendar, you may request a continued hearing (which is useful if you would like to buy a little time). Also, if the contract interpreter is clearly not making himself understood to the client, you can request a continuance on that basis. You may want to remind the Court to have an interpreter in your client's most proficient language at future hearings.

## **Arriving at the Court**

To appear for your master calendar hearing<sup>3</sup> 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." 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. They are usually booked, so it is wise to arrive early and be among the first.<sup>4</sup>

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<sup>3</sup> The Executive Office for Immigration Review has approved a set of local rules for the Chicago Immigration court, which are attached to this manual. Note that you can now file a written pleading instead of appearing in person at Master Calendar by submitting a written motion and a proposed order in triplicate to be signed by the judge. If deportability is conceded, then the judge will simply set dates for application and hearing and return the order by mail.

<sup>4</sup> Fortunately for MIHRC 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>5</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 MIHRC *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 CONCEDING 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 deportable.<sup>6</sup> The attorney will also be asked to either admit or deny removability as charged on the NTA. IN order to be eligible to apply for asylum, the client, through the attorney, must admit

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<sup>5</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>6</sup> Often, MIHRC 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.

removability under one of the grounds. However, if there is more than one charge of removability, discuss it with your client and with MIHRC staff.<sup>7</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 designate 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**

The judge will then 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. MIHRC 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.

## **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 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 MIHRC 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.

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<sup>7</sup> Clients who have reasonable grounds to challenge deportability are unlikely to become MIHRC clients under the asylum project; rather, they would be referred to other projects within MIHRC or other agencies. However, if in the course of interviewing the client some fact is revealed that may impact on deportability, the MIHRC volunteer should talk with her consulting attorney or MIHRC staff.

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, blanket release of records form, including one to the United Nations High Commissioner for Refugees so that you can release your client's records to the UNHCR for an advisory opinion.

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 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 MIHRC 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 MIHRC 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.

MIHRC 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 the client for you to let the client know something about yourself. Sometimes the best way to begin a relationship with a MIHRC 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 MIHRC 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 that the client can relate the occurrence to.

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. Specifically, many MIHRC 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 quite different and much 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 MIHRC 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 simply block out an entire traumatic event, or significant parts of one. The client may have witnessed or endured something that would clearly make him/her eligible for asylum but may be unable to testify about it in any credible fashion, or even remember it at all;
- The client may be able to remember traumatic events and describe them to the attorney, but 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.

MIHRC is associated with the Marjorie Kovler Center for Treatment of Survivors of Torture. Many MIHRC 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.

MIHRC strongly recommends that if you observe behavior in your clients that suggests the presence of emotional disturbances, MIHRC 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 MIHRC staff for information and a referral to Kovler, where appropriate.<sup>8</sup> The Kovler Center is located at 1331 W. Albion, Chicago, Illinois 60626, (773) 381-4070, fax (773) 381-4073.

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<sup>8</sup> The Kovler Center only accepts cases that deal with persecution based on political activities and political opinions. For other cases, please contact MIHRC staff.

#### **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. MIHRC interpreters are volunteers too and may have little experience dealing with lawyers. In addition, if interpreters are likely to come from different countries than MIHRC 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 MIHRC cases in the past and volunteers should make a strong effort to obtain such witnesses. Expert 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, witnesses offered are 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.

You are strongly urged to consult with MIHRC 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>9</sup> The following are general types of corroborative evidence:

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 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.

Given recent BIA case law, corroborative evidence is more critical than ever before. See *Matter of A-S-*, Int. Dec. 3336 (BIA 1998); *Matter of M-D-*, Int. Dec. 3339 (BIA 1998); *Matter of O-D-*, Int. Dec. 3334 (BIA 1998); *Matter of Y-B-*, Int. Dec. 3337 (BIA 1998); and *Matter of A-E-M-*, Int. Dec. 3338 (BIA 1998).

## **Preparing Your Pre-Trial Memorandum**

Under federal regulations, 8 C.F.R. §3.21(b), and local operating rule 2, each party is directed to file a pre-trial memorandum no later than 10 days prior to the hearing. The pre-trial memorandum 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. 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 of proposed witnesses and what they will establish;
2. A list, together with copies, of all exhibits that may be offered;

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<sup>9</sup> Items in section 2 may be authenticated by a U.S. Embassy or by other means available.

3. A statement that the parties have communicated in good faith to stipulate to the fullest extent possible;
4. A statement of unresolved issues in the proceeding;
5. The estimated time required to present the case; and
6. An additional copy of all exhibits.

(Please provide MIHRC with a copy of your pre-trial memorandum.)

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

MIHRC recommends that you attempt to contact the trial attorney at (312) 353-7317 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, MIHRC 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 account is not credible. As a result, you must try to convince the client in advance that it is very important to remember such details and testify to them to the best of his/her recollection.

## **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 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. Each conducts hearings in his/her own particular style. You 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 MIHRC 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 District Counsel. The DHS trial attorney represents the Government and generally plays an adversarial role. As previously indicated, we recommend that you contact the District 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**

There is also a court clerk, who also functions as the official interpreter when the client's language is Spanish. 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, 19<sup>th</sup> Floor well in advance of the scheduled time. If your client is detained, the

merits hearing will be held at 10 W. Jackson 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 defense 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.

Ofentimes asylum seekers have submitted their own *pro se* applications before seeking MIHRC 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 memorandum. You are encouraged to check with MIHRC or to ask the Judge at Master Calendar what his/her preference is. Either a pre-hearing memorandum 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 memoranda 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.<sup>10</sup>

##### **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>11</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. We recommend that you 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.)

##### **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

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<sup>10</sup> Immigration Judges Brahos and Der-Yeghiayan generally do not grant Motions Requesting Permission from the Court to allow telephonic testimony.

<sup>11</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 MIHRC staff or consulting attorneys about the practices of individual Judges.

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 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**

Few Judges permit closing statements, and in any case they are considerably less valuable than opening statements or pre-hearing memoranda. However, 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 District 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 MIHRC of the outcome and provide MIHRC 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 District Counsel. All correspondence to the BIA must include a certificate of service to the Office of the District 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 MIHRC with a copy of your brief. Once the appeal to the BIA is decided, please notify and provide MIHRC with a copy of the opinion).

Under new 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-*, Int. Dec. 3478 (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*).

## 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, either in the circuit in which the case was originally tried, i.e. the Seventh Circuit for cases tried in Chicago's Immigration Court, or in the circuit where the respondent now lives.

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. The DHS is technically not supposed to deport a person who has properly filed a petition for review. However, where the petitioner is immediately subject to deportation prior to or at the point of the filing of the petition, it is a good idea to draft a letter to the Deportation Branch of the BICE, with a time-stamped copy of the petition attached, and hand-deliver it to the DHS. It is not unheard of for the Deportation Branch to quickly deport people who should not in fact have been deported.

MIHRC'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. MIHRC strongly encourages volunteers to consult with staff or with a consulting attorney early, before the BIA petition is issued, in order to make an initial determination of whether a petition for review is possible and how it should be handled.

# ADDITIONAL INFORMATION



## Obtaining Employment Authorization

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). In addition, 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 or has been stopped and your client may not be eligible for employment authorization because the 180 days required will not be reached.

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. An asylum applicant must demonstrate all of the following:

1. That s/he has NOT been convicted of an "aggravated felony." See 8 C.F.R. § 274a.12(c)(8) and § 274a.13(a) and 208.7(a)(1).
2. That s/he 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). *Id.*
3. That s/he 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 § 208.7(a)(4).
4. That s/he has NOT asked for a continuance in Immigration Court before 180 days since the filing of the application application.

### When To File

The applicant should file "no earlier" than 150 days after the date when his/her completed asylum application was filed, with one exception. See 8 C.F.R. §208.7(a) and §274a.12(c)(8). An applicant who has been recommended for approval may apply for employment authorization when he/she receives notice of the recommended approval. See § 208.7(a). However, if the

asylum application is returned as incomplete, the 150-day period does not begin to accrue until the BCIS receives a completed application. See *id.* That means that any delay requested or caused by the applicant shall not be counted. See 8 C.F.R. §208.7(a)(2).

## **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 s/he may get a social security number for future income tax reporting purposes.

On May 29, 2003, the BCIS made electronic filing of I-765 forms available. For eligibility and instructions, visit <http://www.bcis.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 BCIS 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 \$120.00. 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 what his/her merits for obtaining employment authorization, and demonstrating the reasons for his/her "inability to pay." *Id.*

### **4. PHOTOS**

The applicant must also submit 2 color, "green card" style photographs. "Green card" style means showing a three-quarter front profile of the right side of the applicant's face, with his/her right ear visible. 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.

## **Where to File**

The I-765 application must be filed at the appropriate BCIS 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 BCIS Service Center is:

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

## **Timeline for Adjudication**

It usually takes 60 to 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.

The BCIS has 30 days from the I-765 application filing date to approve or deny the application. Please refer to "When to File" section above for more information.

## **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. See Sample Request to Expedite included in this manual.

To renew, the applicant must file an I-765 form with the \$120.00 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; 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 LJ, 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).

## **Obtaining Your Client's Immigration Records Pursuant To A Freedom of Information Act (FOIA) Request**

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. It takes the BCIS typically from four to six months to respond to FOIA requests. Therefore, if necessary, you should file your request as soon as you are assigned a case. The address where FOIA requests should be forwarded is:

DHS/FOIA  
National Records Center  
150 Space Center Loop, Suite 300  
Lee's Summit, MO 64064-2140

It is important to obtain a copy of your client's file because the DHS may have documents your client does not. For example, the BCIS often uses the Asylum Office Adjudicator's assessment of your client's asylum application when questioning your client. However, they do not produce it and submit it to the Court as an exhibit; therefore, unless you do a FOIA request, you will not have access to that document which may be used against your client.

## **Forensic Examination of Documents**

District Counsel may request that you provide them with original documents so that they may verify their authenticity at their forensic laboratory. Sending documents to the FBI Forensic Laboratory and/or for overseas investigation via the U.S. Consulate. Obtaining results usually takes several months. The DHS trial attorney may ask the Judge for a continuance of your case in order to obtain forensic information. If the continuance is unreasonable or if your case is continued and counsel requests a second continuance for the same purpose, we suggest that you oppose the requests as being inappropriate or will create more hardship to your client. For concerns about 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



When asylum is granted, it means that the asylee will have 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 committed a serious crime, either persecutory in nature or non-political 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>12</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>13</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 BCIS 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 BCIS, 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 six months 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 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. For common-law spouses of asylees living outside the United States, it may be possible to obtain "humanitarian parole" at the discretion of DHS. Discuss this possibility with MIHRC staff and consulting attorneys.

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<sup>12</sup> 8 C.F.R. §208.24

<sup>13</sup> See INA §209, 8 U.S.C. §1159 and 8 C.F.R. §§209.1, 209.2.

The asylee must petition for immediate relatives within a two-year period after being granted asylum. This period may be extended for humanitarian reasons.

### ***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. Unfortunately, this protection does not extend to children who age-out *after* asylum has been granted. The legislation will have to be amended to provide similar protection to this equally vulnerable group. The Asylum Office has looked favorably on independent petitions filed by aged-out children, and this may be an option if no other relief is available.

Please take into account, if possible, the age of an asylum applicant's children when you prepare to file an application, and consult MIHRC 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 recently 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. MIHRC 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. MIHRC will provide referrals throughout 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 s/he has become a legal 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 s/he implicitly no longer fears persecution. MIHRC 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). Unfortunately, current law allows for the adjustment of status to permanent residence of only 10,000 asylees each year. 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. As a result, without a change in the law, new asylees may wait 6-8 years for permanent residence after filing an application.

The grant of LPR status is discretionary. The Immigration Act of 1990 added language to the asylee adjustment statute that allows the BCIS 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 s/he no longer fears persecution. The BCIS 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.

Similarly, if a derivative asylee child is no longer a minor child, that is, attains the age of 21 before having an opportunity to adjust status and become an LPR, s/he may not have a right to simple adjustment of status. The Asylum Office has provided a remedy in this instance through a process by which such child may be granted a *nunc pro tunc* asylum approval. This approval offers the child of the principal applicant independent asylum in the United States, but is based on the parent's original claim and is rarely denied.

The derivative child must also remain *unmarried* to be eligible for adjustment of status, unless s/he has already attained the age of 21 and a *nunc pro tunc* application for asylum has been granted.

## Citizenship

Five years after an asylee receives permanent residence ("green card" status), s/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 on-going nature of proceedings with the Department of Homeland Security is imperative to the success of a new life in the United States.

## **Draft 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>.

## MIHRC CONTACT INFORMATION



**Mary M. McCarthy**, Director  
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208 S. LaSalle St., Ste. 1818  
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Fax: 312-660-1505  
Email: [dmitros@tia-mirc.org](mailto:dmitros@tia-mirc.org)

# IMPORTANT PHONE NUMBERS AND ADDRESSES



## **Chicago Office of Asylum**

Robert W. Esbrook, Director  
Department of Homeland Security  
Bureau of 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 District Counsel**

55 E. Monroe St. 17<sup>th</sup> Floor  
Chicago, IL 60603  
Phone: 312-353-7317

## **Executive Office for Immigration Review**

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

### Immigration Judges\*\*

Judge O. John Brahos  
Judge Carlos Cuevas  
Judge Samuel Der-Yeghiayan  
Judge James Fujimoto  
Judge Jennie L. Giambastiani  
Judge Robert D. Vinikoor  
Judge Craig Zerbe

## **Board of Immigration Appeals**

5201 Leesburg Pike, Ste. 1300  
Falls Church, VA 22041  
Phone: 703-765-1007

<p style="text-align: center;"><b>EOIR Automated Information Line</b> <b>1-800-898-7180</b></p>
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\*\*Each Judge is assigned a clerk. When you contact the Judge, ask for the clerk assigned to that Judge. He/she should be able to assist you. Again, introduce yourself as a MIHRC *pro bono* attorney.

# LEGAL RESOURCE MATERIALS



## Sources For Case Preparation

### **For Asylum and Withholding Cases:**

AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law & Procedure (3<sup>rd</sup> 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>14</sup>

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

\*\*Also, look to agencies that do high volume asylum work--often someone, somewhere has had a case similar to yours. Call different non-profits and ask about availability of documentation. If

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<sup>14</sup> Get release of documentation from client.

you find that a particular decision is valuable to your case, contact the attorney of record.

# GLOSSARY OF IMMIGRATION TERMS



## A

- “A” Number:** An eight digit number (or nine digit, if the first number is a zero) beginning with the letter "A" that the DHS gives to some non-citizens.
- 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 s/he is not excludable for any reason or has a waiver of excludability.
- 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 one 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.
- Bureau of Citizenship and Immigration Services (BCIS):** The agency within the Department of Homeland Security responsible for adjudicating all applications for immigration benefits.
- Bureau of Immigration and Customs Enforcement (BICE):** 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.

## 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 immediately preceding the date of such application, 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 extreme 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 (U.S.C.):** 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 who 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. A deported person cannot ordinarily reenter the United States for five years, or twenty years if deported for certain crimes. A non-citizen cannot be deported without a hearing, unless he/she has been convicted of certain crimes, and is not an LPR.
- Detention:** Asylum seekers who enter the U.S. without documentation may be detained at an 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 HIV, 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.). Exclusion cannot happen without a hearing unless the non-citizen waives the right, and prevents reentry for one year unless the DHS grants an exception.

**Executive Office for Immigration Review (EOIR):**

The Immigration Court, the Board of Immigration Appeals, and one other agency within the Department of Justice which 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".

**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 are 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, he/she can apply for LPR status. This may often take a long time, until a visa number becomes available.

## 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.

**Relief:** Term used for a variety of grounds to avoid deportation or exclusion.

**Removal:** Proceedings to enforce departure of persons seeking admission to the US who are inadmissible or persons who have been admitted who are removable.

**Rescission:** Cancellation of prior adjustment to permanent resident status.

**Residence:** The principal and actual place of dwelling.

**Respondent:** The term used for the asylum seeker/person in removal proceedings.

## S

**Service Centers:** 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 Southern Service Center (SRC); the Western Service Center (WSC); and the Northern Service Center (NSC).

**Stowaway:** One who obtains transportation on a vessel or aircraft without consent through concealment.

**Suspension of Deportation:** 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. Among other categories, these persons need only prove three years of continuous residence in the U.S.

## T

**Temporary Protected Status (TPS):** 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).

## 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."

## 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 of Ground of Exclusion:**

The excusing of a ground of exclusion 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 (1-22)
Notice of Appearance Form for DHS (G-28)	B (1)
Notice of Appearance Form for the Executive Office of Immigration Review (EOIR-28)	C (1-2)
Request to Review Record of Proceeding or Hearing Tape	D (1)
Fingerprint Request Form	E (1-2)
Notice of Appeal to the BIA (E-26)	F (1-4)
Notice of Appearance Form for the BIA (E-27)	G (1-2)
Sample Cover Letter & FOIA Request Form (G-639)	H (1-3)
Sample Letter Requesting that Employment Authorization be Expedited, Employment Authorization Application (Form I-765) and E-Filing Instructions	I (1-2)
Change of Address Form for the Immigration Court (EOIR-33)	J (1-2)
Change of Address Form for DHS (AR-11)	K (1)

## Sample Documents

Notice to Appear	L (1-2)
Sample Brief/Trial Memorandum (Somalia)	M (1-29)
Sample Index of Exhibits (Sierra Leone)	N (1-13)
Sample Client Affidavits (Sri Lanka & Congo)	O (1-10)
Sample Expert Affidavit	P (1-9)

Translation Templates for Birth Certificate, Marriage Certificate, and Death Certificate	Q (1-3)
Sample Certificate of Translator's Competence	R (1)
Sample Certificate of Service	S (1)
Sample Motion to Allow Expert Witness to Testify Telephonically	T (1-2)

**Resources for Case Preparation**

Local Operating Procedures, Chicago Office of The Immigration Judge	U (1-4)
Summary of Recent BIA Regulatory Changes	V (1-2)
Using asylumlaw.org in Your Asylum Case	W (1-10)
List of Useful Websites	X (1-4)