

IMMIGRATION EQUALITY

Immigration Equality Asylum Manual

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Immigration Equality Asylum Manual

Welcome to the third edition of Immigration Equality and the Midwest Immigrant and Human Rights Center's LGBT/HIV [Asylum Manual](#).

Fully updated in 2006, this edition is a web-based document that can be viewed in its entirety online.

Note: In January 2012, USCIS issued "[Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex \(LGBTI\) Refugee and Asylum Claims.](#)" This offers invaluable information about how the asylum office adjudicates LGBTI claims and should be reviewed by practitioners.

The Manual would not have been possible without the work of many others (especially those who wrote the first two versions of the handbook). Please see the [Preface and Acknowledgments](#) for a complete list of such indispensable individuals.

This handbook is intended for use by pro bono attorneys and immigration attorneys working on LGBT/HIV asylum cases. The handbook is not intended as legal advice and is not meant to be used by unrepresented asylum seekers to prepare their own applications.

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Preface and Acknowledgements

These materials represent the third edition of the Preparing LGBT and HIV Asylum, Withholding and CAT Claims which is a collaborative effort between Immigration Equality in New York and the Midwest Immigrant and Human Rights Center (MIHRC) in Chicago.

The original Preparing Sexual Orientation-Based Asylum Claims: A Handbook for Advocates and Asylum Seekers was first published in 1997, when sexual orientation-based claims were still relatively rare. An updated version was published in 2000.

The first two versions of the Manual were authored by Heather McClure of the Midwest Human Rights Partnership for Sexual Orientation, a project of MIHRC; Christopher Nugent, a Board member of Immigration Equality (formerly known as the Lesbian and Gay Immigration Rights Task Force, LGIRTF); and Lavi Soloway, one of the founders of Immigration Equality and a pioneer in the work of LGBT and HIV asylum claims. Without the tireless work and vision of these three individuals, this Manual would never have been written.

We also wish to acknowledge the contributions to the prior two editions by the following individuals: Reverend Sid Mohn, Betsy Leonard, Amanda Adams, Noemi Masliah, Roger Doughty, Amy Gottlieb, Amanda Orendain, Diego Bonesatti, Suzanne Goldberg, Pradeep Singla, Heather Betz, David Cunningham, and Simone Hill.

The current edition of the Manual is primarily the work of Victoria Neilson, Legal Director of Immigration Equality, Elissa Steglich, Managing Attorney of MIHRC, and former Immigration Equality intern Erin Harrist, Columbia University law student, J.D. anticipated 2007.

Large sections of this manual pertaining generally to the law and procedure of asylum, withholding and CAT claims, have been taken from MIHRC's Basic Procedural Manual For Asylum Representation Affirmatively and In Removal Proceedings. Copyright © 2005, Heartland Alliance's Midwest Immigrant & Human Rights Center (MIHRC). Reprinted with permission from Heartland Alliance's Midwest Immigrant & Human Rights Center.

Every effort has been made to provide accurate and up-to-date information in this Manual. If you see anything which you believe is inaccurate, please contact the authors at [Immigration Equality](http://ImmigrationEquality.org) or MIHRC to bring the error to our attention. Also, please bear in mind that immigration law is constantly changing. Therefore, you should always consult the Immigration and Nationality Act, Code of Federal Regulations, and Board of Immigration Appeals and Federal Court decisions rather than relying solely on the information in this Manual. Moreover, different attorneys may employ different strategies in asylum cases, in many instances the information contained herein as to best practices in asylum cases is the joint opinion of the authors, but reasonable minds may disagree about strategy choices.

We have changed the format significantly from prior versions of the Manual, believing that it is better to direct the content specifically at attorneys and accredited representatives rather than including text directed towards asylum seekers themselves. As enforcement and removal increasingly become the goals of the Department of Homeland Security, we do not wish to encourage any asylum seeker to go forward

without the assistance of a qualified attorney or accredited representative. To that end, both MIHRC and Immigration Equality run pro bono asylum projects, matching volunteer attorneys to meritorious asylum claims. The stakes are high in asylum cases – often they are literally matters of life and death for the asylum seekers. Government statistics have shown that asylum seekers with competent counsel are many times more likely to succeed than those who are unrepresented.

We urge you to consider taking on a pro bono asylum case. As we write, the U.S. government continues to refuse recognition of long-term same sex partnerships, and even lawful marriages between same spouses. Likewise, it remains unclear under what circumstances, if any, the U.S. government will recognize marriages where one spouse is transgender. And the United States continues to enforce one of the world's harshest immigration policies against people living with HIV. For LGBT and HIV-positive individuals who have fled persecution, or who fear returning to a country where they will not be free to express their sexuality or gender identity, or to receive life-saving medication, asylum may be their only hope to begin a new life in the United States.

— Victoria Neilson

Acronyms and Abbreviations

AIDS

Acquired Immunodeficiency Syndrome

AG

Attorney General

AO

Asylum Officer

BIA

Board of Immigration Appeals

ICE

Immigration and Customs Enforcement

CAT

Convention Against Torture

DHS

Department of Homeland Security

EOIR

Executive Office for Immigration Review

FOIA

Freedom of Information Act

HIV

Human Immunodeficiency Virus

IIRIRA

Illegal Immigration Reform and Immigrant Responsibility Act

IJ

Immigration Judge

INA

Immigration and Nationality Act

INS

Immigration and Naturalization Service

LGBT

Lesbian, gay, bisexual and transgender

LGBT/H

Lesbian, gay, bisexual, transgender and/or HIV positive

LPR

Lawful Permanent Resident

NIV

Non-immigrant Visa

NOID

Notice of Intent to Deny

NTA

Notice to Appear

SSA

Social Security Administration

TPS

Temporary Protected Status

UNHCR

United Nations High Commissioner for Refugees

USC

United States Citizen

USCIS

United States Citizenship & Immigration Services

VAWA

Violence Against Women Act

1. Asylum Law Basics: A Brief History

U.S. asylum law is derived from international agreements written after World War II which provide protection to people fearing or fleeing from persecution. The first agreement, the 1951 Convention Relating to the Status of Refugees, was drafted by the United Nations in response to the large migrations of people in the aftermath of the Second World War. The United Nations attempted to set forth an internationally agreed upon standard for who will be considered a refugee. The 1951 Convention, however, only applied to people who were refugees on the basis of events occurring before January 1, 1951. The United Nations incorporated the definition of refugee set forth in the 1951 Convention but expanded it to include future refugees in the 1967 U.N. Protocol Relating to the Status of Refugees. The United States acceded to the 1967 Protocol in 1968. In order to bring U.S. law into compliance with its obligations under the Protocol, the United States enacted the Refugee Act of 1980, adopting essentially the same definition of refugee as set forth by the Convention. 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.”

An individual can be granted asylum if she is present in the United States and otherwise meets the definition of a refugee. Refugee status can be based on either race, religion, nationality, membership in a particular social group, or political opinion. Of the five grounds on which a claim for asylum can be based, membership in a particular social group is the most open to interpretation and thus provides the best basis for claims of asylum based on sexual orientation and gender identity. Although there is no statutory definition of what suffices as membership in a particular social group, it has frequently been described as a group of persons who share a common, immutable characteristic that the members of the group cannot or should not be required to change. In 1994, Attorney General Janet Reno declared as precedent the *Matter of Toboso-Alfonso* case in which a gay Cuban man was found to be eligible for withholding of removal on the basis of his membership in the particular social group of homosexuals. This case was pivotal in establishing that a well-founded fear of persecution on the basis of one’s sexual orientation is a valid basis on which to claim asylum status in the United States. More recently, the Ninth Circuit has affirmed that “all alien homosexuals are members of a ‘particular social group.’” The recognition of this basis for asylum is in accord with other countries which have granted asylum to gay and lesbian refugees.

In the years after *Matter of Toboso-Alfonso*, courts have employed a more expansive definition of what constitutes a particular social group, including gender-based violence, such as female genital mutilation and domestic violence, as sufficient grounds for asylum. Courts have also been more willing to recognize persecution based on sexual identity. Since *Toboso-Alfonso* there have been more than half a dozen precedential lesbian, gay, bisexual, transgender and/or HIV-positive (“LGBT/H”) asylum cases.

Although those who identify as transgender have not been explicitly found to be considered members of a

particular social group, courts have recognized that gay men with female sexual identities constitute a social group and may be persecuted based on this identity. While there has been no precedential decision recognizing women with male sexual identities as members of a social group, there have been numerous successful, non-precedential claims based on this ground.

Another significant ruling for LGBT/H people considers the intent of the person or persons who commit the persecution. Generally in asylum cases, the persecutor intends harm to the victim, however, courts have acknowledged that persecution can occur even when the persecutor has no intention to harm the victim, such as when a gay person is subjected to electroshock therapy to “cure” her sexual orientation.

Persons living with HIV and/or AIDS face harsh and discriminatory policies when attempting to immigrate to the United States. Their entry as legal immigrants is barred unless they are legally married to, are the parent of, or are the unmarried son or daughter or lawfully adopted child of a U.S. citizen or legal permanent resident. For the purposes of asylum, however, there is the possibility that people facing HIV persecution in their own country may be considered members of a particular social group. In 1996, the Immigration and Naturalization Service (INS) Office of General Counsel issued a memorandum which recommended that the INS and the Executive Office for Immigration Review (EOIR) should grant asylum based on the social group category of HIV-positive individuals, assuming that the applicant in question meets all of the other elements required for asylum. Although there are no precedential cases which recognize HIV status as creating membership in a particular social group, asylum has been granted in some cases where HIV persecution was an essential element of the application.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which generally restricted access to asylum protection and greatly hindered the ability to obtain asylum status on the basis of sexual orientation. This legislation created additional bars to asylum, the most restrictive of which was the one year filing deadline. In order to be granted asylum, an applicant must file for asylum within one year of his or her arrival in the United States. This deadline has created unique hardships for LGBT/H asylum seekers because they are often unaware that their sexual orientation, gender identity, or HIV status can form the basis of an asylum claim and, are often afraid to disclose these intimate aspects of their identity to a government official given the persecution they faced in their own country.

In May 2005, Congress passed the Real ID Act which imposes further limitations on the asylum process. Under the revised law, asylum seekers must provide documents to corroborate their claims unless they can demonstrate to the adjudicator why the documents are unavailable or why the applicant cannot obtain them. The Real ID Act also makes it easier for an adjudicator to deny a claim based on lack of credibility by the asylum seeker. Now, if an asylum seeker makes an inconsistent statement, even if the statement is not directly related to the substance of the claim, the application can be denied on credibility grounds. An applicant also must now demonstrate that his or her protected characteristic was “at least one central reason” behind the persecutor’s actions. It remains to be seen whether adjudicators will see the Real ID Act as a codification of existing case law, or whether they will apply a stricter standard to cases filed after May 2005.

In recent years there have been several precedential cases from federal Courts of Appeals on LGBT/H asylum cases. LGBT/H status-based asylum law is an exciting and developing area of the law. As LGBT/H immigrants struggle for equality under U.S. immigration law, asylum continues to be one of the few areas of immigration law where the U.S. government gives LGBT/H foreign nationals the

opportunity to begin a new and freer life in the United States.

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

2. Asylum Basics: Sources of Law

Asylum law as adjudicated in the immigration system and federal courts draw on a relatively limited set of laws, regulations and case law. Adjudications primarily depend on Section 208 of the Immigration and Nationality Act (INA). Agency regulations — 8 CFR § 208 — supplement the statute. An extremely limited pool of agency memoranda also provides guidance to adjudicators. The vast majority of asylum cases are decided by Asylum Officers without issuing a written decision and by Immigration Judges whose decisions are only put on paper if the decision is appealed. Decisions by Immigration Judges (IJs) are not binding on other Judges or the Asylum Office though they can be persuasive. At a minimum, if an attorney is making a creative argument to one IJ, she may feel less uncomfortable accepting the attorney's argument if she knows another IJ has accepted it in the past.

All asylum adjudicators, federal courts, the Board of Immigration Appeals ("BIA"), Immigration Judges, and Asylum Officers are, of course, bound by U.S. Supreme Court decisions. To date there have been no Supreme Court cases on LGBT/H asylum matters.

Removal orders, and denials of asylum, withholding and CAT claims, are appealed from the IJ to the administrative body the BIA. (See section # 28 on the BIA). The vast majority of BIA decisions are unpublished. Unpublished BIA decisions may also be persuasive but are not binding. Published BIA decisions are binding across the country unless there is a Circuit Court decision in direct conflict with the decision.

Decisions by the BIA, or affirmances without opinion issued by the BIA, are appealed directly to the federal Court of Appeals via petition for review. As in all litigation, only decisions from within the Circuit hearing the case are binding on that Court of Appeals. Likewise, Circuit decisions are only binding on adjudicators within the Circuit. Thus, a California Asylum Officer in the liberal Ninth Circuit, may be applying a more lenient standard in asylum cases than an Asylum Officer in Minnesota who is bound by the decisions of the conservative Eighth Circuit.

International law can be used as persuasive evidence in asylum cases. Because the statutory definition of asylum draws directly from the Protocol on the Status of Refugees, foreign courts and international human rights tribunals are often interpreting the same language and definition in refugee and asylum matters. These foreign court decisions, while not binding, can be used to support a novel argument on the interpretation of the definition of a refugee.

After the September 11, 2001 attacks, the U.S. government abolished the Immigration and Naturalization Service ("INS") and formed the new Department of Homeland Security ("DHS") and re-organized the agencies which oversee immigration. DHS is now the umbrella organization for Immigration and Customs Enforcement ("ICE") which is the enforcement and deportation branch; Citizenship and Immigration Services ("CIS") which is the immigration service and application processing branch; and Customs and Border Patrol ("CBP") which oversees border inspection.

Sources of Law Table

Binding

Non-binding

INA

Other IJ decisions

8 CFR

BIA non-precedent cases

INS, DHS and EOIR Memoranda

Foreign court cases

BIA Precedent

UNHCR Handbook

U.S. Court of Appeals

U.S. Supreme Court

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

3. Asylum Basics: Elements of Asylum Law

In order to be eligible for asylum, an applicant must meet the definition of refugee in the Immigration and Nationality Act (INA). The INA defines refugee 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 habitually resided, and who 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."

The elements for an asylum claim based on LGBT/H are a well-founded fear of persecution based on past persecution or risk of persecution in the future if returned to the country of origin because of his membership in a particular social group. The persecutor must be the government or a group or individual(s) that the government is unwilling or unable to control.

The applicant bears the burden of proof of establishing that she falls under this definition of refugee. The applicant is required to testify under oath regarding the truth of her application in order to meet this burden of proof. The Board of Immigration Appeals "not only encourage[s], but require[s] the introduction of corroborative testimonial and documentary evidence, where available." Testimony, however, can be sufficient to sustain the applicant's burden of proof if the testimony is credible.

3.1 Well-founded Fear of Persecution

3.1.1 Definition of Persecution

Although persecution is not specifically defined within the INA, the courts have held that "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution." The United Nations High Commission on Refugees has endorsed a similar standard in its Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. Persecution has also frequently been defined as "the infliction of suffering or harm upon those who differ in a way regarded as offensive." Persecution is usually physical but can also be emotional or psychological.

Recognizing persecution is extremely fact-dependent and fact-specific. Although asylum adjudicators will determine what constitutes persecution on a case-by-case basis, they have consistently recognized certain types of behavior as persecution. The following five broad categories describe abuse that adjudicators may find rise to the level of persecution:

1. serious physical harm;
2. coercive medical or psychological treatment;
3. invidious prosecution or disproportionate punishment for a criminal offense;
4. severe discrimination and economic persecution, and

5. severe criminal extortion or robbery.

As explored below, successful applicants must demonstrate that the persecution was motivated by one of the five protected grounds (race, religion, nationality, membership in a particular social group or political opinion).

3.1.1.1 Serious Physical Harm

The most recognized form of persecution is the infliction of serious physical harm including confinement, kidnapping, torture, and beatings. Rape, sexual assault and other forms of gender-based violence are also persecution.

The rape and beating of a gay person on account of his sexual identity constitutes persecution. Many LGBT individuals have been raped or sexually assaulted as "punishment" for their sexual orientation or for violating traditional gender boundaries. In the case of *Hernandez-Montiel*, the Ninth Circuit found that there was persecution when a "gay man with a female sexual identity" was detained, stripsearched, sexually assaulted, and raped by police officers on more than one occasion and sexually assaulted and attacked by a group of men.

Threats of violence will generally not be sufficient to establish past persecution unless the threats themselves cause significant harm. "Threats standing alone...constitute persecution in only a small category of cases and only when the threats are so menacing as to cause significant actual suffering or harm." Threats will be more likely to establish future persecution if the applicant can demonstrate that the group who is making the threats has the will and ability to carry them out.

Female genital mutilation ("FGM") is also a form of persecution. Although the threat of FGM in the future can demonstrate a well-founded fear of persecution, a recent Ninth Circuit case has held that genital mutilation is an ongoing act of persecution "which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear." Thus, both past FGM and the threat of having the procedure can be the basis for a well-founded fear of persecution.

Violence against an applicant's family members can also support a case for asylum.

3.1.1.2 Coercive Medical and Psychological Treatment

Certain types of medical and psychological treatment will demonstrate a well-founded fear of persecution. The Board of Immigration Appeals has found that "forced institutionalization, electroshock treatments and drug injections could constitute persecution." The coercive family planning practiced by the Chinese government also constitutes persecution.

The most significant holding in this area is the Ninth Circuit decision in *Pitcherskaia v. INS*. Pitcherskaia, a lesbian from Russia, was arrested and imprisoned on several occasions for protesting violence and discrimination against gays and lesbians in Russia. The militia threatened her with forced institutionalization and required her to attend therapy sessions. She was prescribed sedative medication which she successfully refused. In addition, an ex-girlfriend of hers was institutionalized against her will

and was subjected to electric shock treatment and other treatments meant to 'cure' her of her sexual orientation. The Ninth Circuit ruled that it is not necessary for the persecutor to intend harm in order for unwanted medical or psychological treatment to amount to persecution as long as the victim experiences the treatment as harmful. The proper test is whether or not a reasonable person would have found the suffering inflicted as offensive.

Lack of access to adequate medical treatment, however, is generally not considered persecution. HIV-positive asylum applicants will have difficulty securing asylum status on this basis. Nevertheless, at least two international human rights law tribunals have recognized that a country's failure or inability to provide life-sustaining medical treatment can allow for protection under refugee law. In addition, lack of adequate medical treatment for HIV/AIDS has been one of several factors that have been considered when a claim is made based on HIV status. The discrepancy within the cases may be attributed to the difference between not receiving the best quality medical care and government refusal to provide basic medical care to people with HIV/AIDS.

There have also been successful non-precedential CAT claims for HIV-positive individuals who were able to demonstrate that they would be incarcerated in sub-standard conditions if returned to their home countries. Finding that such incarceration would like lead to death, at least two IJs have granted CAT under these circumstances.

3.1.1.3 Invidious Prosecution or Disproportionate Punishment for a Criminal Offense

Asylum status will not be granted for criminal prosecution as a result of a violation of a fairly administered law. Prosecution may be considered persecution, however, if there is either severe punishment or pretextual prosecution. Asylum adjudicators will focus on whether the punishment under a country's laws is disproportionately severe or whether the law or punishment is contrary to international human rights standards. In determining whether a particular law is considered to be in violation of human rights standards, asylum adjudicators may use U.S. law as comparison. Since *Lawrence v. Texas*, private consensual same-sex activity can not be prohibited by law in the United States. This ruling helps demonstrate that sodomy laws in other countries are in violation of rights explicitly recognized by the United States.

Many countries still prohibit homosexual acts in their criminal codes. The existence of such a law, however, may not be sufficient to demonstrate persecution. Several unpublished decisions emphasize the importance of evidence that the laws are actually enforced.

3.1.1.4 Economic Persecution and Other Forms of Severe Discrimination

Generally, harassment and discrimination will not constitute persecution. Persecution is regarded as an extreme concept that differs from general discrimination against minority groups. Persecution requires "more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty." Severe forms of discrimination will amount to persecution in some instances. Discrimination will amount to persecution "if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g.

serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities." Cumulative discrimination that is increasing in severity will have a higher chance of being considered persecution. For instance, the inability to travel safely within a country and forced expulsion from the country amount to persecution.³

One form of severe discrimination recognized by the courts is in the form of economic persecution. Economic persecution requires a probability of deliberate imposition of substantial economic disadvantage based on a protected ground. In a non-precedential case, the Ninth Circuit found that a lesbian from the Philippines had not experienced economic persecution when she could not continue working as a dentist because no patients would patronize her after they learned of her sexual orientation. The Court found that the inability to pursue one's chosen profession, as opposed to the complete inability to find any livelihood, did not rise to the level of persecution, particularly considering that there was no showing that the government was unable or unwilling to address the problem.

Severe discrimination may be a grounds for HIV-positive applicants to claim asylum. The discrimination, however, must go beyond inadequate medical treatment. In one unpublished decision by an Immigration Judge, the Judge found that a married woman with HIV would be subject to persecution on account of severe discrimination. In making this decision, the Judge considered documentary evidence that people who have HIV lost their jobs when employers learned of their status and that hospitals turned away HIV-positive patients. Additionally, the IJ determined that the woman could face criminal prosecution for being married despite a law against people with HIV marrying.

In another non-precedential case, an HIV-positive man from Togo was granted asylum by an Immigration Judge. The Judge considered evidence that drugs for treating AIDS were scarce or nonexistent, that a cousin of the applicant had been sent home to die when he was sick from AIDS-related illnesses, and that the applicant would be ostracized by the community and would be unable to secure work. In contrast, the BIA, in an unpublished decision, affirmed a denial of withholding of removal based on future persecution based on HIV status. In the decision, the BIA suggested that the evidence needs to demonstrate social stigma and not just an increasing infection rate in a particular country. The BIA also noted the importance of showing that poor treatment of those suffering from AIDS is due to severe discrimination against those with AIDS rather than a reflection of widespread poverty and unemployment.

3.1.1.5 Severe Criminal Extortion or Robbery

Extortion can constitute persecution when the extortion clearly and selectively occurs on account of one of the five statutorily listed grounds. Threatening to disclose one's sexual orientation to a hostile community may constitute persecution if the applicant can put forth evidence that makes it reasonable to believe that the extortion was at least partially based on the fact that the individual is gay or imputed to be gay.

Crime alone will most likely not reach the level of persecution. If, however, the applicant can demonstrate that the robbery or assault was motivated by a protected characteristic and police failed to provide protection, it may constitute persecution.

A gay man from Mexico failed to gain asylum because the Board of Immigration Appeals found that

incidents where police called him immoral and extorted money from him, thieves robbed him while calling him gay, and a group of men beat him up while yelling 'faggot' did not constitute persecution, but was rather only harassment and discrimination. The case illustrates how robbery and extortion will generally have to reach a certain level of extremity in order to amount to persecution.

Proving that robbery and extortion amount to persecution will be difficult if the country in question is experiencing civil unrest and economic strife, conditions which greatly increase the incidence of both forms of crime against the general population.

3.1.2 Establishing a Well-Founded Fear

In order to demonstrate a well-founded fear of return, an asylum applicant must establish that he has both a subjective and objective fear of returning to his country of origin. The subjective component requires that the applicant demonstrates a genuine fear of persecution. "An asylum applicant's candid, credible, and sincere testimony demonstrating a genuine fear of persecution satisfies the subjective component of the well-founded fear standard." The United Nations High Commissioner of Refugees states that "an evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions." Although not binding law on U.S. asylum applications, the Handbook is persuasive authority.

The test for the objective component is whether a reasonable person in the applicant's circumstances would fear persecution. The objective element requires credible, direct, and specific evidence that supports a reasonable fear of persecution. A ten percent chance of persecution may result in a well-founded fear sufficient for asylum. As long as the objective component is established by the evidence, it need not be shown that the situation will probably result in persecution. It "is enough that persecution is a reasonable possibility."

The United States Supreme Court has held that a risk of 10% or more of persecution if the asylum applicant is returned to his country is sufficient to warrant a grant of asylum.

3.1.3 Past Persecution

An applicant may be granted asylum based on past persecution alone. If an applicant sufficiently demonstrates past persecution, she is presumed to have a well-founded fear of persecution. The presumption of a well-founded fear of persecution, however, can be rebutted if a preponderance of the evidence demonstrates that there has been a fundamental change in circumstances or that the applicant could reasonably relocate to another part of the country of origin.

Even without a demonstration of a well-founded fear of persecution, the applicant may be granted asylum if there are compelling reasons that she is unwilling or unable to return based on the severity of the past persecution or if the applicant has established that there is a reasonable possibility that she may suffer other serious harm.

Making a case for a well-founded fear of persecution based on past persecution may be weakened if the

applicant remained in her country for a lengthy period of time after the initial persecution without any additional incidents. Adjudicators may also find it damaging to a case if the applicant has returned to the country of origin since arriving in the United States. Return trips without incident may be one factor that can contribute to a rebuttal of the presumption of future persecution established by past persecution. In one unpublished Ninth Circuit opinion, the Court found that return trips alone do not rebut a presumption of well-founded fear. The case, *Pena-Torres v. Gonzales*, involved a gay applicant who took several trips back to his native Mexico after he was the victim of persecution by the police. The Court found that the return trips alone did not rebut the presumption of well-founded fear, particularly since the State Department report corroborated violence against homosexuals.

If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of demonstrating that the fear is well-founded. Establishing past persecution generally provides the strongest case for an asylum claim because it puts the burden on DHS to demonstrate that the fear is not well-founded.

3.1.4 Pattern and Practice of Persecution Against Similarly Situated Persons

An applicant can demonstrate a well-founded fear of persecution by showing that there is a pattern or practice in her country of persecution of LGBT/H individuals. The applicant must establish that she is LGBT/H and that her fear upon return is reasonable. Persecution against a specific group must be systemic, pervasive, or organized in order to amount to a pattern or practice sufficient for establishing a fear of future persecution. An applicant will not have a well-founded fear of persecution if it would be reasonable for her to relocate to another part of her country of origin.

Fear of future persecution tends to be the more difficult route for demonstrating asylum eligibility. The applicant will need to provide documentation from compelling, accurate, and clearly identified sources in order to establish a pattern of mistreatment. Helpful documents include reports by recognized and respected human rights and LGBT/H international rights organizations, such as Amnesty International, Human Rights Watch, the International Gay and Lesbian Human Rights Commission, and the International Lesbian and Gay Association. The applicant should also include newspaper articles regarding violence against LGBT or HIV-positive individuals in the country of origin. Testimony by experts on conditions in the country in question will also be considered. U.S. State Department Reports on country conditions will be highly influential in the absence of contradictory evidence.

3.1.5 Individualized Fear of Future Persecution

An individual who has not suffered persecution can nevertheless demonstrate a well-founded fear. In *Matter of Mogharrabi*, the BIA 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.

Karouni v. Gonzales is a significant precedential case for sexual-orientation based asylum claims because it is based only on a finding of a well-founded fear of future persecution. Karouni, a gay man with AIDS from Lebanon, had satisfied the requirements for both a subjective and objective fear based on future persecution by providing evidence that Hizballah militants frequently persecuted homosexuals, that his cousin was killed on the basis of his sexual orientation, and that his gay identity had been disclosed to the police by gay men who were beaten by authorities.

3.2 On Account of Membership in a Particular Social Group

The applicant must prove that the persecution she fears in the future is motivated by the applicant's actual or imputed membership in the particular social group. Since 1994, when Attorney General Janet Reno designated *Matter of Toboso-Alfonso* as precedent, homosexual men has been recognized as a particular social group under asylum law. More recently, the Ninth Circuit has ruled that "all alien homosexuals are members of a 'particular social group.'" In the case *Amanfi v. Ashcroft*, the Third Circuit held that imputed membership in the particular social group of homosexuals can also be grounds for an asylum claim. In *Amanfi*, the Court recognized that persecution on account of sexual orientation may be sufficient for an asylum claim even if the victim is actually not homosexual but is thought to be by the persecutor. In that case, a man from Ghana engaged in homosexual activity with another man in order to be spared from being ritually sacrificed, after which he was continuously beaten by police for his perceived homosexuality.

The Ninth Circuit has also found that gay men with female sexual identities constitute a particular social group in the case of *Hernandez-Montiel*. The Court rejected the argument that *Hernandez-Montiel*'s female identity was volitional, concluding that his presentation of self as female was immutable and inherent in his identity and that he could not be required to change it. The Court reaffirmed its holding in *Reyes-Reyes v. Ashcroft*. Although those with transgender identity have not been explicitly found to constitute a particular social group, there have been many successful non-precedential cases.

People with HIV have not explicitly been found to constitute a particular social group for the purposes of asylum. In 1996, the INS Office of the General Counsel recommended that the social group category of people with HIV should be recognized for the purposes of asylum law. Some Immigration Judges have found that HIV-positive status can form the basis of a particular social group. The Board of Immigration Appeals has also recognized, in an unpublished opinion, that people living with AIDS can comprise a social group. Although these decisions are significant for HIV-positive asylum applicants, the applicant will still need to individually establish that people with HIV in their countries constitute a particular social group since they are not precedential rulings.

An essential component of an asylum application for a lesbian or gay applicant will be proving that he is in fact gay. This may include testimony or documentation by past partners or friends living in the United States.

The applicant must also provide evidence, either direct or circumstantial, that the persecution is on

account of his sexual orientation. In an unpublished decision, *Pena-Torres v. Gonzales*, the Ninth Circuit reversed a decision by the Immigration Judge that a gay man from Mexico suffered from police brutality rather than persecution on account of his sexual orientation. The Ninth Circuit remanded the case for a new determination regarding asylum eligibility because it found that an incident where the applicant was beaten to the point where he required medical attention and was threatened by the police after leaving a gay bar, did amount to past persecution on account of his homosexuality. The Court reached this conclusion by citing evidence that the police attacked the applicant only after they asked him whether he was gay.

Significantly, the Board of Immigration Appeals has consistently followed the doctrine of mixed motives which holds that there can be more than one motivation for the persecution, as long as the harm was motivated in part by an actual or imputed ground as shown by direct or circumstantial evidence produced by the applicant.

If an applicant does not clearly fit within a precedentially defined social group, she must establish that she is a member of such a social group. The major case setting forth what constitutes membership in a social group is *Matter of Acosta*.

‘Persecution on account of membership in a particular social group’ mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Other adjudicators have found that the attributes of a particular social group must be recognizable and discrete. Social groups should be defined in specific terms rather than in broad, generally applicable terms such as youth and gender. For instance, the following social groups have met the requirements for asylum: young women of the Tchamba-Kunsuntu tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice and HIV-positive individuals living in the Ivory Coast and Togo.

As noted, broad social groups, such as gender, will not satisfy the membership requirement as it is currently construed. This exclusion of women creates difficulties for those who seek asylum in order to escape domestic violence or other forms of violence within the private sphere. BIA precedent suggests that one way to construe the social group category for victims of domestic violence may be through differing political beliefs. In the case *In Re S-A-*, the Board of Immigration Appeals found that a woman who suffered abuse at the hands of her father established past persecution on the basis of her liberal Muslim beliefs. Her beliefs conflicted with her father's orthodox Muslim views about the proper behavior of women.

Political opinion may be an additional ground that LGBT/H individuals can claim asylum. LGBT/H people who are involved with gay rights groups may use political opinion as a supplemental ground for asylum claims. In addition, the BIA has found that persecution can be based on an imputed political opinion.

3.3 Imposed by the Government or by a Group which the Government is Unable or Unwilling to Control

The applicant must have suffered persecution by the government or by a group which the government is unable or unwilling to control. The government generally includes the police, the military, and government-run schools. Groups that the government is unable or unwilling to control encompasses guerrilla and paramilitary groups and gangs. The government, for the purposes of asylum law, also includes government-sponsored groups.

Generally, beatings by other citizens will not constitute persecution if there is no showing that there was government involvement or that the government refused to assist in prosecuting the abusers or protecting the victim. For instance, in the case of *Galicia v. Ashcroft*, a Guatemalan gay man's petition for review was denied because beatings and verbal abuse by his neighbors were committed only by non-governmental actors. He never contacted the authorities and therefore was unable to claim that the government was unwilling or unable to protect him or prosecute his abusers.

Adjudicators have broadly interpreted what constitutes a group that the government is unable or unwilling to control. Some decisions find that crime committed against the applicant by family members may constitute persecution if the government is unwilling or unable to protect the victim or prosecute the violator. For instance, in the case of *In re Kasinga*, the applicant established a well-founded fear of persecution based on threats by her husband and other family members that they would perform female genital mutilation on her. Although the state itself would not have participated in the act of mutilation, the BIA found that the government would not have prevented her family from acting.

The BIA has also found that domestic violence can constitute persecution in some instances. In *In re S-A*, the BIA found that there was persecution in a case where a father was beating and abusing his daughter because she did not conform to his strict Muslim beliefs and practices. She was beaten once a week, often times severely, was burnt on the insides of her thighs, and twice attempted suicide when she was forbidden to leave the house, including to attend school. Although she never approached the government for aid, the BIA was convinced by evidence presented that Moroccan authorities would not have protected her.

The decisions of *In re Kasinga* and *In re S-A* are significant for gay and lesbian asylum applicants who may have been the victims of violence directed at them by family members. The decisions have particular significance for lesbian applicants who, because they are women and are largely kept within the private sphere, may be victims of domestic violence. An asylum claim will be more likely to be successful if the violence is continuous and reaches a level of severity and if there is evidence that the government would not protect the victim.

Although these cases provide some hope for victims of domestic violence, violence or sexual assault at the hands of family members generally will not be sufficient unless the applicant had approached police regarding the problem and the police refused to assist the applicant or the applicant can clearly demonstrate through compelling documentary evidence that seeking government protection would have been futile or dangerous. Several unpublished decisions find that sexual assaults and beatings inflicted by family members are private conduct when not brought to the attention of government.

3.4 Meriting a Favorable Exercise of Discretion

Even if an applicant meets all of the requirements to qualify as an asylee, the adjudicator may deny a grant of asylum if she feels that the applicant does not merit a favorable exercise of discretion. It is therefore advisable to provide evidence that the applicant "deserves" asylum. If there are no significant negative factors in the case, and the applicant has met the standard for asylum, she generally wins.

If there are negative factors, such as a criminal conviction, it will be important to explain the circumstances of the conviction, and, if possible demonstrate rehabilitation. Likewise, if the applicant entered the United States by using fraudulent documents, he should be prepared to explain why this was necessary in order to flee the situation in his country.

3.5 Humanitarian Asylum

Once an applicant has established past persecution, a well-founded fear of future persecution if returned to the applicant's home country, DHS has the opportunity to rebut this presumption, which it can do by demonstrating that circumstances in the home country have changed such that the applicant would no longer be at risk of persecution if returned. If DHS does successfully rebut the presumption of future persecution, the burden reverts back to the applicant to demonstrate eligibility for a humanitarian grant of asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(ii)(A) or (B). The BIA and Courts of Appeals have often stressed that an applicant must still demonstrate past persecution in order to be eligible for humanitarian asylum. See, e.g. *Mambwe v. Holder*, 572 F.3d 540, 549 (8th Cir. 2009), *Ben Hamida v. Gonzales*, 478 F.3d 734, 741 (6th Cir. 2007), *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012).

The applicant may show that he or she has compelling reasons, based on the severity of the past persecution, for being unable or unwilling to return to the country of origin. 8 C.F.R. § 1208.13(b)(1)(ii)(A). Applicants will be eligible for humanitarian asylum on these grounds when they have suffered "an atrocious form of persecution that results in continuing physical pain and discomfort." *Matter of L-S-*, at 712. Put another way, the applicant must establish that the "past persecution was so severe that repatriation would be inhumane." *Abrha v. Gonzales*, 433 F.3d 1072, 1076 (8th Cir. 2006). The focus of the inquiry is on the degree of harm suffered, the length of time over which the harm was inflicted, and the lingering physical and/or psychological effects of the harm. *Id.* In *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008) the BIA found that a mother and daughter who had been subjected to FGM that had severe and lasting consequences were eligible for humanitarian asylum. In *Matter of B-*, 21 I&N Dec. 66, 72 (BIA 1995) humanitarian asylum was granted to an Afghani applicant who had been imprisoned for 13 months where he was subjected to torture and kept from knowing the fate of his

missing father. By contrast, an applicant who had been detained for 1 month and had knowledge of his missing father's ultimate death was not eligible for humanitarian asylum. *Matter of N-M-A-*, 22 I&N Dec. 312, 326 (BIA 1998).

Alternatively, the applicant may qualify for humanitarian asylum based on a reasonable probability of other serious harm upon removal to the country of origin. 8 C.F.R. § 1208.13(b)(1)(ii)(B). This provision was added in 2001 to expand the availability of humanitarian asylum by broadening the standards from the overly restrictive "compelling reasons" standard. Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed Jun. 11, 1998) (Supplementary Information). This standard is forward looking, rather than backwards looking. The serious harm need not be inflicted on account of a Convention ground, or even in connection with the past persecution, but it must be so serious that it equals the severity of persecution. *Matter of L-S-*, 25 I&N at 714. The BIA has held that determinations of when other serious harm rises to this level are best made on a case by case basis. In its most recent decision on humanitarian asylum the BIA provided a litany of examples of situations that might reach that level. In one case involving an LGBT applicant the Ninth Circuit held that internal relocation was not available to a gay HIV+ Mexican man who would face "unemployment, a lack of health insurance, and the unavailability of necessary medications in Mexico to treat his disease," because he would likely experience other serious harm. *Id.* (citing *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090-91 (9th Cir. 2005)). Other examples of serious harm could include: extreme circumstances of inadequate health care, *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011); mental anguish of a mother who was a victim of FGM having to choose between abandoning her child or seeing the child suffer the same fate, *Kone v. Holder*, 596 F.3d 141, 152-53 (2d Cir. 2010); or unavailability of psychiatric medication necessary for the applicant to function, *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008).

3.6 Frivolous Asylum Applications

Knowingly filing a frivolous asylum application is one of the most serious wrongs that an applicant for immigration status can commit. The regulations define an asylum application as frivolous "if any of its material elements is deliberately fabricated." Thus an application is not considered "frivolous" simply because it is denied or because it is obviously weak; a "frivolous" finding requires "deliberate fabrication."

If an Immigration Judge or the BIA determines that the applicant filed a frivolous application, and that the applicant has received the required notice of the penalties for filing a frivolous application, "the alien shall be permanently ineligible for any benefits under the [Immigration and Nationality] Act." However, a finding of a frivolous asylum application "shall not preclude the alien from seeking withholding of removal."

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

4. Precedential LGBT/H Asylum Cases

With asylum cases in general, and LGBT/H cases in particular, there is not that much precedent that exists. The vast majority of cases are decided without any written opinion at the Asylum Office level. Even cases that go before Immigration Judges are mostly decided by oral opinion which is only transcribed if a party appeals. In any event, decisions by Asylum Officers and Immigration Judges do not have precedential value.

Similarly, the vast majority of BIA decisions are unpublished. To date there has been only one precedential LGBT/H BIA decision. In recent years, there has been an increasing number of LGBT/H decisions in the federal Courts of Appeals.

[The Asylum Decisions](#) page on our website has case descriptions and links to every precedential LGBT/H asylum case decided by a federal court. It also has a very detailed chart summarizing more than a hundred unpublished decisions which are available on Westlaw and Lexis.

It is advisable to review some of these cases, especially those with decisions from the country your client is from. Bear in mind, however, that because each stage of appeal carries with it an increasingly deferential standard of review, some cases which lose on appeal might have been winnable before the asylum office or immigration court if the record had been better developed.

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5. Immigration Basics: The One-Year Filing Deadline

One of the major provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is the requirement that all asylum applicants must apply within one-year of their last entry into the United States.

The statute specifically states that an asylum applicant must demonstrate “by clear and convincing evidence that the application has been filed within 1 year after the date of the [applicant’s] arrival in the United States.” An asylum applicant can demonstrate that he is eligible for an exception to this rule if there are changed circumstances or extraordinary circumstances relating to the delay in filing the application. The applicant only needs to demonstrate that it is reasonable for the Asylum Officer to conclude that the exception applies under the circumstances. The application, however, must still be filed within a reasonable period of time after the changed circumstances or extraordinary circumstances occur in order to warrant an exception to the one-year bar. The one-year deadline only applies for asylum applications and not for withholding of removal or relief under CAT.

The one-year filing deadline is calculated from the date of the applicant’s last arrival in the United States. An application is considered to have been filed on the date it is received by Citizenship and Immigration Services. If the application was mailed within the one-year period but was not received by CIS within that period, the mailing date will be considered the filing date if the applicant provides clear and convincing documentary evidence that the application was mailed within the required time period.

Final regulations regarding the one-year filing deadline were promulgated in December of 2000. Notably, although the asylum regulations list specific situations that fall within the exceptions to the one-year deadline (see below), BIA precedent holds that an individualized analysis as to the facts of the case is still required even when the facts fit into one of the enumerated situations. Another source of guidelines regarding the one-year deadline is the Asylum Officer Training Course released by the INS, although it is not binding law.

5.1 Appellate Review Jurisdiction

5.1.1 Prior to the Real ID Act

Until the recently enacted Real ID Act became law, federal courts did not have jurisdiction to review BIA decisions about whether an asylum applicant had met the changed or extraordinary circumstances exceptions for an untimely filing. A few circuit courts had remanded some cases to the BIA when it was unclear on what grounds a denial of asylum was affirmed or when the BIA had failed to make a determination regarding an exception to the one-year deadline when the issue had been raised by the applicant. The only other means available for directly challenging one-year filing issues prior to the Real ID Act was through habeas corpus review under 28 U.S.C. §2241. The Supreme Court held in *INS v. St. Cyr* that although judicial review may be restricted by statutory provisions, matters of law through the habeas process are not similarly restricted unless there is an express statement of Congressional intent to

preclude judicial review on habeas. One district court found that the changed circumstances exception was reviewable on writ of habeas corpus on the basis of the Supreme Court's ruling in *St. Cyr*.

5.1.2 After the Real ID Act

On May 11, 2005, the Real ID Act was signed into law. Among other things, the Real ID Act prohibits habeas corpus review of orders of removal, deportation and exclusion. This provision removes the possibility of habeas corpus review of issues relating to the one-year filing deadline under 28 U.S.C. §2241, expressly disallowing the application of the *St. Cyr* holding to removal orders. The Act, however, does expand the jurisdiction of the federal Courts of Appeals to cover any issues involving constitutional claims or questions of law via petitions for review regardless of jurisdictional bars listed in the INA. The statute specifically states that nothing in the INA “which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals.” This provision essentially repeals the jurisdictional bar blocking review of decisions regarding one-year filing exceptions when a question of law is at issue.

Petitions for review are now the only means available to challenge a decision regarding the application of the one-year filing deadline. The petitions must be filed with the federal Court of Appeals of the relevant jurisdiction within 30 days of the final removal order. All petitions for review must be filed with the clerk's office on or before the 30th day after the final removal, deportation or exclusion order.

Because the Real ID Act was enacted so recently, most of its provisions have not yet been interpreted by the courts, and the effect of the Real ID Act on the one-year filing deadline is still unclear. For example, it remains to be seen under what circumstances courts will interpret one year issues as purely legal issues versus factual issues which are apparently reviewable. Advocates will need to follow the Circuit Courts' interpretation of the Real ID Act to find guidelines for bringing challenges to adverse one-year filing deadline decisions.

5.2 One Year Exceptions

In order to prevail on an asylum application when the applicant is filing more than one year after arriving in the United States, the applicant must demonstrate “either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the [first year of entry.]” Additionally, the applicant must prove that the application was filed within a “reasonable period of time” after the changed or extraordinary circumstance.

5.2.1 Changed Circumstances

An applicant may be granted asylum after missing the one-year deadline if she can demonstrate “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum.” Essentially this means that something has changed such that the applicant did not fear returning to his home country when he arrived in the United States and he now does fear returning. The application must be made within a reasonable period of time in light of the changed circumstances. When determining what constitutes a reasonable period of time, an adjudicator must take into account whether the applicant had a delayed awareness of the occurrence of the changed circumstances.

According to the regulations, the following situations constitute changed circumstances:

- Changes in conditions in the applicant’s country of nationality or, if the applicant is stateless, country of last habitual residence; or
- Changes in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk.
- In the case of an applicant who had previously been included as a dependent in another applicant’s pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

The changed circumstances exception can be broken down into several more specific categories of changes which can warrant an exception to the filing deadline.

5.2.1.1 Change in Country Conditions

In the LGBT/H context, a changed country condition may include the criminalization of same-sex sexual activity or a change in the policies of the government such that anti-sodomy laws begin to be enforced. Additionally, adverse changes in country conditions such as a change to a repressive homophobic government regime may warrant a one year exception. Although there is little precedent in this area, asylum adjudicators have emphasized that the changed country conditions must have particular significance to the facts of the individual case.

5.2.1.2 Change in the Applicant’s Circumstances

Circumstances that may materially affect an applicant’s eligibility for asylum based on sexual orientation may include coming out as gay man or lesbian, becoming active in LGBT organizations or events, or being diagnosed with HIV. Although it is difficult to win an asylum application based solely on HIV-positive status, there have been many successful claims which are based on both sexual orientation and

HIV-positive status. A recent HIV diagnosis may qualify an applicant for a one year exception, particularly when there is severe discrimination or persecution of those with HIV in the applicant's native country.

This exception is also the most important for transgender people who are in the process of transitioning. If a transgender applicant has recently taken medical steps to transition, such as hormone therapy, electrolysis, or sex reassignment surgery which she believes will increase her risk of persecution in her home country, she may qualify for a changed circumstances exception.

5.2.2 Extraordinary Circumstances

The second exception to the one-year filing deadline is the existence of extraordinary circumstances. The regulations state that extraordinary circumstances "shall refer to events or factors directly related to the failure to meet the one-year deadline." Essentially this means that something prevented the applicant from filing up until now. The applicant must also demonstrate that he has not created the circumstances through his own action or inaction.

The asylum adjudicator will conduct an individualized analysis of the facts of the case when determining if extraordinary circumstances excuse an untimely filing. The applicant will need to establish the following three requirements:

1. Demonstrate the existence or occurrence of the extraordinary circumstances;
2. Show that the circumstances directly relate to the failure to file the application within the given one-year period; and
3. Demonstrate the delay in filing was reasonable under the circumstances.

The regulations list six categories of events or situations which will demonstrate the existence of extraordinary circumstances. These are:

- Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the one-year period after arrival; or
- Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the one-year period after arrival; or
- Ineffective assistance of counsel, (but see below for very specific requirements);
- The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application; or
- The applicant filed an asylum application prior to the expiration of the one-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period thereafter; or
- The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

5.2.2.1 Extraordinary Circumstances -- Serious Illness or Mental/Physical Disability

An applicant's serious illness or mental or physical disability during the one-year period will excuse an untimely filing. One circuit court has recognized post traumatic stress disorder (PTSD) as an extraordinary circumstance. LGBT/H asylum applicants may be suffering post traumatic stress disorder or other forms of mental or physical trauma as a result of the persecution they suffered in their native countries. In addition, applicants from countries where homosexuality is greatly stigmatized may have difficulty accepting their sexual orientation themselves, leading to severe depression. Significantly, because of the potential for overuse of this exception, the applicant will need to demonstrate through the testimony of psychiatrists or therapists that he is suffering from PTSD, depression, or another serious illness or disability. Testimony will be considered more credible when the applicant has an ongoing relationship with the medical health professional than if the applicant has been evaluated once for the purpose of strengthening the asylum application.

LGBT/H applicants may also have difficulty discussing their sexual orientation, gender identity or HIV-positive status in the United States because they have settled in communities mainly populated by people from the applicant's native country who also ostracize LGBT/H individuals. Notably, although these types of pressures may not constitute a mental disability specifically, the Asylum Officer's training manual states that severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization may also constitute extraordinary circumstances.

The disability category is particularly relevant for those who are HIV-positive. Severe illness during the first year of arrival in the United States may justifiably keep an applicant from timely filing for asylum. In addition, severe depression may be a consequence of being diagnosed with HIV.

5.2.2.2 Extraordinary Circumstances -- Legal Disability

Unaccompanied minors can claim that they have a legal disability excusing them for failing to meet the one-year filing deadline. The legal disability must have been during the one-year filing period. The argument that unaccompanied minors have a legal disability could potentially be extended to include accompanied minors as well, particularly for LGBT/H youths who are afraid to inform their families of their sexual orientation and are not reasonably able to pursue their asylum claims until they have left the family household. For purposes of the one year filing deadline, "unaccompanied minor" is defined as a child under the age of 18 in the United States without a parent or legal guardian.

5.2.2.3 Extraordinary Circumstances -- Ineffective Assistance of Counsel

In order to use ineffective counsel as a basis for the extraordinary circumstances exception, an applicant must meet three requirements she must:

1. file an affidavit testifying to the details of the agreement with the attorney;
2. inform the attorney of the complaint giving the attorney an opportunity to respond; and
3. file a complaint or explain why she has not filed a complaint with the relevant disciplinary authorities.

The asylum adjudicator is not supposed to evaluate whether the applicant was given poor counsel. The adjudicator's role is to determine whether the three requirements have been met and to evaluate whether the counsel's actions or inactions were related to the delay in filing.

An asylum applicant may be able to make a colorable claim to an ineffective assistance of counsel exception if he met with an attorney before the filing deadline and the attorney never informed the applicant of the possibility of applying for asylum based on his sexual orientation, gender identity, or HIV status. Such a claim of ineffective assistance would be difficult, however, if the applicant never raised the issue of his sexual orientation, sexual identity, or HIV status on his own.

Ineffective assistance of counsel will more likely be useful to LGBT/H applicants if an attorney helped file a poorly prepared application that was unsuccessful but was filed within the one-year filing deadline. In addition, a claim of ineffective assistance of counsel may be successful if an LGBT/H applicant was not informed of the one-year deadline when he sought assistance prior to falling outside of the one-year period.

5.2.2.4 Extraordinary Circumstances -- Maintenance of Lawful Status

An applicant has an exception to the one-year filing deadline if she files for asylum within a reasonable period after her Temporary Protected Status or lawful immigrant or non-immigrant status ends. Determinations regarding what constitutes a reasonable period of time will take into account the facts of the individual case. However, the Department of Justice has stated that waiting six months after lawful status has ended is clearly not reasonable.

This exception is very helpful to LGBT applicants who "come out" while they are studying in the United States and to applicants who learn that they are HIV-positive while working or studying here. Many LGBT/H students are forced to file for asylum when their families stop paying for school once they learn of the applicant's sexual orientation, gender identity or HIV status.

5.2.2.5 Extraordinary Circumstances -- Improperly Filed Application within the One-Year Period

An applicant has an exception to the one-year filing deadline if he filed an application within the one-year filing period but it was rejected because the application was not properly filed, was returned for corrections, and was re-filed within a reasonable period.

5.2.2.6 Extraordinary Circumstances -- Death of Serious Illness of Legal Representative or Family Member

The death or serious illness of a legal representative or a family member will excuse a late application. In determining who will be considered a family member, the asylum adjudicator is instructed to consider “the degree of interaction between the family members, as well as the blood relationship between the applicant and the family member.” Although the instructions for the Asylum Officers are not binding on courts, the Asylum Officers’ Training Manual does emphasize the importance of an individual assessment of the relationship between the applicant and the family member. Although the Defense of Marriage Act denies federal recognition of same-sex marriage, the more expansive view of family recognized by the CIS may include same-sex partners for the purposes of the extraordinary circumstances exception. An LGBT/H person who has been unable to timely file due to the serious illness of a partner could argue that she falls under this exception.

5.2.2.7 Extraordinary Circumstances -- Other Circumstances

Extraordinary circumstances are not limited to the six categories listed above. The Asylum Officers Training Course notes that other circumstances will be considered such as “severe family or spousal opposition, extreme isolation within a refugee community, profound language barriers, or profound difficulties in cultural acclimatization.” These circumstances may be particularly relevant for LGBT/H applicants who are afraid of how their families and communities will respond to their sexual orientation, gender identity or HIV status. LGBT/H applicants who have settled in communities of immigrants from their native countries may be afraid to disclose their sexual identity or medical issues to others in the community and may not have the language skills to seek therapy or help for accepting their sexual orientation, gender identity or HIV-positive status. Although lack of awareness of the one-year deadline is not considered a justification for an untimely filing, isolation within a refugee community, community and family stigmatization of homosexuality, and fear of discussing one’s sexual orientation because of past physical trauma, may be expanded to include lack of awareness based on these factors.

5.2.3 Reasonable Period of Time

After demonstrating the existence of a changed or extraordinary circumstance, the applicant must show

that he filed within a reasonable period of time given those circumstances. As indicated, asylum adjudicators will take into account the particular facts of the case and may consider “education and level of sophistication, the amount of time it takes to obtain legal assistance, any effects of persecution and/or illness, when the applicant became aware of the changed circumstance, and any other relevant factors.”

As a practical matter, asylum adjudicators tend to interpret the “reasonable period of time” very restrictively. Therefore it is extremely important for an attorney to file a late application as quickly as possible to avoid a finding that the applicant did meet an exception but did not file within a reasonable period of time after the exception.

5.3 Relief Comparison Chart

Click [here for a pdf chart](#) outlining the differences between asylum, withholding of removal, withholding under CAT and deferral under CAT.

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6. Immigration Basics: Withholding of Removal

Withholding of removal is an alternative form of relief for an individual fearing persecution in her country of origin.

Generally, applicants file an application for both asylum and withholding of removal at the same time on form I-589. In order to be granted withholding of removal, the applicant must meet a higher standard than for asylum. Additionally, withholding can only be granted by an Immigration Judge, not by an Asylum Officer.

6.1 Withholding of Removal – A Higher Standard

An applicant has the burden of demonstrating that it is more likely than not that he or she will face persecution on account of a protected ground if returned to his country of origin. Courts have held that the applicant must show that there is at least a 51% likelihood of suffering future persecution as compared to a likelihood of at least 10% in asylum cases. See [Section #3.1.2](#). As in asylum law, however, if the individual can show that he suffered persecution in the past, then he is given 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 is not barred from eligibility as discussed below.

Withholding of removal is not subject to a one-year filing deadline and may be available for applicants who have been convicted of an aggravated felony. In contrast to asylum, which is a discretionary form of relief, withholding is mandatory if the applicant meets the clear probability test set forth in *Stevic*.

In the case of *Molathwa v. Ashcroft*, the Eighth Circuit found that there was not enough evidence demonstrating that Molathwa, a gay man from Botswana, would more likely than not be subject to persecution if returned to Botswana. The Court determined that an isolated incident where the police entered Molathwa's apartment without a warrant, the beating of a friend by relatives on the basis of his sexual orientation, and the incarceration of a gay man for two days who was caught engaging in sexual activity with another man did not amount to a pattern of harassment. Molathwa was not eligible for asylum because he had missed the one-year filing deadline. On the other hand, in *Matter of Toboso-Alfonso*, a gay Cuban man who had been forced to report regularly to the government and had been forced to attend a labor camp, did meet the heightened standard for withholding. Likewise, in *Reyes-Reyes v. Ashcroft* the Ninth Circuit remanded the case for further proceedings on the withholding and CAT claims where the applicant had been kidnapped, beaten and raped by non-government actors and the government had turned a blind eye to the mistreatment.

An applicant who has won withholding does not receive as many benefits as an asylee. The individual can seek work authorization; however, she will not be able adjust her status to become a legal permanent resident, nor can he become a citizen. Additionally a winner of withholding can never travel internationally, and does not have the ability to petition for derivative status for immediate relatives.

6.2 Bars to Eligibility for Withholding of Removal

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

1. Is a persecutor; or
2. Has been convicted of a particularly serious crime. An aggravated felony conviction does not automatically bar an applicant from withholding of removal unless he received a 5-year or more sentence, imposed or suspended. An aggravated felony is presumed to be "particularly serious." 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 the community.

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7. Immigration Basics: Relief Under CAT

Relief under the Convention Against Torture is the third form of relief an individual fearing persecution can seek.

An applicant bears the burden of demonstrating that it is more likely than not that she will be tortured if removed to her country of origin. The Board of Immigration Appeals has found that torture “must be an extreme form of cruel and inhuman punishment” that “must cause severe pain or suffering.” There are no bars to eligibility for relief under CAT.

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 that her fear of torture is on account of race, religion, nationality, political opinion, or membership in a social group.

Immigration regulations create two separate types of protection under CAT. The first type of protection is a new form of withholding of removal under CAT. Withholding under CAT prohibits the return of an individual to her home country. It can only be terminated if the individual’s case is reopened and the DHS establishes that she is no longer likely to be tortured in 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 can be terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to her home country. Additionally, an individual granted deferral of removal under CAT, may be detained by the DHS if she is deemed to be a threat to the community.

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 she fled persecution, but can be removed to a third country if one is available. An individual granted CAT cannot adjust her status to legal permanent resident, but can obtain work authorization.

7.1 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.

Recently, the BIA interpreted the definition of torture and further defined torture to be “an extreme form of cruel and inhuman punishment and does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment.” The BIA also found that indefinite detention, without further proof of torture does not constitute torture under this definition.

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 generally must include awareness of the torture and failure to intervene thereby breaching a legal responsibility. The Ninth Circuit has taken a somewhat more expansive view of government acquiescence. In *Reyes-Reyes v. Ashcroft*, the Court found that “acquiescence” can include “willful blindness” by government officials so that the applicant is not required to prove “actual knowledge.”[re]384 F.3d 782,at 787 (9th Cir. 2004).[ref]

7.2 Proof of Torture

The standard of proof under the CAT is higher than the standard for asylum. The applicant must prove that it is “more likely than not” that he would be tortured if forced to return to his country. The evidentiary proof for torture is very similar to the proof for asylum or withholding claims. As with asylum and withholding claims, the Court will look for a consistent pattern of “gross, flagrant or mass violations of human rights.”

7.3 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 the applicant is filing for asylum, she should request relief under withholding of removal and CAT in 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 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 the applicant 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 or withholding. It is generally only applicants with serious criminal convictions who benefit from CAT. Thus, while most applicants file for asylum, withholding and CAT in the alternative, unless the applicant is statutorily ineligible for asylum or withholding, it is unlikely that the CAT claim will be a major part of her case.

7.4 LGBT/H CAT Case

While the regulations state that under CAT, torture is severe pain or suffering “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” the Ninth Circuit has taken a broader view. In the case of *Reyes-Reyes v. Ashcroft* finds that, “acquiescence” by the government included not addressing severe physical abuse inflicted by non-government actors. The case involved a transgender woman who was kidnapped, severely beaten, and raped by a group of men. In addition, she was also threatened by her abusers and feared retaliation if she reported the crimes. The court remanded the case for a reevaluation of both the CAT and the withholding of removal claims, finding that the Immigration Judge had misapplied the requirement for government involvement.

7.5 HIV and CAT

There have been at least two unpublished cases where attorneys have successfully demonstrated that an HIV-positive applicant who would be jailed upon being returned to his country of origin, meets the standard for CAT relief. In those cases, the Immigration Judges found that prison conditions in the applicants’ countries of origin, Haiti and Cuba, were so atrocious, that a person living with HIV would likely die shortly after returning to his country. In the Haitian case, the applicant faced mandatory detention in Haiti because he would have been a criminal deportee. In the Cuban case, the applicant had deserted the Cuban army because he refused to serve in Angola, and therefore would have faced imprisonment.

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8. Immigration Basics: Voluntary Departure

Voluntary departure permits an individual, who is otherwise removable, to depart from the country at her own expense within a designated amount of time in order to avoid a final order of removal. However, voluntary departure is not available in all cases.

Voluntary departure is preferable to a removal order for a number of reasons. If an individual is issued a removal order she may be barred from reentering the United States for up to ten years and may be subject to civil and criminal penalties if she enters without proper authorization. If the individual voluntarily departs within the time ordered by the court, 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. *See* Sections #8.1 and #8.2 below.

There are significant penalties for failing to depart under a voluntary departure order, however. If the attorney determines from discussions with the applicant that under no circumstances other than physical removal by the U.S. government does she plan to leave the United States, the attorney should not necessarily automatically seek voluntary departure.

8.1 Voluntary Departure – Before the Conclusion of the Hearing

If the application for voluntary departure is prior to, or at the Master Calendar hearing, the individual must show that he:

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 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. The Judge may not grant voluntary departure under 8 C.F.R. § 1240.26(b)(E)(ii) beyond 30 days after the Master Calendar at which the case is initially scheduled, except pursuant to a stipulation.

8.2 Voluntary Departure – After the Conclusion of the 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 she intends and has the financial ability to depart;

3. Pays a bond (of at least \$500) if the Judge so requires;
4. Shows good moral character for five years prior to the application; and
5. Presents to the DHS a valid passport or other travel document sufficient to show lawful entry into her country, unless such document is already in the possession of the DHS or is not needed in order to return to her country.

If the applicant establishes these requirements, the Immigration Judge may grant voluntary departure for a period of up to 60 days.

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9. Immigration Basics: Real ID Act

On May 11, 2005, President Bush signed into law the Real ID Act as an attachment to the Emergency Supplemental Spending bill.

Although some of the harsh asylum provisions originally included in Real ID were significantly ameliorated in the final bill language, the law will nevertheless have a negative impact on immigrants and asylum seekers seeking protection in the United States from persecution in their home country.

The changes Real ID makes to existing law include an amended burden of proof for asylum and withholding of removal claims, a standard regarding sufficiency of evidence, and provisions relevant to credibility determinations. Most of these changes apply only to new asylum, withholding and CAT applications filed on or after May 11, 2005.

9.1 Post Real ID Act — Burden of Proof

The Real ID Act amended the INA requiring an applicant "[t]o establish that the applicant is a refugee within the meaning of [INA §101(a)(42)(A)], the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."

As a result, applicants will now be expected to demonstrate a clear nexus between the persecution and a protected ground. Attorneys should take care to consider and highlight all direct and circumstantial evidence in the case which demonstrates this nexus. Client affidavits and testimony should include, where available, statements that persecutors may have made regarding the protected ground and an articulation of all other circumstances, including that of similarly situated individuals, that have led the client to believe that the harm or feared harm is on account of one of the protected grounds.

9.2 Post Real ID Act — Corroborating Evidence

The Real ID Act also places a greater burden on the applicant to corroborate her asylum, withholding and CAT claims. Under the new law:

- An adjudicator may grant asylum on testimony of the applicant alone but only where the testimony "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.
- An adjudicator may require other evidence to corroborate otherwise credible testimony "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."
- "In determining whether the applicant has met the applicant's burden [of proof], the trier of fact

may weigh the credible testimony along with other evidence of record."

Applies to: New applications filed on or after May 11, 2005. Applies to asylum, withholding and claims made under the UN Convention Against Torture (CAT).

While the law protects the ability of asylum-seekers to obtain relief based on their testimony alone, it is at the adjudicator's discretion whether the testimony alone is sufficient. The attorney should put herself in the position of the IJ and ask: "What type of evidence would I want to consider to make a fair determination of this claim?" Attorneys should be prepared to gather all corroborating evidence reasonably available to support a client's claim and, where unavailable, provide a clear explanation as to why the client is unable to obtain the evidence. Whenever possible, the unavailability of evidence should also be supported by corroborating evidence.

For example, if an applicant reports that the police in his country arrested him and his partner when they were leaving a gay club and the applicant's partner was beaten so badly by a homophobic gang that he required stitches on his face, the applicant should attempt to obtain an affidavit or letter from his partner confirming that the incident took place. If at all possible, it would also be best if the partner could supply a copy of the medical report for the stitches. If it is not possible to obtain either of these corroborating documents, the applicant should be prepared to explain why. Acceptable reasons for not getting the evidence could include that the applicant and partner had a bitter break up many years ago and have not spoken since.

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

9.3 Post Real ID Act — Credibility

The Real ID Act also makes it easier for an adjudicator to find that the applicant lacks credibility. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on:

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

Attorneys should review this section of the law together with their client so that the client understands how important past statements, the history of the case, and preparation of testimony will be to the case.

Attorneys should take the following steps to best prepare themselves and their clients for an asylum interview or hearing:

- File a Freedom of Information Act ("FOIA") request: If your case is in Immigration Court, file a FOIA request to obtain a copy of the DHS immigration file on your client. The FOIA should include the Asylum Office's assessment of the case and/or airport statements or credible fear determinations of the client.
- Review the Court file: Attorneys can request to review the Immigration Court's case file and listen to any prior hearings. Note that the Immigration Court's file may be different from the DHS file, so it is wise to both review the Court file and request a FOIA of the DHS file.
- Discuss documents: Prior to filing any document with CIS, the Court or counsel for ICE, it is important to establish its origin, chain of custody and ability to authenticate it. The client should identify the document and how he obtained it. If the attorney has any doubts about the reliability of a document, she should consult with the organization who referred the pro bono case to her or another experienced practitioner prior to filing it with DHS or the Court. Any document presented to Court can and likely may be examined by the federal Forensic Document Lab. If a document is found to be fraudulent, even if it is not central to the claim, the applicant's entire claim may be found not credible.
- Discuss and review prior asylum applications and affidavits: Particularly for attorneys coming into a case after the Asylum Office referred the client to Court, counsel should review for accuracy existing asylum applications and/or client affidavits. Attorneys should inquire as to how past applications were prepared and whether the contents were reviewed with the client in their native language prior to submission. Attorneys should also discuss the use of and competency of any interpreters used prior to representation. If there are any inconsistencies, the attorney must work with her client to explain them. The attorney should never hope that the adjudicator won't notice them, because adjudicators are trained to look for such inconsistencies. It is best to explain inconsistencies fully and at the earliest opportunity after their discovery.
- Prepare for cross examination: Attorneys should take care to prepare their clients for direct and cross examination, as well as inquiry by the Immigration Judge. Clients need to be able to be equally forthcoming in their responses regardless of who might be asking a question.
- Know and prepare witnesses: Real ID introduces witness behavior into the determination of a client's credibility. Before putting anyone on the stand, prepare the witness as one would one's client.

9.4 Post Real ID Act — Review Standards

The Real ID Act also changed certain standards of review. Under the new law:

- The federal courts preserved their authority to order stays of removal.
- Where an IJ failed to make an explicit credibility finding, the petitioner/client and any witnesses enjoy a rebuttable presumption of credibility.
- An IJ finding regarding the availability of corroborating documents is a finding of fact. "No court

shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in sections 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."

The new law applies to:

- New applications filed on or after May 11, 2005 (for rebuttable presumptions of credibility).
- Retroactive to all cases with a final order of removal (for review of finding as to availability of corroborating evidence).

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10. Immigration Basics: Safe Third Country

In December 2004, the United States and Canada agreed to begin the implementation of the Safe Third Country Agreement between the two countries.

As a result, most asylum seekers must apply for asylum in whichever of these two countries they land in first. That is, an asylum seeker who travels through the United States and wishes to seek asylum at the Canadian border, will be turned back and told to pursue her claim in the United States and vice versa. If an asylum applicant loses her claim in the United States and hopes to file a new claim in Canada, as was fairly common a few years ago, she will be unable to do so.

There are several exceptions to the Safe Third Country Agreement. These include:

- Applicants seeking asylum within the borders of the country. The Agreement only applies along the land border; those who enter by air or sea may still seek asylum in the other country;
- Applicants who have a valid visa or do not require a visa to enter the other country may still pursue asylum in the second country;
- Unaccompanied minors may seek asylum in either country;
- Applicants with family members in the other country who are citizens, residents, students, refugees, asylees, or have asylum applications pending. For this exception, family is broadly defined to include:
 - Parents (including legal guardians);
 - Grandparents;
 - Uncles and aunts;
 - Children;
 - Grandchildren;
 - Nieces and nephews;
 - In Canada only : “Common law partners” which is defined as a person of the same or opposite sex with whom the individual has resided in a conjugal (romantic) relationship for at least one year. Although most aspects of the agreement are reciprocal, the United States does not allow a foreign national who traveled through Canada an exception based on his or her “common law partnership” with an American.

For all others who do not fall within one of the above exceptions, they can only pursue asylum in the country in which they first landed.

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11. Immigration Basics: Thorny Issues in LGBT/H Asylum Cases

Some asylum applications are relatively straightforward. The applicant is filing within one year of his last arrival in the United States, he has severe past persecution with documentation to corroborate the abuse, and he has never done anything wrong in the United States or in his native country. Cases such as this are relatively easy to work on, and with careful preparation have a strong chance of winning.

Often, however, clients are not so perfect. When asylum applications include facts which seem to undermine the claim, it is important to address these facts head on. Asylum Officers, Judges, and ICE attorneys will be looking for these issues and will confront your client with them. It is therefore best to have the applicant raise difficult issues first so that he can fully explain the circumstances of the bad fact. There are some issues in particular which arise frequently in LGBT/H asylum issues which require extra thought and preparation.

11.1 Marriage

It is essential to remember in preparing a sexual orientation-based asylum claim, that the first element which must be proven to the adjudicator is that the applicant really is lesbian or gay. This can be accomplished by including affidavits, letters and/or testimony from current and/or past romantic partners. Proof of sexual orientation can also be bolstered by including evidence that the applicant is involved in LGBT organizations. And, of course, the applicant's detailed and compelling written and oral testimony about romantic feelings are crucial.

But what if the applicant was or is married? Will this be fatal to a sexual orientation-based asylum application? The answer, as with most asylum issues, is, it depends. It is important when preparing the case to realize that this will be a significant issue and to prepare the client to talk about the marriage honestly.

11.1.1 Marriage in the Home Country

In many cases an asylum applicant will have married in her own country because her family forced her into the marriage, because she was hoping the marriage would work and she could "cure" her sexual orientation, or because she believed the marriage would provide her with a "cover" which would allow her to continue to seek same sex relationships with other women. In situations where the applicant tried to be married and the marriage failed because of the applicant's sexual orientation, the marriage (and possible divorce) itself can become part of the evidence of the applicant's sexual orientation. It is important, if possible, to corroborate the failure of the marriage, whether this is through a letter from the (ex)spouse, a letter from a friend or family member in whom the applicant confided, or a letter from a therapist who tried to help save the marriage.

The longer the marriage lasted, and the deeper the commitment appeared to be, for example, if the couple had children, the more in depth the explanation the applicant should be prepared to give. Expert testimony from a psychiatrist or psychologist can be essential to a case where the applicant appeared to lead a heterosexual life in the past. It is important to remember that the asylum adjudicator is probably heterosexual and may need to be educated about the complex psychological components that make up a person's sexual orientation.

11.1.2 Marriage in the United States

If the applicant married a person of the opposite sex in the United States, he will be facing an even more difficult obstacle in his asylum application. It is possible that the applicant married an opposite sex spouse in the United States for the same reasons he might have done so in his own country: the hope of "overcoming" his gay feelings or the hope that he could appease his family. Of course, without the extreme societal pressures which may come to bear on the applicant in his own country, it is more difficult to explain why he would feel the need to marry in the United States where, at least in theory, gay people are free to pursue relationships with members of the same sex. In a situation where the applicant marries in the United States, it will be essential to have a mental health expert testify about the coming out process and the applicant's motivations for entering into the marriage.

An even more difficult situation arises when the applicant married a U.S. citizen or legal permanent resident for the purpose of obtaining a "green card" without truly intending the marriage to be bona fide. In dealing with this situation it is important to remember, first, that an asylum applicant must be truthful at all times. There is no more serious wrong an applicant for immigration status can commit than to intentionally fabricate information in an asylum application, so if the applicant never intended the marriage to be real, he must be truthful about this. Admitting that the applicant committed immigration fraud will probably mean that the applicant will be ineligible for asylum and will instead be focusing on his application for withholding of removal. In addition to meeting the elements of a the refugee definition, a successful asylum application requires a "favorable exercise of discretion" (*See* Section# 3.4) and it is unlikely that an adjudicator will exercise this discretion if the applicant admits to having committed immigration fraud.

The other danger with admitting that the applicant previously submitted a fraudulent application is that the adjudicator may find that if the applicant lied to the government in the past in an effort to receive an immigration benefit, he may be doing so again with the current asylum application. It is important to work closely with a client in this difficult situation to make sure that he testifies with complete candor about the marriage and his motivations for entering into it so that the adjudicator believes his current testimony. It is also important to focus on corroborating the applicant's homosexual sexual orientation, as well as to provide other evidence of the applicant's good moral character so that the adjudicator can see that the fraudulent marriage was an aberration borne out of desperation rather than that the applicant is generally untrustworthy.

11.2 Bisexual Claims

One reason that an applicant may be married now or may have married in the past, may be that she identifies as bisexual rather than homosexual. There are no precedential asylum claims recognizing bisexuals as a particular social group. As with any other asylum claim, whether or not the claim of a bisexual applicant will succeed will be very dependent on the particular facts of the case.

If the applicant suffered past persecution because of bisexuality, there is a rebuttable presumption that she will suffer future persecution. If she is currently married to a man who would return with her to her country if she is removed, this change in circumstances may be sufficient for ICE to rebut the presumption of future persecution. On the other hand, if the applicant was known to have had same sex relationships in her country, and will be presumed to be a lesbian and face future persecution as a result, she could argue that the fact that she has had some relationships with men would not protect her from the abuse she would face in the future.

Asylum adjudicators often want the issues in cases to be black and white. It is not hard to imagine an asylum adjudicator taking the position that if the applicant is attracted to both sexes, she should simply “choose” to be with members of the opposite sex to avoid future persecution. In a case which is based on bisexual identity, it will be very important to include the testimony of a mental health expert who can describe for the adjudicator that bisexual individuals do not “choose” whether to fall in love with men or women any more so than anyone else “chooses” whom they fall in love with.

11.3 The Applicant Does not “Look Gay”

While it is always necessary for an asylum applicant to prove that he actually is a member of the particular social group of homosexuals, it is especially important to focus on this element of the case if the applicant does not fit the stereotype of an “effeminate gay man” or a “masculine lesbian woman.” Every adjudicator approaches an asylum application with his or her own biases. If the applicant “looks gay” to the adjudicator based on whatever stereotypes or “gaydar” the adjudicator brings to the interview or hearing, it is probably more likely that the applicant will win the case. There are several reasons for this.

First, most LGBT applicants cannot prove their membership in a particular group as clearly as other asylum applicants can prove, for example, their affiliation with a political party or their ethnic group. Asylum adjudicators are often fearful that an applicant has completely fabricated his claim simply to remain in the United States. If, on a gut level, the adjudicator believes the applicant is gay or lesbian, it is much more likely that the adjudicator will believe other aspects of the case.

Second, even if the adjudicator does believe that the applicant is homosexual, the adjudicator will also question how the applicant’s government or other members of society will know the applicant’s sexual orientation such that he will be likely to suffer harm in his country. If the applicant is a “flaming queen” it

may be easier for the adjudicator to picture the applicant being gay bashed on the street or abused by policemen than if the applicant looks like a professional athlete. If the adjudicator can't tell that the applicant is gay, the adjudicator may question how the applicant's countrymen could tell.

This is precisely the issue in the *Soto-Vega v. Ashcroft*, a case which is currently pending in the Ninth Circuit. In *Soto-Vega*, the Immigration Judge found that although the applicant had suffered past persecution both by the police and the public in his native Mexico, the applicant did not "look gay" to the Judge, so he did not believe the applicant would suffer future persecution. The BIA affirmed the Judge's ruling without opinion, and the case is now in federal court. Of course, having found past persecution, the applicant was entitled to a presumption of future persecution which the Judge's own informal observations should not have rebutted. The other important lesson from *Soto-Vega*, however, is how important it is to develop the record (which fortunately *Soto-Vega*'s attorneys did) regarding the applicant's sexual orientation. In *Soto-Vega* a witness who was an expert on country conditions in Mexico for LGBT individuals, testified that according to cultural markers in Mexico, *Soto-Vega* was obviously recognizable as a gay man. This testimony in the record is a crucial part of *Soto-Vega*'s appeal.

In cases where the applicant does not fit the U.S. stereotype of gay man or lesbian woman, the applicant's representative must make sure that the record contains as much corroborating evidence as possible that the applicant really is homosexual. (*See* Section # 20.2.1). The applicant must also be prepared to prove that she would be recognized as a homosexual person in her country and would face persecution as a result. Obviously, if she has already been persecuted in the past, this should be compelling evidence both that she was previously recognized as a lesbian and that her sexual orientation would be known in her country if she returns. Testimony from a country conditions expert that the applicant "looks homosexual" according to the cultural norms of her country can also be very important to the success of the case. It is also important to include other evidence of how the applicant's sexual orientation would become known. For example, in many cultures it is unheard of for a 30 year old man to be unmarried. In other societies the fact that two adults of the same gender are living in the same household would immediately subject them to scrutiny from their neighbors and the government. It is essential to get this evidence into the record, both through country condition reports and expert testimony.

11.4 Multiple Return Trips to Country of Origin

The classic factual scenario for an asylum seeker is that the applicant suffers some terrible incident of persecution in his country, flees his country as soon thereafter as possible, and seeks asylum in the United States shortly after arriving here. Cases with this fact pattern are certainly not uncommon, but frequently the realities of asylum seekers' lives don't fit so neatly with this paradigm.

Often LGBT/H individuals have no idea that their sexual orientation, transgender identity or HIV-positive status could be grounds for seeking asylum in the United States. Thus many LGBT/H individuals who visit the United States are careful to return to their countries before their authorized stay expires so that they won't lose the ability to return to the United States in the future. This is often especially true for individuals who are HIV-positive and visiting the United States regularly to obtain medication that is

unavailable in their home countries.

If the applicant has returned to his home country after leaving the United States, the adjudicator will certainly want to know why the applicant fears for his safety in returning now when he returned of his own volition in the past. In many cases there was one final incident that occurred to the applicant or to someone the applicant knows which made the applicant realize once and for all that it would be unsafe to remain in his country. The representative should always discuss with the client what compelled him to flee to the United States permanently this last time.

The Ninth Circuit has recently addressed the issue of return trips to the home country after having been persecuted and reiterated that that Circuit has “never held that the existence of return trips standing alone can rebut th[e] presumption [of future persecution.]” In *Boer-Sedano*, the applicant was a gay man with AIDS from Mexico who had suffered past sexual and physical abuse by a police officer because of his sexual orientation. The Court found that Boer-Sedano’s several return trips to Mexico to gather enough income to relocate permanently in the United States did not render him ineligible for asylum.

As with most issues in asylum cases, whether or not an applicant’s return trips to his country of origin are fatal to his asylum application will depend on the specific facts of the case. It is important for the representative to explore this topic fully with the client and prepare the applicant to explain the reason for the trips to the adjudicator. The applicant should also be prepared to explain (and if possible corroborate) any ways in which he modified his behavior while back in his country. For example, if he remained in his country for a brief time, he avoided gay meeting places and he rarely left his home, these facts may help an adjudicator understand why the applicant was able to escape harm on the trip home.

Be careful, however, that these facts don’t backfire into an adjudicator determining that if the applicant does not “flaunt” his homosexuality, he can avoid harm in his country. The applicant (and representative) should be prepared to argue that it is one thing to spend a couple of weeks avoiding the public eye and potential harm, but it is quite another thing to be forced into a life of celibacy to survive. In another recent 9th Circuit case, *Karouni v. Gonzales*, the Court addressed this issue, finding that it was unacceptable to saddle Karouni, a gay, HIV-positive man from Lebanon, with the “Hobson’s choice of returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts of (2) living a life of celibacy.” Thus the applicant should be able to explain why he would fear having to live in his country again, including his fear of persecution if he had a romantic partner or tried to find a romantic partner, even if he was able to escape harm on a brief visit.

Likewise, HIV-positive applicant may be able to demonstrate that they avoided harm on a brief trip to their home country by bringing enough medication to last for the trip. The applicant could argue that by avoiding seeking medical care (something that would be impossible to do if he returned to his country permanently) he was able to conceal his HIV-positive status.

11.5 Criminal Issues

The interplay between criminal law and immigration law is one of the most complicated areas in the complicated area of immigration law. As such, it is generally beyond the scope of this manual. However, anyone who is representing an asylum seeker must know a few basics about how criminal convictions can affect eligibility for asylum and withholding of removal. Applicants who meet the heightened standard for relief under the Convention against Torture cannot be removed to the country where they would face torture regardless of their criminal history in the United States, though they can face indefinite detention here if they are deemed to be a threat to the community.

The asylum applicant must answer questions on the I-589 about criminal convictions and arrests, so the representative must impress upon the applicant the importance of discussing past criminal activity openly. All asylum applicants are fingerprinted multiple times during the application process, and if the applicant was arrested in the United States, it is extremely unlikely that DHS would not know about the arrest.

Applicants for both asylum and withholding are considered statutorily ineligible if they have been convicted of a “particularly serious crime.” For purposes of asylum applications, any conviction for an aggravated felony will render the applicant statutorily ineligible. For purposes of withholding of removal, if the applicant has been convicted of one or more aggravated felonies for which the aggregate term(s) of imprisonment are five years or more, he will be statutorily ineligible for having committed a “particularly serious crime.” Even if the applicant’s aggregate prison term was under five years, the adjudicator can still make an individualized inquiry as to whether or not the conviction rose to the level of a “particularly serious crime” to determine whether or not the applicant is statutorily eligible.

Even if the applicant’s conviction was for a crime that did not rise to the level of an aggravated felony, the conviction can lead to the denial of an asylum application. The leading case on determining whether or not a criminal conviction is a “particularly serious crime” is *Matter of Frenescu*. Additionally, to qualify for asylum, an applicant must merit a favorable exercise of discretion. Thus, even if an asylum applicant’s conviction is not found to be a “particularly serious crime” and does not render him statutorily ineligible for asylum, an adjudicator may still deny the application on discretionary grounds. If the applicant committed a crime, it will be crucial to the case for the applicant to fully explain the circumstances of the conviction and (if possible) to express remorse and demonstrate rehabilitation.

If the applicant committed a “serious nonpolitical crime” in her own country or any other country outside the United States, she is also statutorily ineligible for asylum or withholding. Again, it is important to question the applicant thoroughly about any criminal activity before she arrived in the United States. In many cases, the applicant may have faced arrest or conviction because of her sexual orientation. If the applicant is being prosecuted for engaging in a protected activity, such as having private, consensual sexual relations, such an arrest would not render the applicant ineligible for asylum and would actually be an important part of her claim.

11.6 Prior Government Employment

Another issue which a representative should explore with the applicant is whether or not he was

employed by the government in his country of origin. In the classic paradigm of an asylum case, where an applicant was a political activist against a dictatorial government, it was reasonable to conclude that employment by that same government would undermine the claim. In most LGBT/H asylum cases, the primary problem that applicants have experienced from the government has been abuse by the police or military, or failure by the police to protect against harm from private individuals. Given this fact pattern, employment as a government clerk or the like should not render an applicant ineligible for asylum, but it may still be an issue which an adjudicator pursues. After all, if the applicant's claim is that the entire country is intolerant of sexual minorities, and sexual minorities face abuse and discrimination, why would the government hire a gay person? If the answer to this question is that the applicant kept his sexual orientation hidden from his employer, then an adjudicator might reasonably question how the police, individuals on the street, or other potential persecutors would be aware that the applicant was gay when those as close to him as his employer remained unaware. Again, the answers to these questions will be specific to the facts of the case, but it is an issue which the representative must prepare the applicant to discuss with the adjudicator.

11.7 Visa Waiver Program

If an applicant entered the United States without a visa under the Visa Waiver Program (VWP), she is not entitled to an interview with an Asylum Officer. Instead, her application will be heard by an Immigration Judge in asylum only removal proceedings. Most entrants under the VWP, a program which allows foreign nationals from low risk visa violating countries to enter the United States for up to 90 days without first applying for a tourist visa, come from Western Europe and would therefore not be seeking asylum in the United States. The issue does arise at times, however, when the applicant has dual citizenship with a VWP country and enters the United States using the passport of the VWP country. Also, while Argentina has been removed from the VWP list, there are Argentine nationals who entered the United States under the VWP as it existed several years ago who may wish to seek asylum because of their sexual orientation.

11.8 Dual Nationality

If an asylum applicant has dual nationality, that is she is a citizen of more than one country and has the legal right to reside in and enjoy full citizenship rights in both countries, this can be a reason to deny the asylum application. The principle behind asylum applications in the United States is not that the application is a way to choose to live legally in the United States but rather that it is an application of last resort to avoid persecution. Thus, if the applicant has a safe alternative in another country, the United States can remove the applicant to that country. Therefore if an applicant is a dual citizen of Venezuela and Spain, it will be very difficult to win an asylum case in the United States since Spain now grants greater rights to gay and lesbian citizens than the United States does. On the other hand, if the applicant is a dual citizen of Venezuela and Colombia, the applicant may be able to prevail on an application based on

persecution in Venezuela, but will also have to prove, through country conditions documentation, that Colombia is also an unsafe country for LGBT/H people.

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12. The Application Process: Working with Asylum Seekers

There is no doubt that the work an attorney does on an asylum application can mean the difference between a successful application, or deportation of the client. Vital as the attorney's role is, however, it is ultimately the client's story which will win or lose the case. In many ways, your most important job is to build a relationship of trust with your client so that he feels free to tell his entire story to you and, ultimately, to the adjudicator.

A client-centered approach differs from traditional lawyering by stressing the central role of the client in her relationship with the attorney, and the client's active, intelligent participation in the preparation and representation of her claim. While not suspending a professional rapport, a client-centered approach encourages the attorney to consider the client's circumstances from the client's perspective and to respond to the client's legal issues (and non-legal concerns when appropriate) with human care and compassion. This approach helps both you and your client work together in a partnership more effectively, thereby ensuring client satisfaction, high quality legal services and even client empowerment. Client empowerment results not only when the client understands her relationship to the relevant law and its procedure, but when she assumes a central role and responsibility in preparing the case. Through this approach, the client becomes a critical agent in the process and in the potentially successful outcome of the case.

There are additional considerations that both you and your client should be aware of when beginning to explore an asylum claim. Asylum-seekers can be experts in their own culture, language and education, and particular concerns related to their experiences and fears of persecution in their homelands, and therefore, asylum-seekers can be valuable sources of information for the attorney. However, asylum-seekers' unfamiliarity with the United States's legal system compounded with experiences they may have had in their home countries, also can challenge the development of client-attorney rapport. Asylum-seekers often mistrust the law and lawyers, especially when their countries' legal systems are not independent and are riddled with corruption. Additionally, asylum-seekers may be unfamiliar with refugee law in the United States and its procedures. Given their intense fear of return and the possible psychological repercussions of their experiences, it is important that asylum-seekers and their attorneys understand how stress or trauma can affect asylum-seekers' memory, testimony and demeanor during the proceedings, which can adversely impact their claims.

Through a client-centered approach, you and your client can build mutual trust, respect and understanding and, in turn, facilitate the client's openness and cooperation with the legal representative. A client-centered approach can also assist LGBT/H immigrants who are unfamiliar with the grounds for asylum based and who may fear "coming out," especially to a foreigner (let alone a legal professional). This reluctance is understandable given societal homophobia, transphobia, HIV phobia and/or clients' perceptions that their sexual orientation, transgender identity or HIV-positive status is private fact not for a legal representative and immigration authorities to know. Indeed, many asylum seekers may erroneously believe that being LGBT/H could lead to a denial of their claim.

You therefore need to take affirmative steps to create a safe space to ensure that the client trusts you, and feels comfortable to discuss her sexual orientation, gender identity and/or HIV status and related experiences in her homeland, and ensure her active participation in the case. There are certain methods

that the attorney may use in interviewing, preparing and representing the client that provide for an effective demarcation of roles and a time-saving division of labor.

12.1 Recognizing And Respecting Client Individuality

An open, non-judgmental attitude that involves recognizing and respecting client individuality is the key to a successful relationship with LGBT/H clients through the proceedings because sexual minorities and people with HIV/AIDS are individuals as diverse as their heterosexual or HIV-negative counterparts. You should not make assumptions about your client's experiences based merely on stereotypical profiles such as appearance, dress and physical features; e.g. gay men as effeminate and probably HIV-positive; lesbians as masculine. Questions laden with stereotypes or judgments not only might injure the client's self-esteem but might inhibit the client from trusting and working with you. Common stereotypes to avoid include: that a person's sexual orientation or HIV-status is the central defining feature of her identity; that homosexuals are promiscuous, lonely, self-hating people; that a homosexual no longer practices or believes in her religion since most religions reject homosexuality; that homosexuality is "caused" in men by overbearing, controlling mothers and absent fathers; that lesbians are trying to be men, or always dress in a masculine or androgynous manner; that an ostensibly "effeminate" character means that the male homosexual plays a woman's role in a romantic relationship; that in order to define herself as a transgender, a transgender individual must have had surgery or be contemplating medical interventions.

Regarding people with HIV/AIDS, there are many judgmental assumptions about how they contracted HIV (e.g. that they contracted HIV through willful or reckless conduct); their celibacy (e.g. that they should be celibate now); medical treatment regimens (e.g. that they should be pursuing Western medical treatment and the protease inhibitor "cocktail"); social support needs (e.g. that they should be involved in individual or group therapy). Additionally, there is the negative assumption that a client is somehow self-hating when he is not completely "out" about his sexual orientation, gender identity and/or HIV status to family, friends, employer, etc.

The diversity of how clients construct, understand and live their identities is the evidence that contradicts these stereotypes and judgmental perspectives. Through your conscious, close attention to your own communication and interaction with the client, you can evince an open, nonjudgmental attitude. This bolsters the client's trust, confidence and cooperation with you through all stages of case preparation and representation.

12.2 Setting the Stage for Client Trust, Confidence and Candor in the Initial Consultation

It is important in the initial consultation for you to set the stage for client trust, confidence and truthfulness by explaining the format of the consultation and the respective roles of the client and the attorney. You should stress that the consultation is confidential and no information will leave the office or be revealed to anyone including immigration authorities without the client's prior consent. You should also clearly caution the client that he must openly share all information in order for to represent him effectively. It is important that the client understands that you cannot assist him in putting forward

anything that is untruthful in the application. Given your professional ethical responsibilities, you could face sanctions by immigration authorities, while the client could face deportation and the inability to obtain future immigration benefits in the United States if any aspect of his claim is fabricated. *See* Section # 3.5.

12.3 Brief Explanation of Asylum Law, Its Extended Eligibility to Socially Marginalized Groups and Its Requirements

If you are taking a pro bono asylum case that has been screened through a non-profit organization, an attorney at the non-profit will already have had one or more consultations with the client and will have explained the asylum application process. Nevertheless, immigration law is complicated and an applicant may need to hear the same information several times before he fully understands it. You should therefore expect that the applicant may have basic questions about the asylum application process, and you should make every effort to understand the basics of the process before your first client meeting.

If the applicant asks you a question that you aren't sure how to answer, you should never "guess" the answer because if you are wrong the client will be misinformed and may find it hard to trust your answers in the future. Instead, explain that you are new to this area of law, that you don't know the answer right now, but you will research the question before your next meeting. The non-profit who referred the case to you may be able to answer your question easily or, in any event, should be able to steer you to the correct place to research the answer.

12.4 Overcoming Cultural Barriers

Even if you are an LGBT/H person yourself, remember that your client may come from a culture that is entirely different from ours. Your client may have limited literacy abilities or may have never been in a city before coming to the United States. Try to keep an open mind when meeting with your client and remember potential cultural barriers in your understanding of the client's experience. For example, your client may talk about his prior homosexual experiences in sexual terms without seeming to express strong emotional attachment to someone he "dated" for a long time. It is best to suspend judgment in your early meetings, and after you and your client have become more comfortable together, you can gently ask him questions about his feelings. In some cultures, the possibility of having a long-term, same sex relationship may be so taboo that it is difficult even for sexually active LGBT people to imagine the possibility of a true "partnership" with someone of the same sex.

Another area where you client may have difficulties is remembering dates. Clients frequently are not able to remember in 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.

12.5 Dealing with Psychological and Medical 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 asylum seekers suffer from Post Traumatic Stress Disorder (PTSD) or other psychiatric disturbances, such as depression or anxiety 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 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 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 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.

It is often very helpful to the asylum seeker to seek professional mental health assistance during the asylum application process. Even if the applicant never thought that he needed counseling in the past, you can explain to him what an emotionally draining experience it is to apply for asylum. If the applicant has severe memory problems or her affect during testimony is flat, it can be crucial to the claim to have an affidavit from a mental health expert explaining the psychological causes of the client's difficulties in testifying.

If you are working with an HIV-positive client, it is also important to understand that her HIV illness may include neurological impairments. Many HIV medications also have severe side effects, and, again, it will be very important to have a letter from the applicant's doctor if, for example, side effects of the HIV medication include loss of memory or ability to focus.

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13. Working with LGBT/H Asylum Seekers

If this is your first case working with a lesbian, gay, bisexual, transgender and/or HIV-positive client, you may be unsure of what questions are appropriate to ask and which are not.

The basic rule, as with all aspects of asylum cases, is to be respectful, non-judgmental, and, for the most part, limit your questioning to issues that are relevant to the development of the case. If you are LGBT/H yourself, you may want to disclose this to your client if you believe this will make him feel more comfortable. On the other hand, you may feel comfortable not disclosing personal details of your life to your client. There is no right or wrong approach, but the more comfortable you feel with your client, the more comfortable you will make him feel to open up about the basis of his claim.

Remember that sexual orientation, gender identity and HIV status are all separate issues. An applicant may have claims based on more than one of these issues simultaneously, but you should treat each issue separately. Do not make assumptions. Just because an applicant is HIV-positive, doesn't mean that he's gay. Just because an applicant is transgender, doesn't mean that her romantic relationships are with men.

13.1 Working with Lesbian, Gay and Bisexual Clients

It is important to understand that every client is different. Some clients will be very open about their sexual orientation, while others may feel very reticent to talk about an aspect of their identity that they perceive to be a "problem." Follow your client's lead, make her feel comfortable, and understand that it will take time and several meetings before she begins to reveal information about her case.

It is often a good idea to use the same language that the client uses to describe herself. Thus if your client refers to herself as a "lesbian," you can ask her, "When did you first realize that you were a lesbian?" If she uses the word "gay," use the word "gay." If your client calls herself a lesbian, it is best not to refer to her as "homosexual" because this word often has negative clinical connotations.

Remember clients who come from different cultures which are not as open about sexual orientation issues may not use the same terms to talk about their sexuality. Thus, you may ask your client, "When did you come out as a lesbian?" and she may now know what this means. Use your common sense and don't leap to conclusions because your client expresses her sexuality in a way that's different from you (even if you are LGBT/H yourself).

If your client is bisexual, explore what this means to her. Sometimes clients from very homophobic cultures will self-identify as bisexual rather than homosexual even though they don't really have any interest in the opposite sex, because bisexuality seems less taboo than homosexuality. On the other hand, if your client has only had relationships with members of the opposite sex, and is not sure if she will ever act upon her attraction to women, it may be impossible to prove that she is a member of the particular social group of bisexuals. *See* Section # 11.2 for more information about bisexual claims.

» *Practice pointer: Avoid the terms “sexual preference” and “lifestyle.” “Sexual preference” sounds like the client’s orientation is not immutable, like she may “prefer” women to men, but that it is something which could, perhaps be changed. Likewise, “lifestyle” sounds like a choice. Deciding to live in a fancy apartment in Manhattan versus renting a more reasonable priced outer borough apartment is a “lifestyle” choice; falling in love with someone of the same sex is not.*

13.2 Working with Transgender Clients

If you have never worked with a transgender client before, remember the basic rules, be respectful and non-judgmental. The term “transgender” can have different meanings to different people. For some, being transgender simply means not conforming to rigid gender norms, and thus some people, for example very butch lesbians, or effeminate gay men may identify as transgender although they do not believe that their bodies do not match their gender identity.

For others, the term “transgender” means that the individual feels that the anatomical sex with which she was born does not match her gender identity. Transgender people who feel this way often take medical steps to make their anatomy match their gender identity.

Transgender people often refer to the anatomical sex which was assigned to them at birth as their “birth sex.” The process of taking medical steps, such as hormone therapy, electrolysis, and/or surgery, to give an outward appearance that matches gender identity, is often called “transitioning.” When referring to a client’s gender or sex after transitioning, the phrase “corrected gender” or “corrected sex” is often used.

When working on the asylum claim with your client, you’ll want to ask her about any problems she had as a child. Maybe she was perceived as particularly effeminate and suffered mistreatment as a result. You’ll want to find out when she first realized that she was transgender and when she began living as a female. You can also ask whether she’s taken any medical steps to transition and whether she has any plans in the future to transition further.

Remember, most transgender people never have genital reassignment surgery. Surgery is expensive and rarely covered by health insurance. For transgender men (F→M) the surgical techniques are not as advanced as they are for transgender women. Gender identity is comprised of much more than just anatomy, and some transgender people never choose to undergo any medical steps to transition.

Also, remember that being “transgender” is not a third category of gender; transgender people, like non-transgender people, are either male or female. Don’t refer to your client as a “transgender” person; refer to her as a transgender woman.

It is also important to understand that gender identity and sexual orientation are different aspects of a person’s identity. Transgender individuals, like non-transgender individuals may consider themselves heterosexual, homosexual, or bisexual. Don’t make assumptions about your client’s sexual orientation based upon her gender identity. On the other hand, remember that even if your client identifies as

heterosexual, he may be perceived as homosexual in his country and may fear persecution on this basis. For example, if an F→M transgender man had a relationship with a woman in his country in the past, people in his community may have considered the relationship lesbian, even if the applicant and his partner viewed the relationship as heterosexual.

13.3 Working with HIV-Positive Clients

If your client's case is based in whole or in part on his HIV-positive status, you'll need to get some information about his health. Remember HIV and AIDS are not synonymous; HIV is the virus which leads to AIDS. Your client can be HIV-positive without having full-blown AIDS. It is only after an individual has suffered an AIDS-defining symptom, or had his CD4 cell count fall below 200, that he is given an AIDS diagnosis. Once a person is diagnosed with AIDS, he will always be considered to have AIDS even if his CD4 cells rise and/or his symptoms go away. You should be prepared to educate the adjudicator about the difference between being HIV-positive and having AIDS. For information about AIDS-defining symptoms, see www.health.state.ny.us/diseases/aids/facts/questions/appendix.htm.

You should find out when your client was diagnosed with HIV as this will generally be relevant to the case. Sometimes a recent HIV diagnosis can be used as an exception to the one year filing deadline. On the other hand, if your client was diagnosed with HIV in his own country, it will be important to elicit whatever information you can about problems he experienced as a result of his HIV.

How your client contracted HIV is generally not relevant to the case. Unless your client believes that he contracted HIV as a result of the persecution he suffered (for example being raped) there's probably no reason to question your client about how he may have been infected with HIV.

You should make sure that your client is currently receiving medical care, and if he is not, you should try to find an appropriate referral for him to do so. As the attorney in your client's asylum case, it is generally not appropriate for you to give your client medical advice, or to counsel him about HIV transmission. If you believe your client is not getting appropriate medical treatment or is engaging in unsafe behavior, you should refer him to an appropriate medical/social service professional. The non-profit organization which referred you the case should be able to provide you with referrals.

You should talk with your client about any medical problems he's had as a result of his HIV, whether he's ever been hospitalized, and what medications, if any, he is currently taking. You should get a letter from his medical and/or social service professional detailing the course of his illness, what medications he is currently taking, and what would happen if the medications were no longer available.

Some states, such as New York, have very strict laws about revealing confidential HIV information. Before a medical or social service professional can speak with you about a case, your client will have to sign a specific HIV release form. Although attorneys are not strictly required to have a client sign such a release before disclosing his HIV information (for example to CIS), it is best practice to have your client sign the form. The form is available at www.health.state.ny.us/forms/doh-2557.pdf.

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14. Application Process: Elements of an Application

An asylum application is comprised of four basic components. The elements of the application are:

1. the USCIS application form itself, form I-589;
2. a written declaration by the applicant explaining in detail the basis for her claim;
3. documents specific to the case that corroborate the applicant's claim; and
4. indexed country condition documents.

Technically, only the I-589 itself is required to apply for asylum, but, as discussed below, to be successful with an asylum case it is essential to include all of the above components with the asylum application.

The ideal way to begin preparing an asylum application is to have the applicant write a rough draft of her declaration. Often applicants are better able to put incidents of past abuse into a written statement than talk about them with an attorney. You should meet with the applicant on numerous occasions to work on revising the declaration together. It is generally best to get the declaration into its completed form before working on the I-589. Sometimes, if there is a one year filing deadline issue or if the case is already in Immigration Court, you may have to file the I-589 before completing the declaration. It is very important that all of the information in the I-589 (especially dates) match the information in the declaration exactly.

It is also important from the earliest meetings with the applicant to begin brainstorming about possible corroborating documentation. If the applicant has to track down medical records or letters from individuals in her home country it may take weeks or even months to do so. The earlier you get started on this process the better.

Generally, the final step will be researching and indexing country conditions materials. If this is your first experience working on an asylum application from the applicant's country, however, you should begin at least preliminary country condition research from the beginning stages of the application. The more you understand about the conditions in the country, the better you will be able to understand the applicant's situation and ask informed questions that will elicit relevant information.

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15. Application Process: Preparing the I-589

The information in this chapter refers to the most recent version of the I-589 application form, which was revised on 7/3/03.

Please note that CIS revises this form from time to time. The form is available on the CIS website at uscis.gov/graphics/formsfee/forms/i-589.htm. Please make sure that the most current version of the form online is the same as the one discussed herein. In any event, guidance on how to fill in the form should still be useful.

The Application for Asylum, Withholding of Removal, and Relief under the Convention against Torture ("CAT") is filed with your Regional Service Center (See the USCIS website for addresses <http://uscis.gov/graphics/>) using Form I-589.

If you are filing the application affirmatively, the Asylum Office should be scheduled for an interview within 45 days after submitting the asylum application. The same form is used to submit applications for Asylum, Withholding and CAT, although Asylum Officers are only authorized to adjudicate the asylum claim.

» *Practice Pointer: It is the filing of the I-589 itself that initiates the Asylum application process. Thus, it is the date that the application is received by the Service Center or that the application is filed in Immigration Court, which marks the filing date for purposes of determining whether or not an applicant has met the one year filing deadline. In cases where you have very little time to file before the one year deadline, you can file a barebones I-589 application and submit the affidavit and supporting documents at the interview.*

15.1 Filling out the I-589 Asylum Application Form

The purpose of this chapter is to guide the asylum applicant's representative in the preparation of the application form itself.

The I-589 form is available online at uscis.gov/graphics/formsfee/forms/i-589.htm. Unfortunately, this is not a "fillable" form as some CIS forms are. There are commercial companies which offer fillable and saveable immigration forms on cd disks to immigration practitioners. It is also possible to find free fillable versions of the I-589 online on private attorneys' websites by doing a google search such as "I-589 fillable." If you use one of these sites, make sure that the revised date on the lower right hand corner of the form matches the most recent version on the CIS website. While the data on web-based fillable forms cannot be saved electronically, you can write out the answers in Word or Wordperfect and cut and paste them into the fillable form. You can also print the form and type or handwrite the answers.

A. Part A: "Information About You"

The first part of the application requests biographical information about the applicant. This section collects information which may form an important part of the applicant's claim. As with every part of the application, you must be careful to answer these questions correctly. Wherever the question asks for

information that does not apply to the applicant or for which there is no answer you must write “not applicable” “N/A” or “none.” All questions on the Form I-589 must be answered. If an applicant fails to answer a question, the Service Center may reject and return the entire application.

1. Alien Registration Number (A#).

The “A” number is the number assigned to people who have ever filed an application with the INS, CIS, or have had a case in Immigration Court.

The “A” number is an eight or nine digit number. Most applicants applying for asylum for the first time will not have an “A” number at the time the application is filed. If the applicant does not have an “A” number, the correct answer here is “none.”

2. Social Security Number.

Most foreign nationals seeking asylum will not have a valid social security number in his or her name. If so, the correct answer is “none” since the application asks only for the applicant’s social security number. If the applicant does possess a valid social security number issued to him or her, then this number must be entered in this space. This may arise, for example, if the applicant was in the United States on a student visa and had employment authorization. Some undocumented immigrants who have been in the United States for many years have valid social security numbers because ten or more years ago it was relatively easy for anyone who applied to obtain a Social Security number. Also note, some foreign nationals have IRS tax payer I.D. numbers. This is not a social security number and should not be included in this box.

3. Complete Last Name.

This refers to the applicant’s family name or surname, including two last names such as “Mendez-Robles.” If there is any doubt as to which part of an applicant’s name is the surname, it may be easiest to refer to the applicant’s passport or other identification document. To avoid confusion, it may be helpful to enter the applicant’s last name in all capital letters to distinguish this part from the applicant’s first and middle names and to repeat this style throughout the application.

» Practice Pointer: Sometimes asylum applicants enter the United States with false identity documents. The applicant should always use his or her true information on the asylum application form even if she does not have a valid identity document that matches her real name.

4, 5. First Name, Middle Initial.

This refers to the applicant’s first or given name. Again, if there is any doubt as to what part of the applicant’s name is the first name, it may be helpful to refer to the applicant’s passport or other identification documents.

6. Aliases.

Here you should include all aliases, nicknames, previous names or other versions of the applicant's real name by which he is known or which has ever been known. If the applicant is transgender and goes by a different name from what is on his identity documents, he should put the other name here. Likewise, if the applicant has had a legal name change, you should put the prior name here.

7. Residence in the U.S.

This should be the address where the applicant lives. The address entered in response to this question also determines which Asylum Office has jurisdiction over the applicant's application. It is therefore important that this information is correct and that the Immigration Service is notified of any changes to the applicant's address after the filing of the application.

8. Mailing address in the U.S.

This should be an address where the applicant receives mail. The applicant will receive written notice that the INS has received the asylum application and written notices of the interview and future proceedings at this address. If this is the same as the residence, write "same." While both attorney and client are supposed to receive a copy of all correspondence from CIS, sometimes CIS only sends notices to the client or to the attorney, so it's important to include an address where the client can reliably receive mail.

9. Sex.

If the applicant is transgender, you should enter the sex that the applicant uses to self-identify. Be aware, however, that in other contexts, CIS only recognizes corrected gender if the foreign national has undergone sex reassignment surgery. Thus, for example, if your client is an M→F transgender woman who has not completed sex reassignment surgery, you should put "F" as her sex, since this is how she self-identifies and this will be part of her asylum claim, but you should also let the client know that unless she completes sex reassignment surgery, CIS probably will not recognize her corrected gender on whatever documents she receives from them.

10. Marital Status.

Because of the Defense of Marriage Act, the U.S. federal government, including CIS, does not recognize same sex marriages. Nevertheless, if the applicant is legally married (currently only the Netherlands, Belgium, most provinces in Canada and the state of Massachusetts grant full marriage rights), she should check "married." If the applicant is in a relationship other than marriage – a civil union or domestic partnership – "single" is probably the most appropriate box to check.

11. Date of Birth.

Note: sometimes asylum applicants enter the United States with false identity documents. The applicant should always use his true information on the asylum application form, not the data from the false documents.

12. City and Country of Birth.

Note: many countries do not automatically confer citizenship on individuals who were born in the country. For this box you must enter the birthplace, not the place of citizenship.

13. Present Nationality (Citizenship).

Applicant should enter the present country of nationality/citizenship in this space. If an applicant holds dual citizenship, you should include each country of nationality.

14. Nationality at Birth.

Applicant should enter the country of nationality at birth, even if it is the same as present nationality.

15. 16. Race/Ethnic or Tribal Group. Religion.

These sections should be completed if the applicant is a member of such a group or religion regardless of whether the applicant's claim is based upon this characteristic. It is important to fill in "none" in the religion box if the applicant does not have a religious affiliation. Asylum applications are often returned by the Service Center if this box is left blank.

17. Immigration Status.

It is important to be sure that your client is not currently and has never been in removal or deportation proceedings. If the applicant is in proceedings or has a final order of removal or deportation, he will have to file the application with the Immigration Court rather than with the CIS Service Center because the Asylum Office will not have jurisdiction. If the applicant has an A#, you can call the Immigration Court automated phone system to make sure there has never been Immigration Court case for the applicant. This automated phone number is 800- 898-7180. While the information on this phone system is generally accurate, if the applicant was in proceedings more than ten years ago, it's possible that his removal information will not have been entered in the phone system.

If the applicant is in valid immigration status, such as student status, you should write that here, for example, "student, F1." In many cases the applicant will be out of status. For example if the applicant entered with a tourist visa and overstayed, you could write "expired B1/B2." If the applicant entered by crossing the border without inspection, you should write "none."

18. a. The Date of Exit from Applicant's Country.

This should be given as the date when the applicant last left her country. This date is important to determine whether the applicant traveled through or resided in other countries before finally arriving in the United States and if so, whether the applicant had meaningful opportunity to seek asylum in such countries.

18. b. Current I-94 Number, if any.

The I-94 is the white or green passport size Departure Card that a foreign national is given when he enters the United States with inspection at an immigration port of entry. The I-94 will have a number of approximately 12 digits in the top left corner which should be entered here. If the applicant entered illegally (crossing the border) you should write “none” in this box.

18. c. List Each Entry to the U.S. Including Date, Place, Status and Date Status Expires.

The Date of Last Arrival in the United States should be given as the date of the applicant’s last (most recent) entry. Many applicants will still be in possession of the white card given to them upon entry known as the I-94 Departure Record card (or green I-94W Departure Record) which records the date and port of entry. In these cases, date of entry is easily determined.

Sometimes it is more difficult to determine the exact date of entry. The burden is on the applicant to prove that he filed within one year of his last entry into the United States. If the applicant last entered the United States without being inspected by an Immigration Officer at a port of entry (“Entered Without Inspection” or “EWI”) then the date given should be the date on which the applicant actually crossed the border. If the specific date is not known to the applicant, as is often the case when the applicant has entered without inspection and/or many years have passed since entry, the applicant should attempt to establish with the greatest accuracy possible the date on which the last entry took place. If this cannot be done, you should offer an approximate date using the words “on or about.” If even an approximate date of entry cannot be ascertained (e.g. if the applicant entered the country as a young child and has no way of learning the approximate date of entry) then the appropriate answer would be “unknown.” It is important to note that under the changes in the law in 1996, an individual seeking asylum must file an application within one year of his last arrival in the United States or meet narrow exceptions to this rule. Therefore, the answer to this question may determine whether or not the applicant is eligible to file an application for asylum.

Place of Last Arrival is also usually easily determined. Most applicants will still have this information recorded on the I-94 Departure Record card or in their passport. Applicants who have entered without inspection (or who are no longer in possession of the I-94 Departure Record card) can usually identify the general geographic area at which they crossed the border and entered the United States, such as “Arizona.”

Status.

The applicant’s status when admitted is usually easily identified by reference to the I-94 Departure Record or passport. Most applicants will have entered originally on a non-immigrant status, for example, as a visitor for business or pleasure (B), exchange visitor (J), student (F), professional worker (H), journalist (I), crew member (D), religious worker (R), or visa waiver tourist. Some applicants will have entered without inspection, most commonly by crossing the border, and therefore will have not entered on any lawful status. In such a case the correct response to this question is simply, “EWI” or “entered without inspection.” If the applicant entered with fraudulent documents, she did not actually enter without inspection. You should write in the type of visa she used but indicate that it wasn’t really hers, for example “B1/B2, not issued to applicant.”

Expiration of status refers to the expiration of the permitted stay on such status. For example, a foreign national admitted to the United States as a visitor on a B-2 visa for six months would designate the end of the time period allowed to remain in the United States as the expiration date (unless it had been extended) and not the expiration of his or her visa (a B-2 visa may be valid for entries as a visitor for many years in some instances). Some I-94s, such as those for students, have the designation "D/S" for "duration of status" written on them rather than a specific date by which the applicant is supposed to leave the United States. If the I-94 says "D/S" you should write this in on the Date Status Expires line.

For each entry the applicant has made into the United States, she must provide information to the best of his or her ability about the date, place and status of entry.

19. Country that Issued Last Passport or Travel Document.

This should be self-evident. Again, you must always be truthful so if the applicant obtained a fake passport that was not issued by his own country, he must indicate the actual country that issued the passport used. Attach a copy of the applicant's passport, front and back cover and every page. Be sure to remove any stapled or loose papers from the passport so that every page is clearly visible. Also be sure that the copies of the various stamps or visas entered into the passport are clearly visible. If the applicant has an I-94 Departure Record card stapled into the passport, it might be helpful to remove it from the passport and to copy it both front and back and attach the copy with the copy of the passport. Also, if the applicant has renewed his passport since being in the United States, attach copies of both the current passport and the passport which he used to enter into the United States.

20. Passport/Travel Document #.

Enter the passport number of the applicant's current or most recent passport (even if it is now expired). This number can generally be found on or close to the identification page of the passport.

21. Expiration Date.

Enter the month, day and year of expiration of the applicant's current or most recent passport (even if it is now expired).

22, 23, 24. Languages.

Write in the applicant's native language. If the applicant has more than one native language, she should write in the language in which she feels most comfortable. If the applicant is fluent in English, answer "yes."

Part A. II. Information about Your Spouse and Children.

This part of the application asks for information about the applicant's spouse and children. Most applicants for asylum based on sexual orientation will not be married or have children. For those applicants who are married, the section for the applicant's spouse must be completed, whether or not the applicant's spouse is included as part of this application. If the applicant is not married, check the box

on the top line and proceed to the Question 2 which asks about children. If the applicant has no children simply write “none.” The information requested regarding spouse and children is similar to the information requested for the applicant and should be filled out as explained above.

Part A. III. Information about Your Background

1. Address.

This box requires the applicant to list her last address outside the United States. If the applicant did not come directly to the United States, then she must also list her last address in the country from which she is claiming persecution.

2. 3. 4. 5. Residences; Education; Employment; Parents and Siblings.

The current I-589 form asks for personal history including information about the applicant’s parents, applicant’s education, addresses at which the applicant resided for the past five years, and the applicant’s employment (including unauthorized employment) for the past five years. Note that for residences and employment, the applicant must list information for the last five years.

Often applicants who are working without authorization do not want to give the name of their employer for fear of getting the employer in trouble. In that case, the applicant may feel more comfortable being somewhat vague, such as “Mexican Restaurant, Brooklyn, NY” rather than naming the specific establishment.

Similarly, if the applicant has relatives who are in the United States without lawful status, the applicant may feel more comfortable giving a vague current location, such as “Los Angeles, CA” as opposed to a specific address.

Part B. Information about Your Application

In Part B of the application, the applicant is expected to lay out in detail the basis for his claim. A limited amount of space is offered on the application to answer several basic questions about the reason the applicant is seeking asylum.

» Practice Pointer: Some practitioners do not write anything other than “See attached affidavit” in response to the “essay” questions. This strategy is strongly discouraged. Often at the asylum interview, the Officer will be following along with the I-589 and not with the affidavit itself. Thus the best practice is to succinctly summarize the claim in a few sentences which include the most serious incidents that comprise the claim. You can attach additional sheets of paper to expand on these answers, but since you will already be attaching a very detailed affidavit, it’s best to try to fit the answers in the space provided.

Remember, the Officer will have the entire declaration to read as she is reviewing her notes and the file after the interview. Your goal with the I-589 should be to make it as easy as possible for the Officer to follow along with the applicant’s story during the interview.

1. Why Are You Seeking Asylum?

You should check the box “Membership in a Particular Social Group” for claims based on sexual orientation, transgender identity and/or HIV status. Note: it is possible to apply on more than one ground at once. Thus an applicant may simultaneously be applying on other ground(s) such as religion or political opinion. If the applicant was active in promoting LGBT/H rights in his country, this may also form the basis of a political opinion claim. Also note: if the applicant is seeking relief under the Convention against Torture, you should check this box as well.

1. A. Have You, Your Family or Close Friends or Colleagues Ever Experienced Harm, Mistreatment or Threats in the Past?

This question is asking about past persecution. It is important to succinctly state any past harm that either the applicant or anyone whom she knows personally has suffered on account of her sexual orientation, transgender identity or HIV-positive status. If the applicant has never directly experienced harm herself, it is very useful for her to give detailed examples of harm that her family or friends have experienced as this helps personalize her fear of future persecution. Likewise even if the harm she suffered in her country didn't rise to the level of persecution, it is important (if factually possible) to include some examples of harm here (for example, school taunts, family disownment) to paint a picture of the life that the applicant is afraid to return to.

It is best to be succinct and specific in answering this question because the Asylum Officer will probably follow along with the answers to the “essay” questions during the interview.

1. B. Do You Fear Harm or Mistreatment if You Return to Your Home Country?

This question essentially asks whether the applicant fears future persecution. For the applicant to qualify for asylum the answer to this question must be “yes.” Again, it is helpful to be both succinct and specific in detailing the type of harm feared – abuse by police, gay bashings, coercive psychological “treatment,” forced marriage, disownment by family, lack of medical treatment, inability to find any employment, etc.

The answer to this question is especially important if the applicant did not experience past persecution. You should explain specifically how the applicant became fearful of the consequences of being LGBT/H especially if he had no personal experience with such persecution. In some cases, the applicant may have become aware of the persecution of other sexual minorities because of incidents in which friends or acquaintances had been victims of persecution, or when such incidents happened to strangers and were reported in the media or documented in other sources. Again the applicant should be as specific as possible about how he learned of the harm that occurred to others.

B. Have You or Your Family Members Ever Been Accused, Charged, Arrested, Detained, Interrogated, Convicted and Sentenced or Imprisoned in any Country, Other than the U.S.?

You may have already included information about arrests or detentions the applicant suffered in his country in your answers to a previous question, but you should still list such incidents again in answer to

this question. Remember, this question doesn't only ask about convictions, but includes arrests, detentions, and interrogations. Thus any interaction the applicant had with the police or military in which he did not feel free to leave should be included here.

Answering this question can help provide details about the basis of the applicant's claim, if, for example, he was detained and abused by the police because of his sexual orientation. In some sexual orientation based cases, applicants have been previously arrested, charged and convicted of violating laws prohibiting homosexuality or homosexual sexual conduct. These "prosecutions" for private sexual activity between consenting adults may in fact be persecution.

It is also important to include any information about arrests or detentions even if they are unrelated to the asylum claim itself. Convictions for some crimes could lead to a bar to asylum so the Officer will pay close attention to the answers to this section. *See* Section # 6.2.

3. A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country?

This question is usually most relevant to someone who is claiming persecution based on her political opinion or affiliation with a certain political organization. In the case of sexual-orientation based claims, if the applicant was a member of an LGBT/H organization and for that reason was targeted for persecution then the applicant may have a dual claim based on LGBT/H status and political opinion. The applicant should list any or all associations or memberships with LGBT/H organizations in her home country along with corroborating evidence of such membership such as letters, membership cards, news stories, etc.

Even if the applicant herself was not affiliated with any organizations in her country, she may fear returning because of her family's affiliations. For example, a Colombian applicant with a politically active brother may fear returning to her country based on her own imputed political opinion because of her brother's activities. It is therefore important to answer this question thoroughly regarding the entire family.

The answer to this question could also trigger mandatory bars to asylum if the applicant was affiliated with an organization with the United States considers to be a terrorist or genocidal organization.

3. B. Do you or your family members continue to participate in any way in these organizations or groups?

The answer to this question could impact the applicant's fear of future persecution, so if he is still involved in any of these groups, he should explain thoroughly his involvement.

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

If the applicant is applying for relief under the Convention against Torture, she should be able to answer truthfully "yes" to this question. *See* Section # 7 for more information about CAT relief. Basically, if the

applicant fears physical harm or pain either directly at the hands of her government or with the acquiescence of her government, she should respond that she fears torture in her country. Again, although the answer to this question may be redundant with answers to other questions, you should still include succinct but detailed information about why the applicant fears torture and by whom.

Part C. Additional Information About Your Application

If an applicant can truthfully answer all the questions below by checking NO that means that the applicant is not facing any substantive issues that may jeopardize the applicant's eligibility for asylum. However, if the applicant has to answer any of the questions in the affirmative then the applicant should include a detailed explanation of his answer.

1. Have you, your spouse, your child(ren), your parents, or your siblings ever applied to the United States Government for refugee status, asylum or withholding of removal?

The response to the question of whether an applicant has previously applied for asylum or withholding of removal may be extremely important in the adjudication of this application. If the applicant has never before filed such an application, then the obvious correct answer is simply to check the "no" box.

In some cases, an applicant is filing an application because he has been previously included in an application by a parent, but no longer qualifies as an unmarried child under twenty-one and must now file a separate application.

In other cases, however, the applicant has previously filed an application (yes). This application may still be pending with the Immigration Service or may have been denied administratively (denial by the Asylum Office.) In either case, a subsequent application for asylum must fully explain the circumstances surrounding the previous application and the disposition or status of the previous application. This explanation may be incorporated in the applicant's affidavit, particularly if it is a lengthy explanation and if it helps explain other parts of the case such as the applicant's fear of return to his country.

It is worth noting here that some individuals with true LGBT/H based asylum claims may previously have had weak, frivolous or fraudulent asylum applications filed on their behalf on other grounds. These previous applications may have been filed by an attorney or non-attorney (such as a "notario") in order to obtain employment authorization for the applicant without fully explaining the nature of the documents being filed. It is, therefore, vital that an applicant fully explain the reasoning behind the previous application.

2. A. After leaving the country from which you are claiming asylum, did you or your spouse or child(ren), who are now in the United States, travel through or reside in any other country before entering the United States?

2. B. Have you, your spouse, your child(ren), or other family members such as your parents or siblings ever applied for or received any lawful status in any country other

than the one from which you are now claiming asylum?

The purpose of these questions is to determine whether the applicant could have sought or could currently seek asylum or other lawful immigration status in a country other than the United States. Asylum is meant to be an application of last resort; if the applicant had or has a reasonable opportunity to safely relocate elsewhere, that is a ground for the United States to deny the asylum application.

Note that question 2. A. inquires both as to whether the applicant resided in another country and as to whether the applicant traveled through another country. If the applicant traveled briefly through another country (for example a Guatemalan traveled overland across Mexico), it is unlikely that the Asylum Officer would question why he did not seek asylum there. If, however, the applicant traveled through another country which grants asylum to LGBT/H individuals, he should be prepared to explain why he did not seek asylum in that country. Likewise, if an applicant actually resided in another country before fleeing to the United States, he should explain why he did not seek asylum there. For example, if an Egyptian lived in Qatar before coming to the United States and applying for asylum, he could explain that sexual minorities are mistreated in Qatar as well.

3. Have you, your spouse, or child(ren) ever ordered, incited, assisted, or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

This question again addresses mandatory bars to asylum. In the vast majority of cases, the answer to this question will be “no.” If the applicant did participate in persecuting others, for example, during mandatory military service or forced guerilla service, he should explain in detail why he was forced to carry out the actions which he did.

4. After you left the country where you were harmed or fear harm, did you return to that country?

There are many situations which might lead to an asylum applicant returning to her home country after having left it. Because many LGBT/H asylum applicants don't know that their sexual minority or HIV status can be the basis of an asylum claim, many individuals return to their countries to comply with the terms of their visas. Some applicants make regular trips to and from the United States to receive HIV medical treatment here. Other applicants, such as students, may not have experienced persecution in their countries until they've had the chance to live in the United States and “come out.”

The applicant must anticipate that the Asylum Officer will question why she is afraid to return to her country now if she willingly returned in the past. She should address this anticipated question in this answer on the form.

5. Are you filing the application more than one year after your last arrival in the United States?

If the answer to this question is “yes,” you should explain in detail why the applicant did not file within the one year filing deadline. Missing the deadline means the asylum application will be denied unless the applicant can demonstrate an exception to the one year filing deadline. It is important to state succinctly but with some detail the applicant’s claimed exception to the one year filing deadline in this section. The two categories of filing deadline exceptions are for “changed circumstances” and/or “extraordinary circumstances.” If the applicant has missed the one year filing deadline, please *See* Section # 5 for a detailed discussion of the one year filing deadline and possible exceptions. It is also important to understand that even if the applicant meets an exception to the one year deadline, he must file “within a reasonable period of time” after the exception. The answer to this question should therefore also briefly address the reasonableness of the period of time.

In general, an applicant should not file for asylum affirmatively if he or she has missed the one year filing deadline, unless he or she has a strong argument for a filing deadline exception.

6. Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted and sentenced for any crimes in the United States?

It is very important that the applicant answer this question truthfully. The applicant must answer “yes” if she was ever arrested, even if she was never charged or convicted. Thus, even if a criminal case was dismissed and sealed, the applicant must answer “yes.”

If an applicant was convicted of a “particularly serious crime” she will not eligible for asylum or withholding of removal. If you are not certain whether a crime that the applicant committed would affect her asylum eligibility, research this issue thoroughly before filing the application. For more information on criminal bars to asylum eligibility *see* Section # 6.2.

Part E. Your Signature

The applicant must sign and date the application, attach two photographs and write her name in her native alphabet if the alphabet is different from English. If the applicant’s spouse, parent or child assisted in preparing the application, she must write her name on the form. If the application was prepared by an attorney or accredited representative, the “Yes” box should be checked in answer to the question “Did someone other than your spouse, parent, or child(ren) prepare this application?” The applicant should also check the appropriate box to the next question about whether or not he or she has been provided with a list of free or low cost attorneys. Failure to check a box, even if it’s not particularly relevant to the claim, can lead to the entire application being returned to the applicant.

The applicant should read the certification written above the signature line which indicates the penalties for false statement of material fact and the applicant should carefully read the "WARNING" that applicants for asylum may be subject to removal (i.e. deportation) if asylum and withholding claims are not granted.

Part E. Declaration of Person Preparing Form if Other than Applicant, Spouse, Parent, or Child

If the applicant is represented by an attorney, the attorney should complete and sign this part. The attorney must also complete a Notice of Appearance Form (G-28) (preferably on blue paper) to be recognized as the attorney of record.

Nevertheless, if an attorney assists an applicant to complete the application, even if the attorney does not intend to represent the applicant, he or she must sign the form and supply contact information here.

Part F. To Be Completed at Interview or Hearing

The applicant will be asked to complete and sign this part at the interview or before the Immigration Judge to re-affirm that the application and documentation attached are true.

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

16. Application Process: Sample I-589

For a sample of a filled out I-589 (which accompanies the sample declaration in Section #19) [click here](#) for a pdf version.

Note: there are places on the I-589 that require the applicant and the preparer to sign. This version is unsigned since it was saved as a pdf but you and your client should sign the I-589.

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

17. Application Process: Preparing the Asylum Declaration

Every application for asylum should include a declaration, or narrative from the client, detailing her experiences in her country, reasons for fleeing, and reasons that she fears returning. This document is the single most important component of the written asylum application because it allows the client to tell her story completely and, as much as possible, in her own words.

It is often advisable to ask the client to write a draft statement which will serve as the starting point in revisions which you and client will work on together. There are no rules about what length a declaration ought to be, as long as the declaration thoroughly conveys the client's story. That being said, most declarations will be in the 10-25 page range. The declaration should be written in numbered paragraph form for easy reference during testimony, in written briefs, or in closing arguments.

Each declaration will, of course, be different as every applicant's personal experience is different. In general, the declaration should provide a detailed view of the client's life in his country. The representative should help the client to edit out material that is not relevant to the claim, but it is important for the declaration to convey a complete understanding of the situation in the client's country. Thus, even relatively minor incidents of discrimination and harassment, which would not rise to the level of persecution on their own, can be important to provide a context for the incidents which led the client to flee his country.

» Practice pointer: Details matter! It is very important to include as many details as possible in each incident described in the declaration. It is also important to break down generalities like, "I was called names throughout my childhood" to specific examples. The client can start with the generality, and then use specifics to illustrate the point, "For example, I remember once in third grade, I walked over to a game of soccer that the other boys were playing when one of them called me a 'sissy' and told me to go home and play with my dolls."

The declaration must include all of the elements of a successful LGBT/H asylum claim: membership in a particular social group; past and/or well-founded fear of future persecution; and, if relevant, an exception to the one year filing deadline. At a minimum, the declaration should hit on the key points discussed below.

17.1 Client's Childhood

The client should describe how she was treated as a child by her family, peers, school, religious or other authorities because of actual or perceived LGBT/H identity. If she experienced problems, describe the who, what, where, when and why of the experiences and their effects on her. Although clients are often unaware of their sexual orientation or transgender identity during their childhood, they may have already felt "different" or preferred the company or activities of the opposite sex. Often LGBT/H children experience sexual abuse because adults sense their vulnerability and know that the child's "difference" would lead to her being blamed if she reported the abuse.

17.2 Client's Realization of Identity

The applicant should explain at what age and how he realized his different sexual orientation, transgender identity or HIV-positive status; what reactions this caused him and why; what changes the client made in his life because of this identity. Remember that essential to proving an LGBT/H asylum claim is proving that the client actually is LGBT/H. One of the primary ways to prove this identity is through detailed written and verbal testimony about the client's coming to terms with his identity.

17.3 Client's Adolescence

The applicant should detail how he was treated as an adolescent by his family, peers, school, employer, religious or other groups or authorities like the police, military, etc. because of actual or perceived LGBT/H identity. If he experienced problems, describe the who, what, where, when and why of the experiences and their effects on him. Adolescence is often the age at which individuals first begin to understand their sexuality and gender identity, so this period can be particularly important in LGBT/H cases.

17.4 Client's Adulthood

The applicant should describe how she was treated as an adult by her family, peers, school, religious, employer or other groups or authorities like the police, military, etc. because of actual or perceived LGBT/H identity. If she experienced problems, describe the who, what, where, when and why of the experiences and their effects on the client. While problems directly at the hands of the government (such as the police or military) most clearly qualify as persecution, other problems the client experienced should also be included. This may mean include: being gay bashed, threatened by neighbors, fired from work, called names, or denied medical treatment. Even incidents which would not rise to the level of persecution individually may cumulatively be held to be persecution. If the client was mistreated by non-government actors, she must explain why she believes that the government would be unable or unwilling to protect her from these private actors.

17.5 Availability of Legal Protection for Client

It is important for the applicant to explain whether he reported any incidents of abuse to the police or other authorities. If he did not report the incident(s), he should explain why it would have been unsafe or impossible to do so. If the incident was reported, what were the effects of the report, if any, on the client or his family.

17.6 Client's Knowledge of People Similarly Situated

The applicant should describe what she knows about how other LGBT/H individuals in her country have been or are being treated and how she knows this. Since the application is generally based at least in part on a well-founded fear of future persecution, treatment of other, similarly situated individuals, is relevant to explaining the client's fear of return. As with all aspects of the declaration, details matter. It's better for the client to say, "I remember reading a newspaper article a couple of months before I left about a transgender woman who was killed in my city" than to say, "Everyone knows they kill transgender people in my country."

17.7 Client's Possible Delay in Departure after Abusive Experience

The applicant should explain whether and why, if persecuted in the past, she did not leave her country immediately. Adjudicators may try to use a delay in departure to argue that the client suffered an isolated incident and that she lived in her country safely afterwards. If the client did not leave immediately after an abusive experience, she should explain why and also explain what steps, if any, she took to avoid further harm while she was still living in her country.

17.8 Event(s) Triggering or Culminating in Client's Departure

The declaration should include what, if any, specific event or series of events led to his decision to leave his country. For some applicants the decision to flee from their country may be the cumulative result of many incidents, for others, a single compelling incident may cause them to flee. If there was a particular incident that triggered the departure, this should be highlighted. It is especially important to focus on the triggering event if the client had traveled to the United States or other countries where he could have applied for asylum in the past and then returned to his country. A specific triggering event (such as an incident with the police, or attack on a friend) can be very important in explaining why, in spite of having willingly returned to his home country in the past, the client reached the decision that he had to flee his country permanently.

17.9 Client's Destination Choice

The applicant must explain why when she decided to leave her country, she did not opt to pursue: 1) relocation elsewhere in the country; 2) refugee status or relocation to another country, and/or; 3) immediate relocation to the United States.

17.10 Client's Comparison between United States and Home Country

The declaration should also include the client's experience in the United States as an LGBT/H person and an explanation of how has it been different than in his country (e.g. in the areas of employment, health care, social support, involvement in organizations or events for sexual minorities/people with HIV/AIDS).

17.11 One Year Filing Deadline

If the client missed the one year filing deadline, she should detail the "changed circumstances" which now make her eligible for asylum or the "extraordinary circumstances" which prevented her from timely filing. She should also explain why her current filing is within "a reasonable period of time" after the exception. If the client has filed late and cannot demonstrate an exception to the deadline, she cannot win asylum, so you should spend almost as much time developing this section of the declaration as you spend on the rest of the declaration.

17.12 Thorny Issues

If the client has any negative facts in his application, such as arrests, return trips to his country, or a past opposite sex marriage, it is important for him to fully explain the circumstances surrounding the negative facts. The adjudicator will hone in on the negatives, so it's best for the client to head this off and explain himself in his own words. *See* Section #11 for an in depth discussion of common thorny issues in LGBT/H asylum cases.

17.13 Client's Specific Concerns over Return

What specifically does the client as an LGBT/H individual believe would happen to her if she had to return to her country. Why does the client believe this to be true.

17.14 What Not to Include in the Declaration

Opponents of political asylum often argue that asylum seekers are abusing the U.S. immigration system, "cutting in line" in front of other immigration applicants, and really coming to the United States for economic opportunity. In fact, an asylum seeker may be influenced by several motives in coming to the United States. While the declaration cannot contain any untruthful material, it is the representative's job to help the applicant decide which information should not be included because it does not help the case.

Generally, any statements that the applicant wanted to come to the United States because she believed it was the land of opportunity or that she could get a better job here, should not be included. If this is the applicant's primary motivation, then she probably should not be seeking asylum. If, primarily, she fled her country because of feared persecution and hopes that her economic situation will also improve, this economic motivation information will not help her application.

Although, as discussed above, the applicant should give a detailed description of his "coming out" process and write about important relationships he had in his country, he should not include graphic sexual detail. Such information is private and not relevant to the outcome of the case. Likewise, if an applicant has suffered sexual abuse or assault, it is important to include this information in the declaration in a manner that the reader can understand but which is not unnecessarily graphic. For example, it would be better to choose the phrase, "then the officer anally raped me" than to say "then the officer f***ed me up the a**."

Avoid legal terms and conclusions. It is up to the adjudicator to determine whether or not the applicant suffered "past persecution" or has a "well-founded fear of future persecution." Thus, the client should detail fear and harm that she has suffered or fears in the future, but should avoid drawing legal conclusions. It's better to write, "I felt so scared and humiliated when the police officer beat me," than to write "I was persecuted by a police officer beating in my country." The most important part of the declaration is to include a detailed statement of the applicant's life in her country and fears of returning. Leave the legal conclusions to the adjudicator.

17.15 Translation Issues

If the applicant does not speak English you should include a certificate of translation. As a practical matter, if you only submit an English declaration, it's unlikely that anyone will question why you have

not included a certificate of translation, but best practice is to include a translation certificate.

You have two choices for submitting the translated declaration. One choice is to submit the final version of the declaration in the applicant's native language along with an English translation. Another, less time-consuming, option is to submit the declaration in English only, along with a certificate of translation such as:

17.15.1 Sample Certification of Accurate Translation

I, Rita Garcia hereby certify that I orally translated the attached affidavit into Spanish and read it to the affiant who indicated that he understood it and agreed with its contents. I further certify that I am competent in both English and Spanish to render and certify such translation.

Rita Garcia

Sworn to before me this 14th day
of September 2005

Notary Public

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

18. Preparing the Application: Declarations Dos and Don'ts

Do

- **Assist the applicant to shape his declaration.** Some attorneys feel like since the applicant's declaration is his story, it should be submitted to DHS in exactly the form that applicant first writes it. The declaration is in many ways the most important part of the asylum application. This is where the attorney can play the biggest role, working with the applicant to draw out important details and explaining why other details are not relevant and best left out.
- **Organize the declaration chronologically and/or thematically.** Include bold point headings to make it easier for the reader to locate relevant sections of the declaration.
- **Include dates whenever possible.** Of course the applicant won't remember the exact date of an incident which happened many years ago, but she may remember that the incident happened during a particular season or while in a particular grade at school. The more specific the information, the more believable the story. Dates also make it easier for the adjudicator to read and follow the storyline.
- **Include detailed information about the applicant's "coming out" experience.** Before the adjudicator will determine whether or not the applicant has suffered or will suffer persecution, the adjudicator must decide whether or not she believes that the applicant actually is gay. The best way to prove this is through detailed accounts of the applicant's feelings about being gay, his first romantic relationship with a member of the same sex, his first serious boyfriend, etc. It is not necessary or appropriate to include graphically sexual information in this section (though it may be appropriate to do so in the mistreatment sections of the declaration if the applicant was raped or sexually abused.)
- **Include detailed accounts of specific examples of mistreatment that the applicant suffered.** While it's okay for the applicant to make broad statements like, "The police attacked me many times," it is critical to the claim for the applicant to provide detailed accounts of exactly what happened. This means including the who, what, and when of each incident that's relevant to the claim. The incidents of past mistreatment are the heart of the claim and it is the details of each incident which make the application come alive.
- **Include detailed accounts of specific examples of mistreatment that people the applicant knew/knows suffered.** An asylum application is based on past persecution and/or fear of future persecution. Thus, if an applicant's former boyfriend, neighbor, or co-worker is gay bashed or wrongfully arrested, it's important to detail what happened and the reason this increased the applicant's fear.
- **Include enough information about the applicant's life to tell her story completely.** While the focus of the declaration should be on the harm and fear of harm the applicant faces, the declaration should also include enough information about the applicant's life to tell her story completely. This should include: where she lived, where she attended school or worked, whether she had a partner, how her relationship was with her family, etc.
- **Address difficult issues head on.** Asylum adjudicators are trained to spot issues which affect the outcome of the case, so don't hope that if you leave a tough issue out of the declaration the adjudicator won't notice it. If the applicant was previously married, made many return trips to his country, has an arrest for shoplifting, etc, the declaration presents an opportunity for him to explain fully why he did what he did in the past and why he should still be eligible for asylum.

Don't

- **Use language that the applicant would not use himself.** Avoid legalese, legal conclusions, idiomatic expressions, or words that are not in the applicant's vocabulary. Although it's an attorney's job to help draft the declaration, you don't want the adjudicator to question the applicant about a phrase in the declaration which the applicant clearly doesn't understand. On the other hand, if the applicant's English is less than perfect you should not write the declaration in broken English. Just try to keep the language simple.
- **Draw legal conclusions.** Describe the harm the applicant suffered and the harm she fears in the future, but avoid drawing legal conclusions (this is your job as an attorney writing a brief, and the job of the adjudicator in coming to a decision, but not the job of the applicant in relating the facts of her case.) Thus, it's better to say something like, "The first time the police detained me was ... " than to draw the legal conclusion with "The first time I was persecuted by the police ..."
- **Include economic motivations to come to the United States.** When an asylum seeker leaves his country, there may be many reasons that he chooses to come to the United States. The hope of greater economic opportunity may be one reason among those, but this is not something to highlight in the applicant's declaration. Many asylum adjudicators fear that asylum applicants really only seeking asylum for economic reasons, there's no reason to draw attention to this fear. If economic opportunity is the primary reason the individual wants to stay in the United States, he probably shouldn't be applying for asylum.
- **Include anything that is untrue.** Your client may have friends who have won asylum and been encouraged by unscrupulous lawyers or notarios to embellish their stories or make up a claim. There is no more serious wrong in immigration law than intentionally fabricating information in an asylum claim. Be sure your client knows and understands this. See [Section # 3.5](#) on frivolous applications.
- **Include information that doesn't make sense to you just because your client insists it's true.** If something sounds implausible to you, it will almost certainly sound implausible to the adjudicator. Work with your client to understand what happened and to reach a point where you understand the incident.

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19. Preparing the Application: Annotated Sample Declaration

SAMPLE DECLARATION

UNITED STATES DEPARTMENT OF HOMELAND SECURITY CITIZENSHIP AND
IMMIGRATION SERVICES ASYLUM OFFICE LYNDHURST, NEW JERSEY IN THE MATTER
OF: JOAO DOE

STATEMENT IN SUPPORT OF APPLICATION FOR POLITICAL ASYLUM

I, Joao Doe, declare under the penalty of perjury, pursuant to 18 U.S.C. sec. 1546, that the following is true and correct:

» *Practice pointer: The declaration should begin with a brief introduction which lays out the basis of the asylum claim.*

1. My name is Joao Doe. I was born on February 23, 1975 in Sao Bernardo do Campo, a suburb of Sao Paulo Brazil, and I am a thirty year old native and citizen of Brazil.

2. I am a gay man. In Brazil, there was and is such intense hatred and violence against actual or suspected homosexuals by the government, its police, death squads and society that I had to flee to the United States. As a gay man, I suffered public ridicule, beatings, and sexual abuse by police and prisoners. I struggled through my childhood and adolescence to hide my homosexuality, fearing rejection, violence and abuse from the police and others merely because I was different.

» *Practice pointer: In general it is best to use the term "gay man" or "lesbian" rather than "homosexual" as a self-definition. It is okay to use the terms interchangeably in the body of the declaration, but the noun "homosexual," especially in the phrase, "I am a homosexual" sounds very clinical and has a slightly negative connotation.*

3. Although I arrived in the United States on July 7, 2001, I was just diagnosed with HIV on July 18, 2005. In my country, people with HIV and AIDS are called AIDS carriers and mistreated by the government and society. There is much blame against gays for AIDS and therefore they perceive male persons with AIDS as homosexuals and mistreat them more. The fact that I am a gay man living with HIV makes me a greater target for future mistreatment in my country. While I have always been afraid to return to Brazil, now that I know that I am also HIV-positive, I am certain that returning to Brazil would be a death sentence. Because of this enormous change in my situation, I am now filing for asylum.

» *Practice pointer: If the applicant has missed the one year filing deadline, this will certainly be an issue in the case. It is therefore important to address the issue head on.*

Childhood

» *Practice pointer: Bold face point headings help make the declaration readable for the adjudicator.*

» *Practice pointer: Although childhood mistreatment will almost never, in and of itself, be sufficient to win an asylum claim, it is important for the adjudicator to have as full an understanding of what the applicant's life was like in his country as possible.*

4. I am the fourth of eight brothers and sisters. My father is a shoe repairman and my mother, a housewife. I was more effeminate than most young boys growing up. As a kid, my classmates ridiculed me at school and on the streets shouting "menina" ("girl") or "viado" ("faggot.") They'd sometimes shove me when we were at the playground.

» *Practice pointer: When detailing specific bad names or incidents with name calling, it's best to write out the exact word in the language in which it was spoken (or written) and include the English translation directly afterwards.*

5. I remember one incident in particular. When I was maybe nine or ten years old, around 1985, I was walking home from a school and a group of boys were playing soccer. When I was walking by they stopped playing and whispered to each other and then asked me if I wanted to play with them. I was nervous because I wasn't a very good player, but I was so happy to be asked to join in, that I put down my books and ran over to join them. As soon as I made it over to the players, one of them pushed me to the ground and said that soccer wasn't a game for "viados" and that if wanted to join the game, I could be the ball. Then they all started kicking me, and I curled up to avoid getting hit on the head, and they were all laughing, "look he even looks like a ball." At one point they were all laughing so hard, I had the chance to get up and run away.

6. I ran all the way home. I remember trying so hard not to cry in front of the boys when they were kicking me, but as soon as I got away, I couldn't help crying and crying. In my rush to escape, I left my books behind. I was too ashamed to tell my family what had happened and I lied to my teacher about losing my books.

» *Practice pointer: It is very important to include detailed accounts of specific incidents which the applicant recalls. It is in these details that the adjudicator can really understand what the applicant went through in the past and why the applicant fears returning. It is also easier for the adjudicator to judge the client's credibility if there is a specific incident about which the adjudicator can elicit more details. Often applicants are reticent to discuss specific incidents and instead make broad statements like, "I was called names all the time." Or "I was always getting beaten up." It's okay for the applicant to make broad statements like this, but it's essential to also detail specific examples.*

7. I was too young to understand why I was different but knew that I was not as masculine as my brothers and other boys my age. I had no friends as a boy since the other boys insulted me and didn't want to be seen with me. I didn't tell my family about these painful episodes because I didn't want to alarm them and call more attention to the ways that I was different from other boys. My family avoided discussing my difference.

Adolescence

8. In 1989, when I was around thirteen or fourteen years old, I started to realize that I was physically attracted to other guys. I had always known that I was different from the other boys, and I'd always heard the name "faggot," but it wasn't until I was in my teens that I began to have real feelings for other guys and began to understand just what my "difference" meant.

» *Practice pointer: Remember that in an asylum case based on sexual orientation, the first thing you need to prove to the adjudicator is that your client actually is gay. The best way to do this is by providing detailed information about his "coming out" process, including when he first began to realize that he was gay and when he had his first romantic relationship with another man.*

9. In 1990, when I was fifteen, I began to work at a local grocery store during the day and attend school at night. Until then I had been ridiculed and ostracized because others saw that I was effeminate and therefore assumed that I was homosexual. But up to that point I had never acted on my feelings.

10. In 1991, when I was sixteen years old and still working at the grocery store, a man by the name of Jorge moved into town from a larger city and started working at the Post Office down the street from the store. In or around May, 1991, I was in the town park when Jorge approached me and persuaded me to have sexual relations with him in a dead end street. I say "persuaded" because he was much older and

came from a big city and said that he was married. I felt uncomfortable having sex with someone I'd just met, but I was sixteen and had never had any sexual contact with anyone. I remember feeling really scared, but at the same time, feeling kind of relieved to finally confirm for myself that I was gay and that that's why I'd always felt so different.

11. While I knew that this encounter in the park wasn't going to become a lasting relationship, I never imagined what Jorge would do. After we had our encounter, Jorge told a classmate of mine, Paulo, that I had had sex with him.

12. Paulo began to blackmail me, threatening to tell everyone in school how I was in fact a "viado" ("faggot") unless I brought him things from the store where I worked such as cigarettes, beer and food. I had no choice but to do what he told me because I was so afraid of how much worse my life would be if he told more of my classmates that I truly was homosexual.

» Practice pointer: Although purely private incidents with other students may not meet the definition of persecution (since there is no state involvement and no unsuccessful effort by the applicant to receive state protection) it is worth including these accounts because they help to paint a picture of the intolerance the applicant faces in his society.

13. Although Paulo never did tell my classmates, I spent the next two years in that school in constant fear. I was afraid of how much worse my life would be if everyone at school knew for sure that I was gay. I was also afraid that I'd get caught stealing from the store and have to explain to my boss and parents the reason I was taking things.

My Family Moves to Sao Paulo

14. In 1993, at age eighteen, my parents decided to move to Sao Paulo itself. I was relieved that we were moving because I could no longer take the ridicule and blackmail by my classmate and hoped that my life as a gay man would be better there. Once there, I did meet other gay men, and I thought that my life would be easier. However, I soon realized that in big cities the problems for gay people were even bigger as I now describe.

15. I had not yet graduated from high school and hoped that moving to a new city, I'd be able to make a new start. I still had one more year before I would graduate and thought that moving someplace new, I could leave my troubles behind me, but almost immediately, my new classmates suspected that I was gay and made my life miserable calling me not by my name but names like "bicha" ("faggot"). I was so miserable that I eventually stopped going to school.

16. I remember one occasion when I got into the classroom late, but still before the teacher came into the room. As soon as I entered the classroom, all of the other students burst into laughter. I took my seat, and tried not to look at them. Instead I looked at the board in the front of the room, where there was a drawing of a man with an erect penis having sex with a goat. An arrow pointed to the man with my name.

17. I remember opening a book and pretending to read so that I could try to ignore the other students. When the teacher came in, he started yelling at me, asking me if I'd drawn this picture, and the students all began laughing again. I was so humiliated, I just left the classroom without saying anything.

» *Practice pointer: It is always best to include specific examples of mistreatment or problems which the applicant suffered. It is much more powerful for the reader to hear the details of a particular incident than for the applicant to make generalized statements like, "Other students always made fun of me."*

18. There were other times that I would remain in the classroom to avoid being publicly humiliated by the other students when I went outside. I actually filed complaints with the school director's office. Instead of disciplining the other students, the director told me that if I would act more like a man, I would not have these problems with the other students.

» *Practice pointer: It is important to state that the applicant filed complaints, if he did, because this helps show that what he suffered was not merely isolated incidents of adolescent cruelty, but rather that the institutions in his country did not protect him from this behavior.*

19. Even though I only had half a year left to get my high school degree, in the winter of 1993, I dropped out of school. I remember that my mother was very disappointed because she always thought I'd go on to college and maybe become a lawyer or a doctor. Instead, I got a job working in a men's clothing store called Armando's.

20. I was relieved to be away from the abusive environment of the school at last, though I also felt depressed about my future. This was a hard time because I was still living with my family, but I couldn't explain to them the real reason I left school. I just told them that there was no point to going to school and that I was old enough to earn my own money.

My First Relationship

» *Practice pointer: To prove that the applicant actually is a member of the particular social group of "homosexuals," it is important to include detailed information about relationships he had as proof of his sexual orientation.*

21. After I'd been working at Armando's for around six months, my life changed for the better. A young man came into the store looking to buy a suit, and I went over to ask him if he needed help. Immediately I felt a connection with him. I could sense him looking at me longer than he needed to and I felt nervous talking to him.

22. I helped him try on several suits. He told me his name was Ricardo and he asked me to meet him at a bar later. I remember feeling like I could barely breathe when I wrote down the address of the bar.

23. I met Ricardo later that night at a bar that was filled with men. It was the first time I'd been to a gay bar. I felt scared going in there because I knew these bars were sometimes raided by the police, but I also felt elated seeing all these gay men who were so comfortable being together.

24. As soon as I saw what kind of bar this was, I knew for sure that Ricardo was interested in me in the same way I was interested in him. Since I still lived with my family, we went to his apartment from the bar. This was an amazing night for me, to be with someone close to my age (Ricardo was 22), who

seemed like he really liked me and was comfortable with being gay himself.

25. After that, Ricardo and I started to see each other regularly. This was an amazing period for me. After spending my whole life feeling like there was something wrong with me and like I'd never fit in, I finally found a person who was like me and who accepted me as I was. About nine months after I met Ricardo, in early 1995, I moved into his apartment with him.

26. I'm sure that while I was still living at home, my family had begun to understand the true nature of my relationship with Ricardo. We were together all the time. I started coming home very late, and sometimes not at all. And when we weren't together we were talking on the phone. Although I could sense increasing tension with my family, everyone chose to ignore the situation and pretend that what they knew was happening wasn't really happening.

27. Living with Ricardo was wonderful. We were finally free to be ourselves together without having to worry about when I'd get home or what my family might think. Knowing someone who had been "out" longer than I had was also very good for me. Ricardo introduced me to his other gay friends, and I soon had a whole circle of gay friends.

Problems with the Police

28. Even though my home life was improving, however, this didn't mean that as a gay man I was free to live without fear in Brazil.

29. My friends and I never found peace on the streets since young heterosexual men would approach, insult and even attack us as "viados" ("faggots") and AIDS carriers. Even then there were gangs of men who would drive by us in the plaza and throw rotten eggs, water balloons, sticks, and rocks at us shouting that we were faggots and AIDS carriers.

30. The police in Brazil, who are supposed to protect people, instead were often the most abusive towards gay people. We gay people could not defend ourselves against the police but only held our heads down and listened to them in silence. We always knew that if we made them angry, they had this special

mistreatment called “telephone,” a technique where the police officer opened his two hands, lifted us his arms and brought them down hitting the person’s ears, causing intense pain and ringing in the ears.

31. I recall one night in 1996 that the police applied the telephone to my friend Claudio because they claimed that he was homosexual, out late at night and should be home and he spoke back to them.

32. Ricardo and I were at home at around 11:00 when Claudio knocked on our door, waking us up. His shirt was torn and he looked visibly shaken. I asked him what happened but he wouldn’t talk about it, he just asked if he could sleep on our couch. It wasn’t until the next morning that he told us what the police had done and about the “telephone” treatment he had received.

» Practice pointer: Since asylum claims are based on fear of future persecution as well as past persecution, it is helpful to include accounts of serious problems that other gay people the applicant knew experienced. As with the applicant’s own experiences, it’s important to include details rather than to generalize.

I Am Raped by a Policeman because I Am Gay

33. In the summer of 1996 I suffered a terrible experience which still haunts me. I was coming home at night from eating dinner out with some friends. After I’d walked a few blocks from the restaurant towards the bus stop, a man who seemed drunk approached me and told me to walk with him. I told him I did not have time and tried to walk away from him. He then grabbed me, called me “a faggot” and told me not to do anything funny because he had a gun. He forced me to walk with him all the way up a hill near a sawmill, located on the other side of the train tracks. He then pulled down his pants and forced me to perform oral sex on him at gunpoint. Afterwards, he made me take off my clothes and raped me. When he finished, he put his gun into my anus and told me to be still, otherwise he would pull the trigger. He warned me that if I told anyone, he’d kill me. He left me there at the sawmill alone, crying. I made my way home.

34. I pulled myself together before I got home, and I decided not to tell Ricardo about what had happened. To this day, I don’t really understand why I didn’t tell him. But that night I just felt dirty and used, and felt, somehow like I was at fault for this happening. I worried that Ricardo wouldn’t want to be with me any more if he knew.

35. I was angry about what happened, but I also feared reporting this experience to the authorities given his threat. After this happened, I was scared to leave my home because I was afraid I might see him again and he might abuse me sexually again. Even though I didn't tell Ricardo what had happened, our relationship changed after this. About two months after the rape, the two of us broke up, though we remained friends. I moved out of Ricardo's apartment and shared an apartment with another gay friend named Silvio. Silvio and I became good friends, but were never romantically involved.

» *Practice pointer: It is always helpful to get affidavits or letters from the applicant's former partner(s) confirming their relationship as another way of proving the applicant's sexual orientation.*

36. In June, I learned who the man that raped me was when I saw his photograph in the *Diario Do Rio Doce* newspaper. His name was Joaquim Cruz and he was an undercover member of the *Policia Militar de Governador Valadares, PMGV*, the military police. The newspaper reported on his death. He was killed in retaliation for having allegedly killed a young couple with a hammer. When I realized that he had been a military police officer, I was even more thankful that I did not report him to the authorities. Now that he was dead, I felt a little safer but that would not last for long.

» *Practice pointer: It is always important to explain whether or not the applicant reported the mistreatment to the authorities. If the applicant did report the incident, what was the result? If the applicant did not report the incident, why not? Even when the applicant suffers harm directly from government agents (like police officers) adjudicators may want to know whether the applicant reported the incident to a higher authority within the government. The applicant should explain why he didn't feel safe doing so, even if the reason (i.e. the police already abused him) seems obvious to him.*

My Second Incident with the Police

» *Practice pointer: Incidents of mistreatment directly at the hands of the government are the clearest examples of persecution. It is crucial to provide in-depth, detailed accounts of any problems the applicant experienced with the police, military or other government agencies.*

37. On another occasion, in around March, 1997, at around 9:30 p.m., I was sitting in the Plaza Italia with my friends Silvio and Nelson, talking with other gay friends when all of a sudden four police cars pulled

up with two police officers in each car. They said to one another, “There are the faggots” and pointed their guns at us. They ordered us to get in their cars because the Police Chief wanted to see us. We asked why but they refused to answer but said that we would soon know why. When we got to the police station, we continued to ask why we were under arrest, and the police officers continued to insult us as “viados” (“faggots”), and ordered us to shut up and behave since otherwise we would be beaten.

38. The commanding officer directed us into a room and ordered us to get undressed down to our underwear and get in a line to be processed for the cell. At the head of the line there were two police officers holding a “cacete,” a weapon made of hard rubber with a wooden handle. They ordered us to walk by them to the cell. Each time we passed, they smacked us hard twice in the buttocks saying this was our stamp to get in the cell. Being hit by the “cacete” was very painful.

39. The commanding officer forced us into a ten foot by ten foot cell with a cement floor and six common criminals. The officer told the criminals “here come your girlfriends, rape them and do what you want with them.” He encouraged the criminals to sexually abuse us! The criminals clarified that they were in there for some time for different kinds of offenses from fights, to car thefts and drugs.

40. As soon as the officer left, the criminals attacked us, pairing up, making us perform oral sex and raping us. I cried to myself as I endured this rape by two criminals. I knew that we were outnumbered and the police condoned the criminals’ actions, so there was nothing I could do to escape.

41. At sunrise, when a guard came to the cell to check on us, we asked when we were to see the Police Chief. The guard told us that it might not be until tomorrow if he decides to take the day off. I became petrified that I was to be detained without charges indefinitely at the mercy of these criminals and their sexual abuse.

42. Thankfully a few hours later, an officer finally came to bring us from the cell to see the Police Chief. We were ordered up against the wall when the Chief came in. In front of the other officers, the Chief insulted us as “viados” (“faggots”) and asked us how we enjoyed the evening in the cell. He ordered us to walk across the room, still in our underwear, saying that we walked like faggots. He warned us that he did not want to hear anything about us or see us hanging out on the street, since the next time, we would not

be released the following day but be kept in jail for our faggot ways. He then ordered us to get dressed and sent us out of the police station. "Look at the faggots walk," the Chief and other officers laughed as we left. It was therefore now completely clear to me that the Chief and police had detained me and my friends and encouraged the criminals to sexually abuse us as punishment simply because we were gay.

43. I suffered bruises from the criminals' rape all over, including in my rectum and I could not sit down for days from the pain. I did not seek medical attention for fear of being identified as a homosexual by the doctor and mistreated. I did not report the actions of the police since it was the police themselves who told the criminals to abuse us. I believed if I tried to make some sort of complaint, I would only be attacked again by the police. In Brazil, gay men frequently "disappear" and I feared for my life if the police thought I was a troublemaker.

» Practice pointer: If the applicant suffers an injury which requires medical treatment, it's important to obtain the medical records. If the applicant did not seek medical treatment, it's important to explain why not since the adjudicator may wonder why the applicant has not provided medical records otherwise.

My Third Incident with the Police

44. About one month after the arrest, on the Wednesday before Good Friday of 1997, at around 8:30 p.m., I was with my friend Silvio, and another friend, Jose, just walking down the street together, when we saw two police cars approaching. The sight of the police sent us running for our lives given the Chief's previous threat against us if the police found us again. I could not escape too far but scrambled up a bushy tree from where I could not see much of what happened but could hear everything. I heard the police officers shout "stop!" I heard one of my friends, Jose, begging the officers to let him go because he had done nothing wrong. The police said that he looked like a faggot and that they would take him to the station. "Get in," they shouted to him and drove off.

45. After they left, I got down from the tree thankful that I had not been discovered but panicked over what might happen to Jose. I later learned that they detained him overnight without charges. He wouldn't speak with us about what happened to him in jail, so I suspect that he was also subjected to sexual abuse.

46. During this time, I had started to take classes at night so that I could get my high school graduation certificate. I had begun to realize that I wouldn't have any future if I didn't go back to school. In the fall of 1997, I began to take business classes part-time at the University of Sao Paulo while continuing to

work at the clothes store.

My Fourth Incident with the Police

47. At the end of February, 1998, I went to Rio de Janeiro to spend Carnival. On a Saturday night at around midnight, I was walking in a park with an acquaintance named David when two police officers suddenly appeared. The officers demanded to know what we were doing. We told them that we were only talking, which was the truth. The officers called us liars since no two men would go to a park just to talk. They demanded to know which of us was the “bicha” (“faggot”). We denied that we were faggots. They responded that if we did not confess, they would take both of us to jail where we would be kept until Ash Wednesday. I decided to confess since I feared the abuse we would face in jail. They ordered David to leave.

48. When I asked whether I could go now, they responded, “Not before you give us something in return.” The officers pointed their guns at me and ordered me to perform oral sex on both of them. I felt sickened to have to do this, but realized that they had guns and I was completely at their mercy. The abuse lasted around 30 minutes. Afterwards, they released me, telling me “Go, but don’t look back or you’re dead.” As I walked from the park, I shivered in fear that they would shoot me in the back even as I did not look back at them. Again, with the police themselves abusing me and threatening me, I was too afraid to try to report what happened. I didn’t want to go near a police station for fear I’d see the same officers again.

49. After this incident happened, I decided that I would try to avoid going to places where gay people gathered because I was terrified to have another encounter with the police. For the next couple of years I focused all of my energies on working during the day and going to school at night. This was a lonely time for me but I felt like my life was moving forward since I was doing well in school.

My Fifth Incident with the Police

50. It wasn’t possible for me to live my life completely without human contact, however, so one night in June, 2001, after an exam, I went out to a bar with Christian, a gay friend from the university. I was returning home late at night at around 1 a.m., when two police officers stopped me and asked where I was coming from. I told them the truth that I was coming from a bar called Los Ventos. Everyone knew that gay people met each other at this bar, so the police assumed I was gay and began to ridicule me. They told me that I was a faggot, looking to get “fucked,” and that they would take me into the station to let the prisoners have fun with me. I was terrified of being thrown in with the common criminals again and being sexually abused again, so I told them I had to get home to go to work the next morning and began to walk away. One officer took his cacete in rage and smacked my left hand threatening me to “get out of their sight, faggot!”

51. I was so afraid, I started running. I remember that I could hardly see while I was running because I couldn't stop myself from crying. I really believed that I was going to be shot in the back for running away from them, but at that point I decided that I'd rather be killed than be forced again to have sex with the police. Even now when I think about it I remember how I felt that night, scared, angry, humiliated, and completely powerless to protect my rights in a country where the police are free to attack us.

52. That night I decided that whatever it took, I had to get out of Brazil. Later that week, I applied for a tourist visa to come to the U.S. but it was denied.

Escape to the United States

53. After many years of not having an honest conversation with my family about my sexuality, I finally sat down and told my mother everything that I had experienced because I am gay. We talked late into the night, both crying and she agreed to help me get out of Brazil. She helped me pay for a plane ticket to Mexico, and on June 23, 2001, I flew to Mexico City. After that, I met up with some coyotes who were friends of my mother's brother. On July 7, 2001, I entered the United States without inspection by Laredo, TX.

» Practice pointer: Although in this case the applicant missed the one year filing deadline so his exact date of entry is not essential, it is still helpful to bolster his overall credibility if he can submit evidence confirming his story of entering the United States. Thus, he should submit a copy of the airline ticket or passport with the entry stamp into Mexico. It will also be crucial to include an affidavit or letter from the applicant's mother confirming that she agreed to help him after concluding that his life was at risk in Brazil.

54. On July 18, 2005, at the Callen-Lorde Community Health Center, I tested HIV-positive. The news devastated me partly since I always practiced safer sex, except when the police and criminals in Brazil sexually abused me against my will. I panic just thinking about being deported to Brazil as a gay man living with HIV. It is my understanding that there is intense discrimination against people with HIV and AIDS in Brazil. Because of poor information about AIDS, people with HIV and AIDS are treated unfairly. Those who have the disease are ostracized and treated like lepers. I recall that many times while in Brazil since people think homosexuals are responsible for AIDS and are AIDS carriers, people who suspected that I was a homosexual insulted and threatened me as an AIDS carrier even when I was HIV-negative. Now that I am HIV-positive, I believe they will try to hurt me any way possible by not treating me in the hospital, refusing to give me employment, and not protecting me from police or gang violence.

55. I also fear for my life if deported because I am a gay man, considering the abuse I already experienced as a homosexual and considering the rise of the death squads that have been killing homosexuals with impunity. I have heard from my friends in Brazil of several people in my city who were murdered because of their sexual orientation and HIV status. I heard that in May 2003, Oswaldo Borges, an acquaintance of mine was found dead at age 27, with his body dismembered at a gas station in town. It is believed that he was murdered because he was HIV-positive.

56. To date, I still experience nightmares over what happened to me with the police, criminals and society. However, I wake up and am thankful for having found real safety in the United States.

57. I did not apply for political asylum until now in the United States since I did not know that the persecution I suffered in the past and fear in the future as a gay man could be the basis for political asylum here. It was not until I was diagnosed with HIV, two months ago, that I learned about asylum from a social worker at the Callen-Lorde Community Health Center. The social worker, Martin Peña referred me to Immigration Equality.

58. Although I have always been afraid to return to Brazil because of my sexual orientation, now, as a gay man who is also HIV-positive I'm more afraid than ever. I believe that if I'm deported to Brazil I will again face abuse and rape by the police, and that the mistreatment I face will be even worse now that I am also HIV-positive.

59. It is my hope that after so much abuse and mistreatment as a homosexual including physical and sexual abuse by the police and criminals and the prospect of even more abuse and mistreatment as a homosexual with HIV/AIDS if deported to Brazil, that the Asylum Office will consider granting me political asylum in their discretion. I thank you for your consideration of my application.

Signature Line Joao Doe Sworn to before me this 15th day of February 2006

Signature Line Notary Public

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20. Preparing the Application: Corroborating Client-Specific Documents

One of the greatest fears that an asylum adjudicator has is that the applicant has fabricated his story and that nothing he is saying is actually true.

It is therefore essential to provide as much supporting documentation to corroborate the applicant's claim as possible. Obviously, the most important documentation is that which goes to the heart of the applicant's claim – police records, medical records, affidavits and letters of partners, friends and family who witnessed the harm the applicant suffered – but it is also helpful to provide corroborating documents for other aspects of the applicant's story, including school records, employment records, and proof of community involvement.

It often takes considerable time and effort for an applicant to obtain corroborating documents, especially since such documents generally come from his home country, and he may not be in touch with family members or friends there any more. It is therefore important to begin brainstorming with the applicant almost immediately about what kind of corroborating documentation he will be able to provide.

Until recently, case law has made clear that an asylum applicant's specific, detailed testimony alone could be sufficient to win a claim for asylum. With the enactment of the Real ID Act, in May 2005, however, asylum applicants will be required to provide corroborating documents for their claims or offer a specific explanation of why it would not be possible to obtain the supporting documents. *See* Section #9 for a practice advisory on the Real ID Act.

20.1 Supporting Documentation Checklist

Understanding the significance of supporting documentation, the next question is what types of documentation should the applicant include? How can supporting documentation help prove the claim? The following is a "brainstorming" list, but it is not exhaustive. The more supporting documentation the applicant can provide (so long as it's not needlessly redundant) the better.

20.2 Proof of the Applicant's Membership in a Particular Social Group

20.2.1 For LGBT Applicants

- Affidavits/letters from the applicant's current and/or former partner(s) to establish sexual orientation and/or transgender identity;
- Affidavits/letters from the applicant's family member(s) or close friends who are aware of the applicant's sexual orientation and/or transgender identity;
- Photographs of the applicant with her partner or former partner(s);
- Letters from LGBT organizations which the applicant is/was a member of, volunteers with, etc.
- Letters from therapists or other mental health professionals who can attest to therapy sessions which deal with "coming out" issues, gender identity issues or other LGBT-specific issues.

20.2.2 For Transgender Applicants

- Affidavits/letters from medical and/or mental health professionals describing any steps the applicant has made in “transitioning” anatomical sex.

20.2.3 For HIV-positive applicants

- Affidavits/letters from medical and/or mental health professionals confirming the HIV diagnosis and describing in detail the applicant’s treatment regimen. If the medical provider has sufficient knowledge, this letter should include information about the unavailability of treatment in the applicant’s home country.

20.3 Proof of Past Persecution

- Affidavits/letters from partners, friends, family members or anyone else who was present during the act(s) of mistreatment;
- Affidavits/letters from partners, friends, family members or anyone else who the applicant confided in about the incident. This is particularly important if the witness saw proof of physical harm (injuries, torn clothes, etc.) or mental harm (crying, anxiety etc.);
- Newspaper or other media coverage, or coverage by human rights groups of the particular incident in which the applicant was involved;
- Arrest records. (These are generally not available since most LGBT asylum applicants are never actually charged with a crime);
- Records of police complaints. Sometimes applicants will make an official complaint with the police after an act of violence by a third party. The record of the complaint can help verify that the incident actually happened and corroborate the applicant’s account that the police did not protect her if the perpetrator was never caught or if the applicant continued to have problems after seeking police protection.
- Medical records. If the applicant required medical treatment for an act of mistreatment, it is vital to provide the medical records. If it is impossible to obtain the medical records from the home country, the applicant should document the injury if possible by seeing a medical professional in the United States who can write a letter. For example, if the applicant’s nose was broken in a beating, the applicant should provide a letter from a medical professional confirming that his nose has been broken and that the pattern of the break is consistent with being hit by a blunt object;
- Death certificates. If a partner or close friend of the applicant was killed because of her sexual orientation, it is very important to document this, if possible with the death certificate.

20.4 Proof of Well-Founded Fear of Future Persecution – Country Conditions

See Section #21 for more in depth information on documenting country conditions.

- U.S. State Department Reports on Human Rights;
- Human Rights Reports by Amnesty International, Human Rights Watch, the International Gay and

Lesbian Human Rights Commission, or other local human rights or LGBT rights organizations;

- Newspaper or other media stories of human rights abuses against LGBT and/or HIV-positive individuals in the home country;
- Expert affidavits on country conditions

20.5 One Year Filing Deadline

- I-94 and/or stamped passport. If the applicant is filing within one year of her last entry into the United States and she entered with inspection, she should submit a copy of her I-94 and/or stamped passport as proof of the date of entry. Even if she entered using a fake passport, she should submit that if she still has it because it is important evidence of her entry date;
- Other proof of date of entry. If the applicant is filing within one year of his last entry, but entered without inspection (for example, crossing the border), he should provide documentary evidence that proves he was outside the United States within the last year, such as work records or medical records. Additionally, proof of travel (airline tickets, bus tickets, hotel receipts) within Mexico or Canada can be very helpful. Proof of travel from a border state to the final United States destination doesn't hurt, but is not really dispositive since the applicant could have been living in the border state for a long time.
- If the applicant missed the one year filing deadline, it is essential to submit adequate documentation about the changed or extraordinary circumstances. This could include medical records, affidavits from mental health professionals, reports of substantially changed conditions in the home country, etc. *See* Section # 5.2 on one year filing deadline exceptions.

20.6 Criminal Issues

If your client has ever been arrested in the United States, even if he was never convicted of anything, or even if the case was dismissed and sealed, he must obtain original, certified dispositions of the criminal cases. You can submit photocopies of the dispositions when you send in the asylum application, but by the time of the interview your client must have original, certified dispositions to give to the Asylum Officer.

20.7 Proof that the Applicant Merits a Favorable Exercise of Discretion

In addition to meeting the legal definition of refugee, an asylum adjudicator will look at all the relevant facts to determine if the applicant "deserves" asylum. Any documentation of positive factors should be included (especially if there are negative factors, such as arrests to counterbalance.) This proof could include:

- Proof of volunteer work, in the form of affidavits/letters on the organization(s)' letterhead;
- Proof of rehabilitation. If the applicant committed a crime or had a substance abuse problem, proof that the applicant has completed community service or attended a drug rehabilitation program should be included;
- Proof that the applicant has been attending school, or otherwise been productive while waiting for the asylum application to be adjudicated;
- Proof that the applicant is part of the community. This could include an affidavit/letter from a

religious leader stating that the applicant regularly attends religious services, or affidavit/letter(s) from LGBT or other community organizations such as HIV/AIDS service providers in which the applicant participates;

- Proof that the applicant has a partner who relies upon him, in the form of an affidavit/letter.

20.8 Supporting Documentation Format: Affidavits and Letters

In an affirmative asylum application, sworn or affirmed affidavits are submitted with the application. Asylum Officers will generally allow submission of unsworn letters, but may give them less weight than sworn statements. If the person who wrote the letter was afraid to get the document notarized (in many other countries obtaining a notarization is a much more formal procedure than in the United States), the person writing the letter should explain the basis of her fear of doing so. The witnesses writing these statements are not required to appear at the asylum interview.

Affidavits from family or friends which are being used to corroborate LGBT/H status should include: 1) the approximate date when the family member or friend first learned of the sexual orientation of the applicant and/or the relationship between the applicant and his partner; 2) how long the family member or friend has known the applicant or partner, and; 3) any sexual minority or HIV/AIDS oriented activities in which the applicant participates, e.g. pride parades, support groups, bars, films or other community or relevant cultural events.

In an application for asylum before the Immigration Court, the Judge may not allow the introduction of statements by individuals who are not willing to appear in court to testify unless they are unable to do so because of prohibitive travel costs, or for other compelling reasons. In such cases, the Judge may or may not admit the affidavits. In general, and as discussed below, Immigration Courts have much stricter rules for admitting evidence than Asylum Officers do. This is one of many reasons that it is important to do the best possible job in preparing the application at the Asylum Office level.

All documentation and affidavits should be submitted with the application, if possible. However, asylum-seekers and their legal representatives who are nearing the filing deadline may be forced to decide whether to file an application without having obtained and reviewed all documentation available. Additional documentation and affidavits obtained after filing may be submitted at the interview. Whenever possible, an exhaustive search for documentation completed before submitting the application can help the asylum-seeker and her attorney to assess the strength of the claim before filing.

20.9 Translation of Documents

All foreign language documents must be translated into English or they will not be accepted by the Asylum Office or the Court. Anybody but the applicant herself who can swear that she is competent in English and the foreign language can do the translation and sign the certificate of translation. There is no requirement that the translator have any professional training in translation; she must simply be able to certify in a notarized certificate that she is competent to render the translation.

There is no rule prohibiting the attorney of record from certifying translations. Whenever a foreign language document is being submitted the entire document must be translated, not just the relevant sections.

Every foreign language document must have its own certificate of translation attached. For each exhibit, you should attach, first the English version, then the foreign language version, then the certificate of translation.

An example of a typical translation certificate follows:

20.9.1 Sample One – Certification of Accurate Translation

I, Rita Garcia hereby certify that I translated the attached document from Spanish into English and that to the best of my ability it is a true and correct translation. I further certify that I am competent in both Spanish and English to render and certify such translation.

Rita Garcia Sworn to before me this 7th day of September 2005

_____ Notary Public » *Practice pointer: Sometimes, if the applicant is fluent in English and his native language, you can ask the applicant to do the translations himself (since he may have more time to spend on this than staff in your office) and you can then have a third party who is fluent in both languages review the translation and submit a Certificate confirming that she has reviewed the translation and the translation is accurate.*

21. Preparing the Application: Corroborating Country Conditions

21.1 Researching Country Conditions

To win an application for asylum, the applicant must demonstrate that he has a subjective fear of future persecution and that that fear is objectively reasonable. To accomplish this, the applicant should submit proof that the types of harm he suffered or fears suffering in the future are documented in his country.

USCIS and ICE officials often rely heavily on U.S. State Department reports on human rights conditions in the applicant's country. Therefore you should always be familiar with the report for your client's country and generally should submit the report yourself with the country conditions information. These reports can be found at www.state.gov/g/drl/hr/c1470.htm. More often than not these reports will include little or no information about LGBT/H issues, so you will have to look elsewhere as well. If, however, there is information about human rights abuses or lack thereof of LGBT/H people in the State Department report, this will carry a great deal of weight.

The International Gay and Lesbian Human Rights Commission (IGLHRC) is an invaluable resource for LGBT/H corroborating information. See <http://www.iglhrc.org/cgi-bin/iowa/home/index.html>.

IGLHRC and asylumlaw.org teamed up to make much of their country conditions materials available online for free. These packets about LGBT and HIV country conditions can be found at www.asylumlaw.org/legal_tools/index.cfm?category=116&countryID=233.

Another invaluable resource is www.asylumlaw.org which contains country conditions information and a search engine that explores 15 different human rights databases. If a leading human rights organization, such as Human Rights Watch www.hrw.org/ or Amnesty International [amnesty.org/](http://www.amnesty.org/) has released a report on LGBT/H conditions in the applicant's country, including the complete report will also be very beneficial to the case.

The USCIS website has its own Resource Information Center (RIC) which, somewhat randomly, addresses specific country conditions questions for various countries and issues. It's worth checking this website to see if there have been any reports on LGBT/H issues in the applicant's country. uscis.gov/graphics/services/asylum/ric/.

Andrew Reding has frequently written reports for RIC. In 2003, he authored a *World Policy Report on Sexual Orientation and Human Rights in the Americas*, available at www.worldpolicy.org/globalrights/sexorient/2003-LGBT-Americas.pdf which you should review for Latin American and Caribbean cases.

You should also research LGBT media websites online. Many mainstream LGBT media report regularly on international LGBT/H issues. A non-exhaustive list of useful websites is available at Section #36 Important Resources.

Another useful way to find relevant articles for your country conditions packet, is to do a google or yahoo search for "international newspapers" and then search for keywords such as "gay" or "homosexual" within

newspapers of the applicant's country.

You can use google to search most websites even if the website doesn't have a google search bar. You do so by going to www.google.com and then entering your search terms followed by site:website. For example, if you want to find search 365gay.com to find out about arrests in Egypt, you could do the following search on the google website "Egypt arrests site:www.365gay.com".

21.2 Indexing Country Conditions

There is no magic number of reports and articles which you need to include. Remember, you want to have enough materials that objectively support your client's fear that an adjudicator will find that fear objectively reasonable. If there is a news report about a particular incident, such as a gay bashing which led to a person's death, you should find the article from the most credible source and include that. There's no need to include five articles about the same incident. You want to be as thorough as possible with country conditions without being needlessly redundant. You should also focus on country conditions within the last five years, and include few, if any articles that are more than a few years old. If, however, there is a seminal report (such as an Amnesty International report) specifically about LGBT/H issues in the applicant's country, it may be worth including that even if it is outdated. It would be very helpful to also get a letter from the organization that issued the report stating that conditions have not improved since the report.

When you are putting together your country conditions information, your goal is to make the job of the adjudicator as easy as possible. You should arrange the materials in reverse chronological order, so that the most recent news comes first. You should index the materials and attach the originals with exhibit tabs which correspond to the numbered entries in the index. When you index the materials you should either offer a brief summary of the article/report you are attaching or pull out a quotation or two of sections that are especially relevant or helpful to your claim. The purpose of the index is for the adjudicator to be able to quickly digest the content of the country conditions without having to read them all herself. Additionally, you can use a highlighter pen on the materials themselves to draw the adjudicator's attention to the most relevant passages. If you do this, make sure you use the highlighter pen on all copies *after* you've finished photocopying, otherwise the yellow just photocopies as grey.

If your applicant is applying based on more than one ground, for example sexual orientation and HIV-positive status, it's best to index the conditions thematically. That is, put a bold heading such as "Country Conditions for Gay Men" and then summarize and list the gay-related articles/reports in reverse chronological order. Then put another bold heading such as "Country Conditions for HIV-Positive Individuals" and then summarize and list the HIV-related articles/reports in reverse chronological order.

Any article that is not written in English must be translated into English and include a certificate of translation. (*See* Section #20.9 above). Even if only one paragraph of a two page article is really relevant to your case, the best practice is to translate the entire article since the adjudicator has no way of knowing whether the untranslated portion of the article may contain information which actually undermines the applicant's claim.

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intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

22. Preparing the Application: Indexed Country Conditions Sample

The country conditions index that follows was submitted on a case in which the applicant had received death threats from a skinhead "social cleansing" group. This index does not correspond with the sample declaration and application, although those are also based on a Brazilian case, because "Joao Doe" was not threatened by skinhead groups.

Country conditions should be tailored to the particular claim(s) in your case. For example, lesbian cases should include information about the treatment of women in her country and transgender cases should include information about gender roles. It's always helpful to begin your research with a country condition packet from IGLHRC (www.iglhrc.org/site/iglhrc/) or with the packet another pro bono attorney used, but you must also make sure that the conditions cover the issues specific to your client's case.

Brazil: Country Conditions

1. "Brazil: Country Reports on Human Rights Practices" U.S. Department of State, released by the Bureau of Democracy, Human Rights, and Labor, February 28, 2005, available at www.state.gov/g/drl/rls/hrrpt/2004/41751.htm

» *Practice pointer: You should always include the U.S. Department of State report even if there is no relevant information or even if there is information which indicates that there are no problems for LGBT/H people in the applicant's country. The adjudicator will always look at this report anyway, so it's better if you submit it and deal with the information in the report head on. There is often little or no information about LGBT/H people in the reports.*

"Afro-Brazilians and homosexuals continued to face societal discrimination and, on occasion, violence." (p. 1)

"The law prohibits discrimination on the basis of sex, race, age, religion, or nationality; however, discrimination against women, Afro-Brazilians, homosexuals, and indigenous people continued." (p. 14)

"On January 13, members of human rights organizations in Sao Paulo held a demonstration to denounce the actions of groups who promote racial superiority and discrimination against Afro-Brazilians, Northeasterners, homosexuals, Jews, punks, and other minorities. Demonstrators also called on authorities to investigate further known racist groups such as Carecas ("Skinheads") do ABC, Carecas do Suburbio, Poder Branco ("White Power"), and Imperial Klans do Brasil. The demonstration was held where skinheads from Carecas do ABC attacked Edson Neris da Silva and Dario Pereira Neto for holding hands in 2000. Silva died from the injuries sustained during the attack." (p. 19)

"According to the Ministry of Health, there were approximately 180 killings of homosexuals during the year." (p. 21)

2. "Youth Mistaken for a Thief is Beaten," Folha de Londrina, October 23, 2004.

"After establishing that he wasn't a suspect, the Military Police (MPs) initiated a physical assault, possibly motivated by prejudice based on the youth's sexual orientation, because he had invitations to a gay night club in his pockets" (p. 1)

"According to the adolescent, the policemen began to call him "faggot," covered his nose and mouth with their hands, and began to beat him with a nightstick in his stomach. Anderson, who yesterday had hematomas on his two ears and hearing difficulties, said that he ended up falling and then received various blows to the head." (p.1)

Of 500 complaints made from July of 1999 through December of 2000, 18.7% were for physical assault, 10.3% for extortion, and 6.3% for assassinations. (p. 1)

"A study of 416 homosexuals (gay, lesbians, transvestites, transsexuals) revealed that 60% of those interviewed had been victims of some type of aggression motivated by their sexual orientation." (p. 1)

3. "Homophobia Is Still a Principal Problem for LGBT Population in the Region", report emailed by A.T.T.A. (Association of Argentinean Transvestites and Transsexuals), July 2, 2004

» Practice pointer: If you aren't sure whether or not the evidence is from a source that will be considered admissible, you should generally still include it in your packet. Asylum Officers almost never keep out documents based on evidentiary rules and even Immigration Judges and ICE attorneys may not look at every document in your country conditions packet. Of course, information that comes from known sources, such as established human rights groups or recognizable media carries more weight than information that comes from random websites.

"Despite the existence of advances in recognizing sexual diversity and the emergence of political proposals and legal norms that introduce the possibility of an improved situation for those persons whose sexual orientation is different from the majority, hundreds of murders are committed every year and the perpetrators enjoy impunity from prosecution." (p. 1)

4. "Brazil: Country Reports on Human Rights Practices" U.S. Department of State, released by the Bureau of Democracy, Human Rights, and Labor, February 25, 2004 available at www.state.gov/g/drl/rls/hrrpt/2003/27888.htm

"Police violence against homosexuals continued. Gay rights activists in the city of Recife compiled substantial evidence of extortion and the unlawful use of violence against transvestite prostitutes. Police routinely extorted money from transvestites and often beat or killed those who failed to cooperate. Several NGOs documented the existence of skinhead, neo-Nazi, and "machista" (homophobic) gangs that attacked suspected homosexuals in cities including Rio de Janeiro, Porto Alegre, Salvador, Belo Horizonte, and Brasilia (see Section 5). In some cases, these gangs allegedly included police officers." (p. 8)

5. "Human Rights Watch World Report 2003: Americas: Brazil", Human Rights Watch, 2004, available at hrw.org/wr2k3/americas2.html

"Violence against gay men and lesbians was also a cause of concern. Hate crimes against gay men were

believed to be especially serious in the states of São Paulo, Pernambuco, and Bahia, and in the Federal District." (p. 5)

6. "World Policy Reports: Sexual Orientation and Human Rights in the Americas," Andrew Reding, Project for Global Democracy and Human Rights, World Policy Institute, [excerpt] December 2003 available at www.worldpolicy.org/globalrights/sexorient/2003-LGBT-Americas.pdf

» *Practice pointer: Andrew Reding has written reports for the INS Resource Information Center uscis.gov/graphics/services/asylum/ric/ in the past so his opinions may be given particular weight by DHS. Although the report is largely based on the same types of documentary evidence (human rights reports, media reports) that you will be submitting anyway, you should always consult his report for Latin American and Caribbean claims.*

"...in the last decade more than a thousand gay men and at least thirty lesbians were murdered in Brazil – one every five days. The real number is surely much higher than the already hideously high number we learn about, because the families of many convince the press not to include scandalous details about the lives and deaths of those murdered for being homosexual. Most of the crimes include extreme violence: castration, burning of the body, hundreds of stab wounds. Only about one in ten of the killers is arrested. The few who are and who go to tribunal frequently claim that they killed the victim because he tried to violate their honor (that is, fuck them)." (pp. 25-26)

7. "Skinheads in Brazil", posted at Stormfront White Nationalist Community, May 2003, available at www.stormfront.org/forum/showthread.php?t=72862

» *Practice pointer: Even though you will attach hard copies of the articles, whenever possible you should include a website citation so that the adjudicator can learn more about the source organization/publication and determine the weight to give the evidence.*

"The largest concentration of Brazilian neo-Nazi Skinheads is in Sao Paulo... Three separate groups operate in the city: 1. Carecas do Suburbio (Skinheads of the suburbs), a gang noted for its ultra-nationalism and gay-bashing, which hangs around bars... 2. Carecas do ABC (ABC Skinheads)... The ABC Skins are extremely violent and hostile toward Jews, homosexuals, and Northeasterners... 3. White Power Skinheads, an avowedly Nazi gang that is the most violent of all. They hate Jews, blacks, homosexuals and Northeasterners..." (p.1-2)

8. "Protest Violent Arrests of Transvestites in Sao Paula, Brazil", Brazil Action Alert, International Gay and Lesbian Human Rights Commission, June 11, 2003, available at www.iglhrc.org/php/section.php?id=5&detail=437

» *Practice pointer: There is often more news about violence against transgender people than about sexual orientation-based violence. If your client is lesbian, gay, or bisexual, but not transgender, you can include an article or two like this for a sexual orientation-based case (to show general hostility towards LGBT people) but don't overwhelm the adjudicator with articles, for example, about violence against transvestites if your client never dresses as a woman. You don't want the adjudicator to draw the conclusion that only transgender people and not LGB people are targeted for violence.*

Conversely though, with a transgender claim, even if your client does not identify as LGB, you should include information about sexual orientation-based violence because a transgender person is likely to be perceived as LGB by others. For example, an M–&F woman who has relationships with men will probably be perceived as a gay man if her government, community, etc., does not recognize her gender as female.

"On May 29 and 31, 2003, officers from Police District 16 in Sao Paulo, Brazil, arrested a total of 145 transvestites in the area surrounding Indianapolis Avenue... transvestites were beaten and forced into police vehicles." (p.1)

9. "Demand Investigation of Lesbian Murders in Pernambuco, Brazil", Brazil Action Alert, International Gay and Lesbian Human Rights Commission, November 3, 2003, available at www.iglhrc.org/php/section.php?id=5&detail=477

"Given the high rates of impunity in crimes where the victims are women, gay men or transgender people, local NGOs are asking for international help to pressure the Recife government to investigate." (p.1)

10. "Human Rights Watch World Report 2002: Americas: Brazil", Human Rights Watch, 2003, available at hrw.org/wr2k2/americas2.html

"Attacks against and harassment of lesbians and gays were also of concern. The Gay Association of Bahia, a gay rights advocacy group, reported frequent murders of gay men, claiming that less than 10 percent of such crimes were successfully prosecuted in the courts." (p.5)

11. "Report: Brazil is a Leader in Gay Hate Crimes", United Press International, April 23, 2002 available at www.upi.com/view.cfm?StoryID=23042002-052102-4811r

"More than 100 gays, lesbians and transsexuals were killed in Brazil last year as a result of hate crimes, the largest number recorded of any nation, a gay-rights group in the northern state of Bahia said Tuesday." (p. 1)

"The GGB report says that only 10 percent of those who commit violence against gays ever serve time for their crimes." (p. 1)

12. "Gay Man Beaten to Death by Skinheads in Sao Paulo", Action Alert, The International Lesbian and Gay Association, July 31, 2000, available at www.ilga.info/Information/Legal_survey/americas/supporting%20files/gay_man_beaten_to_death_by_skinh.htm

"Edson Neris da Silva, 35, died in the early hours of Saturday (February 5th) after having been beaten severely by a gang of skinheads in the center of the Brazilian city of Sao Paulo. According to a statement given by ... a witness and friend of the victim – the two were walking together through the Praca da Republica (a well known gay cruising area) around midnight on February 4, when a group of around 30 skinheads dressed in black closed in on them." (p.1)

13. "Urgent Action: Members and staff of the Brazilian section of Amnesty International and other human

and LGBT rights activists who are under threat from a neofascist group", Action Alert, The International Lesbian and Gay Association, June 13, 2000, available at

www.ilga.info/Information/Legal_survey/americas/supporting%20files/members_and_staff_of_the_brazili.htm

"With [the bomb] was a letter featuring a crude swastika, attacking Amnesty International for its work in defence of gays and blacks." (p.1)

"In the past few months, the FAC has sent letters threatening Amnesty International, human rights activists in general and gay men and lesbians to the human rights organization No More Torture and to a major national newspaper..." (p.2)

14. "Brazil-World Champion in the Murder of Homosexuals", The International Lesbian and Gay Association, April 8 1999, available at

www.ilga.info/Information/Legal_survey/americas/supporting%20files/Brazil_World%20Champion%20In%20The%20Murder%20Of%20Homosexuals.htm

"The Gay Group of Bahia, the oldest gay rights group in Brazil, has published another Bulletin denouncing violations of human rights and 116 murders of homosexuals which occurred in that country in 1998." (p.1)

"According to the Human Rights Secretary of the Brazilian Association of Gays, Lesbians and Transvestites, Luiz Mott, who compiled this dossier, "these numbers are only the tip of an iceberg of hatred and blood, since in many cases, owing to the carelessness and failures of the police and pressure from members of the family, the homosexuality of many victims is not disclosed... Impunity encourages the boldness of the criminals." (p.1)

"On the inside cover of this dossier, the Gay Group of Bahia published '10 tips on how to avoid being murdered.'" (p.2)

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23. Preparing the Application: Sample Cover Letter

January 2, 2006

U.S. Department of Homeland Security
Citizenship and Immigration Services
Vermont Service Center
75 Lower Weldon Street
St. Albans, VT 05479-0589

Re: Joao Doe

Dear Sirs/Madams:

Attached please find the above-referenced individual's application for Asylum, Withholding of Removal, and relief under the Convention against Torture. An original complete packet and two photocopied packets are attached.

Enclosed, please find the following documents on Mr. Doe's behalf:

1. Application for Asylum, and for Withholding of Removal (Form I-589); 2. Notice of Entry of Appearance as Attorney Form (G-28); and 3. One Passport Style Photograph; 4. Complete Copy of Passport; 5. Applicant's Asylum Declaration; and 6. Indexed Supporting Documents.

All documents have been provided in triplicate. Please do not hesitate to contact me at the number above if you have any questions regarding this matter. Thank you for your consideration.

Sincerely,

Clarence Darrow, Esq.

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24. Preparing the Application: Checklist

Everything listed below must be submitted in triplicate -- one original plus two full copies.

- Cover letter to [Regional Service Center](#) which includes a list of all attached documents
- Completed I-589 — be sure every box is filled in and the form is signed, include a passport style photo
- Complete copy of applicant's passport (if the applicant has one) – you must photocopy every page even blank ones
- Completed G-28 (Notice of Appearance Form) – print on blue paper
- Completed Declaration (this should be notarized)
- Indexed documentation specific to the applicant's case (medical records, police reports, letters etc.); and
- Indexed country conditions documentation.

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25. Preparing the Application: Assembling Everything

Once you've prepared all the required documents for the asylum application, all that remains is to assemble it all. You can use the checklist in the section above as a guide for the order in which to assemble the documents.

Immigration files (both at the Asylum Office and in Immigration Court) are held together by two hole punched paper fasteners, so this is the best way to keep your documents together.

Indexed documents which are submitted should be tabbed, either with commercial exhibit tabs, or by creating tabs on your computer which say "Exhibit 1," etc, in large print on the bottom of the page.

Your goal in assembling your asylum packet is to make it as easy as possible for an adjudicator to find the important documents in the packet. It is therefore often a good idea to index the documents specific to your client (medical records, arrest records, letters, etc.) with Exhibit letters (i.e. "Exhibit A,") and index the country conditions documents with Exhibit numbers (i.e. "Exhibit 1".) Include brightly colored paper in between new sections of the documentation, for example, before the client's declaration, before the index, and before the country conditions documents.

If your country conditions documentation is very large, it's okay to submit this as a bound volume rather than two hole punching it.

You must send an original application with (to the extent possible) original supporting documents, and two copies to the [Service Center](#) (scroll to page 10). You should keep one copy for yourself. Never submit originals of identity documents (passports, drivers' licenses, government identification cards, birth certificates, etc.) unless ordered to do so by an Immigration Official. You should send in photo copies and have your client bring the originals to the interview.

You should send the asylum application via overnight courier service or some other reliable delivery service where, if necessary, you can prove the date of receipt by CIS.

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26. Affirmative Application Process

An applicant can file for asylum either affirmatively or as a defense to removal proceedings. When an applicant is filing affirmatively, one of the primary roles of an attorney is to help the applicant understand the relative strengths and weaknesses of his case and help him make a decision about whether or not to apply for asylum.

Once the applicant is in removal proceedings, the potential risk of applying affirmatively – being removed (deported) – already exists, so as long as the asylum claim is colorable there generally is no reason not to apply. As discussed elsewhere (*See* Sections #6 and #7) when an applicant files for asylum he generally files simultaneously for withholding of removal and for relief under the Convention against Torture. The latter two forms of relief can only be granted by an Immigration Judge, however.

26.1 The Affirmative Asylum Application Process – When to File?

Often asylum applicants don't seek counsel until they are close to the one year filing deadline and an attorney is left scrambling to put the application together before the anniversary of the applicant's last entry. In some cases, however, an attorney and client have some strategy decisions to make about when to file for asylum.

If the applicant is in lawful status when he comes to see you, you may have to decide whether it's best to apply quickly or to wait until the applicant is out of status. If the applicant is still in lawful status at the time the Asylum Office decision is issued, he will either received a recommended approval or a Notice of Intent to Deny. (*See* Section #26.8.2.) If the application is denied by the Asylum Office, there is no appeal of the denial. The applicant can wait until his lawful status expires and then try to renew his application for asylum, but, as a practical matter, it can be difficult to get CIS to accept the filing of a second asylum application.

Many asylum applicants feel more comfortable filing for asylum while they're still in lawful status because the idea of possibly being placed in removal proceedings is terrifying. It is important that the asylum seeker understands, however, that even if he is in lawful status, (for example, here as a student who is still enrolled in school), at the time the application is denied by the Asylum Office, his immigration possibilities in the United States will be affected by the application. Applicants for many non-immigrant visas (most notably tourist and student visas) most overcome a presumption that their intent is to remain in the United States permanently. Thus, if the applicant loses his asylum application and returns to his country before the expiration of his lawful status here, he will likely find it impossible to obtain another visa to the United States

26.2 Affirmative Filing and Scheduling

An applicant can file for asylum affirmatively. This process is initiated by sending three copies of form I-589 to the USCIS Service Center which has jurisdiction over the region in which the applicant resides. (*See* uscis.gov/graphics/fieldoffices/alphaa.htm >for a complete list of offices by state.) It is generally

best to send the application via overnight delivery so that it is possible to prove delivery of the application if an issue ever arises as to whether or not the application was properly filed.

In addition to the I-589 application form itself, the asylum application packet generally includes a declaration by the applicant, corroborating evidence about the claim, and country conditions information. (See Sections 14-25). Technically, the only document which needs to be submitted to initiate the application process, however, is the I-589. Thus, if an applicant is filing very close to the one year filing deadline, or if the “reasonable period of time” after a filing deadline exception is in danger of passing, it is possible to file only the I-589 and then bring the other documentation in person to the asylum interview.

If an attorney is representing the applicant on the application, the attorney must also file a Notice of Appearance form G-28 (preferably on blue paper.) When there is an attorney of record, USCIS is supposed to send all notices about the case to both the attorney and the applicant. Sometimes, however, it only sends them to the client or to the attorney instead of both, so it is important for both of you to contact one another whenever either of you receives CIS correspondence.

After the I-589 has been filed, the local Asylum Office will schedule the applicant for an interview. There are eight Asylum Offices throughout the United States. (See uscis.gov/graphics/fieldoffices/alphaa.htm >for a complete list of offices by state.) Applicants who reside close to their local Asylum Office will have the interview scheduled at that office, usually 3-6 weeks after the application has been received. Applicants who live far from their local Asylum Office will be interviewed by an Officer who “rides circuit” to a location near them. These “circuit ride” cases can take several months to be scheduled.

26.2.1 Adjourning the Interview

It is generally best not to adjourn an asylum interview unless it is absolutely necessary because if the request is not granted the applicant’s application could be denied and she could be placed in removal proceedings without having an interview with an Asylum Officer. But, if necessary, it is possible to adjourn the asylum interview for good cause. If an attorney has recently taken on a case, has a scheduling conflict, or needs more time to prepare, he can request that the interview be postponed. The best way to do this is to send a letter to both the local Asylum Office and the Service Center via overnight courier and to fax a copy of the letter to the local Asylum Office. If there is no response, it is a good idea to call the local Asylum Office and speak with a supervisor as well.

Generally, the adjournment request will be granted, but you will not receive notice until a couple of days before the scheduled interview. Because asylum interviews are scheduled so quickly, you will probably only be given a short adjournment (3-6 weeks) unless there is a good reason for a longer adjournment, for example if your client is in the hospital.

26.2.2 Requesting Leave for More than One Attorney to Attend the Interview

Most Asylum Offices only want one attorney present for the asylum interview. If you have been working on the case in a pro bono team, you may want more than one team member to attend. It may be possible for two attorneys to attend the interview, but it is very unlikely the Asylum Office will allow more than

two attorneys to be present. The reason for this is partly because the interviews are conducted in the Officers' offices and therefore space is limited. Also, because the interview is non-adversarial the Officer probably doesn't want to feel overrun by a large team of attorneys.

If you want a second attorney to attend the interview, you should write a letter to the Asylum Office director at least a week before the scheduled interview date. You send the letter via overnight courier service and also fax it. If your client is fluent in English and does not need an interpreter, you should state this in the letter, since that frees up a chair in the Officer's office. You may hear from the Asylum Office before the interview date granting your request. If you have not received a response by the interview date, bring copies of the letter with you to the Asylum Office and if the Officer does not want to allow the second attorney in, show her the letters, and she may relent.

26.3 Preparing for the Interview

The most important preparation you will do for the interview is working with your client to prepare the best possible asylum declaration. This will focus the issues in the case and help the client to understand which experiences and incidents are most relevant to his claim.

It is a good idea to go through a "mock interview" with the client. If at all possible, have another attorney from your office who is not familiar with the case play the role of the Asylum Officer. This is good practice for the client to try testifying in front of someone who he doesn't know and will also provide a fresh listener for the case who can tell you if any aspects of the testimony are unclear or do not sound credible.

By the time the client has been through multiple meetings with you and has worked on his declaration for weeks or even months, it may be difficult for him to make his story sound "fresh." It's important that you counsel your client to listen closely to each question and to really make himself relive the experience. Sometimes clients become so accustomed to retelling their stories to the attorney that they begin to sound rote. Tell your client that even though it's natural to try to suppress painful memories and to not want to relive them, it's crucial to his case that his emotions and fear come through at the interview. If the client feels like crying, he should not suppress that at the interview.

It is also always a good idea to ask your client if there is any question that he fears the Officer may ask him. It is better to address your client's fears and formulate a strategy for dealing with them than to allow your client to feel fearful about a particular question which may or may not be answered.

If there are any "thorny issues" in your case (*See* Section #11), be sure to prepare your client completely about the best way to address these issues. It is best for the client to address difficult issues (i.e. one year deadline issues, criminal issues, return trips to his country) head on, honestly, and on his own terms, rather than hoping for the unlucky possibility that the Asylum Officer won't bring them up.

You should tell your client to re-read his I-589 and his declaration, paying particular attention to dates. You can also prepare a timeline (*See* next section) and give that to your client as a document where all relevant dates and incidents are in one place for easy reference.

26.4 Preparing a Timeline

Sometimes after preparing a lengthy declaration, the applicant's story can feel overwhelming to the attorney and the client. It can be very helpful to boil the story down to a single page timeline. The timeline should include all essential information in chronological order, with dates, that you want to be sure your client testifies about. You can have the timeline open in your file during the interview so that if the Officer asks questions out of chronological order, you can track those important incidents that your client has not testified about for your own follow up questions at the end of the interview.

It can also be helpful to give the client a copy of this timeline as a final preparation tool before the interview. Once the essence of the case can be boiled down to a single page or less, the entire case feels much more manageable in size.

26.5 Sample Timeline

The following is a sample timeline based on the sample declaration. (*See* Section #19.) The timeline is not submitted to CIS and you don't have to follow this format or make one at all unless you find it useful.

Sample Asylum Time Line for Joao Doe

2/23/75 – Born, Sao Bernardo do Campo ca. 1985 – Beaten up and kicked like a soccer ball 1991 – 16 y.o., first same sex sexual experience w/ Paulo; resulted in blackmail at school 1993 – Family moves to Sao Paulo 1993 – Ridiculed in class; drops out of school 1993/1994 – Meets Armando, first real boyfriend 1996 – Friend Claudio beaten by police; they play “telephone” with hands beating ears Summer 1996 – Forced to perform oral sex at gunpoint; later learns perpetrator was a cop 3/97 – Cops arrest clt. in gay plaza; beaten w/ cacete; raped by criminals in cell 4/97 – Walking down street w/ gay friend, clt. runs away, learns friend was abused 2/98 – Rio, Carnival, police forced him to perform oral sex 6/01 – Stopped by police outside gay bar, runs away 7/7/01 – Arrived in U.S. 7/18/05 – HIV dx.

26.6 Attending the Interview

Most Asylum Offices are in inconvenient locations. Neither the New York nor New Jersey office is easily accessible by public transportation. It is best to make a plan with the applicant about how she is going to get to the interview and, if possible, travel to the interview together. If an applicant arrives more than thirty minutes late, the interview may be rescheduled or the application may be denied.

Despite the strict rules about being on time for the interview, generally an applicant will have to wait an hour or two after checking in at the Asylum Office before being interviewed. The day of the interview quickly turns into a long day in the middle of nowhere, so it's important that everyone attending eat a good breakfast (no food is allowed in the waiting room) so that they remain alert for the interview. It's

also helpful to recommend that the applicant bring a magazine for the long wait ahead.

26.6.1 Attire for the Interview

The applicant should dress comfortably but respectfully for the interview. The applicant does not have to wear a suit but should also should not wear jeans or a t-shirt. The applicant should dress in a manner that is comfortable to her identity. While some advocates recommend that their gay clients “fem it up” or that their lesbian clients “butch it up,” it is best for the client to dress as he or she generally feels comfortable dressing. The interview process will be stressful enough for the applicant without the applicant feeling like he or she has to pull off some sort of a disguise.

26.6.2 Interpretation at the Interview

Asylum Offices do not provide official interpreters for asylum interviews. Thus if the applicant is not proficient in English, he will have to supply his own interpreter. There is no requirement that the interpreter be a professional interpreter. The interpreter will, however, have to bring an identification document (such as a passport or driver’s license) and must be in lawful immigration status.

If the applicant is proficient but not entirely fluent in English, it is important to discuss with him before the interview whether or not he requires an interpreter. Many applicants are so nervous about the interview that even though they speak English well they feel more comfortable having an interpreter present. For some applicants too, it is easier to speak about events that happened in their own countries in the language in which they experienced the events. On the other hand, even with the best interpreter, there is always some meaning that is lost in translation. It will also be more difficult for the Asylum Officer to experience the emotions of the applicant’s words as he describes past incidents of mistreatment if the Officer is listening to the interpreter rather than the applicant. Deciding whether or not to use an interpreter is therefore an individualized decision which you should fully discuss with the applicant.

Many English-proficient applicants would like to have an interpreter present to fall back upon if they don’t understand a particular question. Different Asylum Officers handle this request differently. Some Officers will allow this, but many, if not most, will require the applicant to conduct the entire interview in English or in the applicant’s native tongue but will not permit the applicant to go back and forth. In any event, if the applicant brings an interpreter as a fall back position, he should know in advance whether or not he plans to use the interpreter if the Officer insists on using one language only.

When the applicant does use an interpreter at the interview, it is important that the interpreter be familiar with the applicant’s story. It is generally helpful if the interpreter can read the applicant’s declaration in advance of the interview. The interpreter should also accompany the applicant to interview preparation sessions with the attorney so that both the interpreter and applicant feel comfortable that they understand one another.

26.6.3 Requesting an Officer of a Particular Gender

Most Asylum Offices will allow an applicant to request an Officer of a particular gender. The offices will

try to accommodate such requests if possible. Many LGBT asylum applicants have suffered sexual abuse or rape as a result of their sexual orientation or gender identity, and it may be much more difficult for the applicant to recount the details of that abuse to a government official of the same gender as the persecutor. On the other hand, applicants who come from cultures with strict gender roles and segregation may find it very difficult to discuss issues of their sexuality with a member of the opposite sex. Many applicants will feel equally comfortable (or uncomfortable) telling their stories to anyone of either gender, but it is always a good idea to discuss with the applicant the possibility of requesting an Officer of a particular gender.

26.7 The Asylum Interview

26.7.1 The Asylum Officer's Approach

Asylum Officers have a great deal of discretion in how they conduct the asylum interview. Some Officers make a point of being warm and welcoming, others immediately lay down rules and make the interview as business-like as possible. It is never possible to know before the interview exactly what the process will be.

Asylum Officers do not receive the asylum applications until the morning of the interview, after the applicant has checked in. Many Officers will take time before calling the applicant in to review the file (hence the long wait in the waiting room). Other Officers will barely skim the file before calling in the applicant, figuring that they will first get the oral testimony and then go back and review the file. In any event, you should not expect that the Officer will have much familiarity with the application.

Most Officers will conduct the vast majority of the interview themselves, leaving time at the end for you to ask follow up questions and/or make a summation of the case. On rare occasions an Officer will allow a representative to question the applicant directly as if the case were in court. Some Officers will allow you to rephrase questions which the applicant doesn't understand or to draw the Officer's attention to relevant documents in the file. Other Officers do not allow the attorney to speak at all until the conclusion of the interview. There is no way to know in advance what style the Officer will have, so it is important for you to be flexible. You can try to participate somewhat in the interview until you are told directly not to do so. If you have taken the case pro bono, he should let the Officer know this. Asylum Officers appreciate the work that pro bono lawyers do, and will also be more likely to fully explain the process if they know that the attorney is not an immigration "regular."

If (fortunately relatively rarely) the Officer asks questions which are inappropriate or assumes an abusive or homophobic demeanor, you should tell the Officer that her behavior or question is inappropriate. If the Officer continues with inappropriate questioning, you should ask to stop the interview and speak with the Officer's supervisor. Sometimes supervisors will sit in on interviews, other times the interview can be reassigned to another Officer.

26.7.2 Questions at the Interview

Again, different Officers have different styles of questioning. Many Officers begin by going through the

biographical background information on the application and then, eventually, move on to the substantive questions on the I-589 form, asking the “essay questions” almost word for word as they appear on the form. Other Officers will follow along more directly with the declaration and ask the applicant to recount problems that she had chronologically. Often the Officer’s questioning will result in the applicant telling her story out of chronological order. It is therefore important for you to listen carefully and to ask follow up questions about any significant incidents which the applicant did not testify about. Creating a timeline before the interview can be very helpful in tracking the applicant’s answers. (*See* Section #26.4).

If there is a one year filing deadline issue (*See* Section #5) or any other thorny issues (*See* Section #11) in the case, it is important to prepare the applicant well for discussing these issues. Since the attorney will generally not be guiding the applicant through direct examination, it is crucial that the applicant be able to articulate on her own why she waited two years to file for asylum or once shoplifted a pair of pants.

There are generally no big surprises at the interview. The applicant should be prepared to testify in detail about everything that is in his asylum application. It is important to remember that the applicant must prove that he really is gay so he should be prepared to testify in detail about when he first realized he was gay, his “coming out” process, and any significant romantic relationships he had. Of course, the most important part of the testimony concerns the persecution the applicant suffered in the past and/or fears in the future. It is crucial to the claim that the applicant’s emotions come through during this testimony. After weeks or months of preparing the declaration with the representative, the applicant’s answers to questions about past abuses may begin to sound rote. You should instruct the applicant about the importance of listening closely to the Officer’s questions and really picturing himself back in his home country, reliving the abuses that he suffered there. Difficult as this may be for applicants, if they can testify compellingly at the interview, this may be the last time that they have to retell the story of their persecution. Most asylum interviews last between one and two hours. If an interpreter is needed, the interviews tend to be closer to two hours.

The Asylum Officer will have to review her decision with her supervisor before issuing it. Thus, Officers often focus on areas of questioning which they think their supervisor will raise. If you see that there is a particular issue of concern to the Officer, for example, multiple return visits to the country of persecution, it can be very helpful to the case for you to sum up and offer an explanation which the Officer can then give to her supervisor. Likewise, if there’s a crucial piece of evidence that the Officer wants that has not yet been supplied (like a medical record from the applicant’s home country), you can feed ex this document, the sooner the better, to the Asylum Officer during the two week period before the decision is issued.

26.8 The Decision

Two weeks after the interview, the applicant must return to the Asylum Office to pick up the decision. There is no substantive exchange with the Officer on this date; the applicant literally receives a piece of paper at the check in window, so there is no need for the attorney to accompany the applicant. In some situations, the case must be referred to Asylum Headquarters before the decision is issued. This is true for cases filed by Mexican applicants, domestic violence cases, and others where the Asylum Office wants guidance. Sometimes, seemingly for no reason, a decision is not ready after two weeks. At times it can

take several months to receive a decision. This lengthy delay does not seem to be an indicator that the case will be denied or approved, and, other than writing follow up letters to the Asylum Office, there's not much an attorney can do to speed the decision-making process.

26.8.1 Recommended Approval

If all goes well, the applicant will receive a brief letter explaining that the Asylum Office has recommended approval of the application. Congratulations! You've won your case. This is a recommended approval, rather than a final approval, pending necessary background checks to confirm the applicant's identity and that the applicant has no criminal or terrorist background which would preclude a grant to asylum. Once the applicant receives recommended approval, she can apply for an employment authorization document under the "asylum pending" ((c)(8)) category. Once she receives employment authorization, she can apply for a social security card. This first social security card will be restricted with the notation "valid only with INS work authorization."

It generally takes around six months for the applicant to receive the final approval notice in the mail along with an I-94 which says "asylee" status granted for an "indefinite" period of time. When the asylee receives the final approval, she can work lawfully without having to have an employment authorization document. She can also obtain an "unrestricted" social security number. One year after the final approval date, the applicant can apply for legal permanent residence. (*See* Section #32.8).

26.8.2 Notice of Intent to Deny

If the applicant is still in lawful status at the time the Asylum Office issues the decision, and if the Asylum Office does not believe that the applicant has met his burden of proving his case for asylum, the applicant will receive a Notice of Intent to Deny ("NOID"). The NOID is a detailed letter which explains the Asylum Office's reasoning for denying the application. The applicant has 16 days in which to respond to the NOID in the hope of overturning the decision.

You should always submit a response to the NOID. As with other aspects of the asylum interview, the rules of response are flexible. You can write a brief explaining why, based on the record submitted and the testimony, the conclusions the Officer drew were incorrect. You can also submit additional evidence. For example, if the NOID states that there was not sufficient evidence of objectively reasonable fear because the country conditions information is mixed, it can be crucial to submit an expert affidavit that directly addresses the specific fear that the applicant has.

It is possible to obtain more time to respond to a NOID if there is a good reason to do so. The attorney can write a letter to the Asylum Officer requesting additional time, for example, thirty days, to respond. You should follow up by calling the Asylum Officer to make sure that the request was granted. If a response is not timely submitted to the NOID, the decision becomes final.

There is no set time frame for when the Asylum Officer will respond to the NOID rebuttal. It may take several weeks or longer. The Officer can change her mind and recommend approval or issue a final denial. If the case is denied, there is no appeal from the denial. The applicant can, however, reapply for asylum in the future after falling out of legal status and then avail herself of the appeal procedure

discussed below. The Asylum Office does not have jurisdiction to decide withholding or CAT claims. These claims can only be heard in Immigration Court. (*See* Section #26.1 for When to File)

26.8.3 Referral to Court

If the asylum application is not approved by the Asylum Office and the applicant is not in lawful status, he will be served with a Referral letter which will very briefly outline the reasons that the case was not approved, and a Notice to Appear (“NTA”) in Immigration Court. The NTA is the charging document which initiates removal proceedings (formerly known as “deportation proceedings”) against the applicant. The NTA will contain charges against the applicant as well as a date and time to appear in Immigration Court. Failure to appear in Immigration Court will result in an in absentia removal order being issued against the applicant. As discussed below, the applicant can renew his application for asylum before the Immigration Judge. Being referred to Immigration Court does not stop time from accruing towards the 180 days needed to be eligible for an Employment Authorization Document. (*See* Section #31).

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

27. Immigration Court Proceedings

Once an applicant has been placed in removal proceedings, the case becomes procedurally more formal and the stakes for the applicant become much higher.

A foreign national can apply for asylum, withholding and CAT before an Immigration Judge (“IJ”) as a defense to removal proceedings if he has been placed in removal proceedings for some other reason, such as an ICE work raid, or a criminal arrest. Also, an affirmative asylum applicant who loses before the Asylum Office can renew his application for asylum, withholding and CAT before the IJ. The asylum application is heard de novo before the IJ. Unlike the asylum interview, removal proceedings are adversarial with an attorney from Immigration and Customs Enforcement (“ICE”) (most often) fighting against relief for the applicant.

In February 2008, the Executive Office of Immigration Review (the branch of the Department of Justice which oversees the Immigration Court) released its own practice manual on Immigration Court Proceedings. This valuable guide is available [online here](#).

In March 2008, the Executive Office of Immigration Review issued a memo on specific procedures which it prefers pro bono attorneys to follow.

27.1 Master Calendar

As in criminal cases, there are two types of court dates in Immigration Court, one is called Master Calendar and the other is the Individual Hearing. The first court date in the NTA will be for a Master Calendar date. On Master Calendar dates, the IJ deals with administrative issues, including scheduling, filing applications, pleading to the immigration charges, and other issues that arise. There are generally 20-30 cases scheduled during a two hour period for Master Calendar. Most Judges take cases where the respondents are represented by counsel first, and some Judges hear pro bono cases before cases with private attorneys.

Most attorneys in Immigration Court practice there every day, so the IJ and ICE attorney will speak in lingo which may be unfamiliar. It is important to let the Court know if you are working on the case pro bono and if you are not generally an immigration practitioner. If the IJ or ICE attorney says anything that you don't understand, ask them to clarify. Even if they seem irritated at having to slow the proceedings down, you are responsible for doing anything the IJ or ICE attorney directs you to do, and complying with any deadlines they impose, so it's imperative that you understand what they tell you.

27.1.1 Arriving in Court

Before or on the date of the first Master Calendar at which the attorney is appearing with her client, she must submit a completed Notice of Appearance form EOIR-28 (www.usdoj.gov/eoir/eoirforms/instru28.htm) preferably on green paper, two hole punched at the top, to both the IJ and the ICE attorney. Even if the attorney has represented the applicant before the Asylum Office, she must submit a new Notice of Appearance to become the attorney of record for the removal proceedings.

When the attorney arrives in the Court room, she should wait for a break between cases and then go check in with the court clerk seated to the side of the Judge. The attorney should hand the clerk the completed EOIR-28 and let the clerk know which number on the calendar her case is. The attorney should then sit and wait for the case to be called. Most Judges call the case by the last three digits of the respondent's alien number or by the attorney's name.

27.1.2 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 pro bono attorney. On the record, the Judge will state the nature of the proceedings and ask your client if she understands what is happening.

27.1.3 Determining Representation by Counsel

The client will first be asked if the attorney is his representative. If an individual appears without counsel, the Judge will usually ask the individual if he would like a continuance in order to seek legal counsel. There generally are not interpreters present for the Master Calendar and normally the only conversation the Judge will have directly with the respondent is to confirm that he wants the attorney present to represent him. Although the respondent plays a minor role at Master Calendar hearings, he must be present for all of them (unless the IJ explicitly waives his presence) or he will be ordered removed in absentia.

27.1.4 Adjourning the Case if You Are Newly Retained

It is generally possible to adjourn the case at least once for attorney preparation if the attorney has been newly retained. It is important to explain to the client, however, that any adjournment which is requested by the asylum applicant or her attorney will stop the clock from running to accrue the 180 days required to apply from Employment Authorization. (*See* Section #31). Generally Master Calendar dates are adjourned for relatively short period of time, such as three to six weeks.

27.1.5 Establishing Receipt of the Notice to Appear

On the Master Calendar date when you go forward with the case, the attorney or the client will be asked if the client has received a copy of the NTA. If not, he 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.

27.1.6 Admitting or Denying the Charges and Conceding Removability

One of the purposes of the Master Calendar is for the respondent, through counsel if represented, to plead to the charges in the NTA, that is to admit or deny that they are accurate. These charges generally look like this:

- You are not a citizen or national of the United States;
- You are a native of EGYPT and a citizen of EGYPT;
- You were admitted to the United States at New York, NY on December 13, 2004 as a nonimmigrant B-2 with authorization to remain in the United States for a temporary period not to exceed March 12, 2005;
- You remained in the United States beyond March 12, 2005 without authorization from the Immigration and Naturalization Service;

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(1)(B) of the Immigration and nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, you have remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States.

Prior to the court date, the attorney should review the charges with the client. If all of the information is correct, the attorney should admit the charges. If any of the facts are incorrect (such as the date of entry into the United States), the attorney should deny the charge and state the correct fact. In most asylum cases, such as in the example above, the charge of removability will simply be that the respondent overstayed his visa, or entered without a lawful visa. If this is true, this charge should be admitted. If the applicant is charged with a criminal ground of removability, the issues are more complicated and the attorney should thoroughly research the charge prior to the court date. Criminal grounds of removability and their consequences are beyond the scope of this manual.

Assuming that the charges are accurate and you admit the charges, you will also be conceding removability on behalf of your client. In order to be eligible to apply for asylum, the client, through the attorney, must admit removability under one of the grounds.

27.1.7 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 since the idea behind an asylum/withholding/CAT application is that under no circumstances does the respondent ever wish to return to his country. The Judge will then identify the client's home country as the country of removal.

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

27.1.8 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, CAT and/or voluntary departure should also be stated. Assuming that the respondent, through counsel, admits removability, the IJ will ask what forms of relief the respondent is seeking. The attorney will then respond, "asylum, withholding of removal, and relief under the Convention against Torture."

Before changes in the law in 1996, respondents would also routinely ask for "Voluntary Departure" ("VD") in the alternative. A grant of VD allows the respondent to depart the United States on his own rather than being deported if he is unsuccessful with his other applications. If the applicant has the ability to travel to a country other than his country of origin if he is unsuccessful with his asylum application, the attorney should request VD. If the applicant has no intention of leaving the United States unless he is forcibly put on an airplane, he probably should not request VD because there are serious penalties for failing to abide by the order. (*See* Section #8 on voluntary departure.)

27.1.9 Setting a Date for Submissions of the Written Asylum Application

If your client has not yet filed an asylum application, the Judge will usually set a date for submission of the completed written asylum application. This time period is generally 30 to 45 days, but if you let the Judge know that you are working on the case pro bono and have a busy caseload, the Judge will probably give approximately 45 days. It is generally best to make sure that you have adequate time to fully prepare the asylum application.

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

If the attorney wishes to file a new I-589, she must do so in open court on a Master Calendar date. The reason for this is so that the IJ can put on the record either that the IJ has read the respondent the warning of the consequences of filing a frivolous asylum application or that the attorney assumes responsibility for doing so. (*See* Section #3.5 on Frivolous Asylum Applications.) It is only the I-589 itself which needs to

be filed in open court, any other supplementary documents, such as a revised declaration, corroborating documents, or country conditions information can be submitted to the ICE district counsel's office and Immigration Court clerk's office prior to the Individual Hearing by a date specified by the IJ.

If the applicant prepared his first I-589 pro se, or if the I-589 was prepared by another attorney or representative, it is generally best to prepare a new I-589 for the Court. The old I-589 is still part of the record, however, so it is important that the answers in both versions be consistent or that any inconsistencies be fully explained. If the attorney representing the applicant in court prepared the I-589 for the Asylum Office, there generally would not be a reason to prepare a new one for court.

27.1.10 Background Checks

Before an immigration judge may grant an application for asylum, withholding of removal or CAT, the ICE trial attorney must confirm that the applicant's biometrics (fingerprints) have passed security clearances. If an applicant has never had his biometrics captured, or if it has been more than 15 months since they were last taken, the applicant must request a biometrics appointment from USCIS. To do so, send USCIS (1) a copy of the first three pages of the I-589 that was filed in court, (2) a copy of your EOIR-28 and (3) the instruction sheet found [here](#). Please note that you should file the biometrics request at least 3-4 months before your individual hearing to allow for sufficient processing time. If biometrics have not cleared by time an individual hearing is scheduled, the judge is likely to allow you to present your witnesses and other evidence and then adjourn the hearing for a final decision after biometrics have cleared. If your case has been adjourned for this very reason, and biometrics have still not cleared by the time of your rescheduled hearing, you may file a motion to adjourn. Neither the applicant nor his counsel will be informed if biometrics have cleared; only the ICE trial attorney will have access to that information. It is a good idea to call the ICE trial attorney a few days prior to your final hearing to inquire whether your client's biometrics are cleared.

27.1.11 Requesting an Interpreter

The Immigration Judge will also ask the attorney what the respondent's best language is. Unlike at the asylum interview, in Immigration Court, a professional interpreter is supplied by the Court for the Individual Hearing. Even if a respondent wants to supply her own interpreter, she cannot. Although the interpreters used by the Immigration Courts are professionals, they are not always very good. Additionally, especially for uncommon languages, the interpreter often comes from the same country as the respondent, and many LGBT/H asylum seekers feel uncomfortable testifying about such personal issues in front of someone from her country. The attorney should assure the client that interpreters are bound by rules of confidentiality and would lose their jobs if they discussed asylum cases outside of court. Nevertheless, as discussed above (*See* Section #26.6.2), if the applicant can testify in English, it is often a better strategy to do so. The attorney can ask the Judge at the Master Calendar whether the Judge will allow the interpreter to be there as back up on the Individual date in case the applicant doesn't understand a question, or whether the Judge's policy is to require the entire hearing to be conducted either in English or in the applicant's native language.

27.1.12 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 (4-18) months in the future. The Judge usually asks how much time will be necessary to complete the hearing. You 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.

At the last Master Calendar, the IJ will also give the attorney a “call up” date for when any other document submissions are due. At a minimum all documents are due no less than 10 days before the Individual Hearing. Some Judges require documents specific to the applicant’s case (as opposed to background, country condition materials) to be submitted 30 or 60 days before the Individual Hearing.

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.

27.2 Before the Individual Hearing

27.2.1 Submitting Witness Lists and Documents

Corroborating evidence is essential to winning asylum cases. Corroboration can come in the form of oral testimony or written documentation. For cases which were filed after passage of the Real ID Act (*See [Section # 9](#) on the Real ID Act and [Section # 20](#) on corroborating evidence*), an applicant will be required to submit certain types of corroborating evidence or account for its absence.

Since Immigration Court hearings are administrative hearings, formal rules of evidence, particularly the hearsay rule, do not apply. An IJ may choose to give hearsay evidence less weight than other evidence, but the fact that it is hearsay does not make it inadmissible. Thus, for example, a letter from an applicant’s former lover confirming that the two were once harassed by the police would probably be admissible.

27.2.2 Witness List

Before the Individual Hearing date, by the call up date that is for documents specific to the respondent’s case, the attorney must submit a list of witnesses she intends to call. The attorney should put the witness’s full name and reason for testifying, for example, “Jose Doe, respondent’s life partner.” If it’s unclear whether or not a particular witness will be able to testify, it is better to list the person on the witness list. There’s no rule that every potential witness must testify.

27.2.3 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 who were present for the persecution, 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.

Remember, however, that one element that you must prove in the case is that the applicant really is LGBT. Thus, if the applicant has a same sex partner in the United States, the partner should testify about their relationship. Even if the applicant doesn't have a partner to testify, if she is active with an LGBT organization, it can be helpful to have someone from the organization testify about the applicant's activities.

Only individuals with lawful immigration status can be witnesses. An IJ would not knowingly allow an undocumented immigrant to testify, and merely entering the Immigration Court would put the undocumented immigrant at grave risk of being placed in removal proceedings.

27.2.4 Expert Witnesses – Country Conditions

If the respondent wishes to use an expert witness at the Individual Hearing, the attorney should submit the expert's name on the witness list. Additionally, you should include the expert's c.v. and an affidavit of what the expert intends to testify about. Failing to submit these documents in advance of the hearing will likely lead to the ICE Trial Attorney arguing against allowing the expert to testify because the attorney could not adequately prepare cross examination.

Expert witnesses, are often critical to winning asylum cases and attorneys 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.

Often times there is very little information about human rights abuses of LGBT/H individuals in the applicant's country. In these situations, it is crucial to find an expert witness. Expert witnesses can also address specific issues which may arise in the case, such as why it would be unreasonable to expect the applicant to relocate internally within the country. Likewise, for some countries with positive media attention about gains made in LGBT rights, having an expert explain that, for example, a well-attended gay pride march does not translate into protection from homophobic violence by the police, can be vital to the case.

The content of a witness's 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.

Expert 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's "expertise" is called into question at the hearing, you should be prepared to argue on behalf of 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's political bias is so strong and so obvious that her testimony carries little weight with the Judge.

27.2.5 Expert Witness – Psychological or Medical

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. This is particularly important if your client has memory problems or a flat, unemotional affect. Similarly, it may be helpful to have a doctor or other qualified expert testify if your client has been tortured or beaten.

Likewise, if your client has filed for asylum beyond the one year deadline and is claiming an extraordinary circumstances exception based on mental health problems, it is almost required that the mental health expert testify in court on the applicant's behalf. Also, if the applicant's one year filing deadline is based on physical health problems, such as HIV-related illness and/or side effects from medication, having the applicant's treating physician testify would be vital to the case. If the doctor has knowledge about the applicant's country and can testify as to unavailability of similar HIV treatment options there, she should also be prepared to testify about this.

Mental health or medical experts can also be crucial to proving that your client is a member of a cognizable particular social group. If your client does not have any other way to corroborate the fact that she is LGBT, having a therapist who the applicant sees regularly testify that he believes that the applicant really is LGBT based on their therapy sessions can be very helpful. Such testimony can be particularly important if the applicant has a thorny issue in the case, such as a prior opposite sex marriage, which may cause the Judge to question the veracity of the applicant's sexual orientation.

It is also important to know who your Judge is an advance of the hearing and how receptive he or she is to LGBT claims. If you know that the Judge is skeptical about such cases, or doesn't really believe that sexual orientation should comprise a particular social group, the expert witness can be helpful to educate the Judge.

27.2.6 Telephonic Testimony

It is possible to have witnesses (especially expert witnesses) testify telephonically. The attorney must submit a motion requesting that the Judge allow telephonic testimony at least ten days before the hearing date. The motion can be short but should explain why telephonic testimony is necessary, for example, if the expert resides in Florida for a Pennsylvania case, and the respondent is indigent.

27.2.7 Submitting Corroborating Documents

As discussed above corroborating the applicant's claim can often mean the difference between winning and losing a case. (*See* Section #20 for information regarding the types of corroborating evidence which you should submit.)

With passage of the Real ID Act, a much greater burden has been placed on asylum seekers to corroborate their claims or explain why corroboration is not possible. If your client does not have corroborating documents which the IJ would expect him to have (such as police records, medical records, letters from friends or family, etc.) you must thoroughly prepare your client to explain why these documents are not

available and what efforts he made to get them. (*See* Section #9 on the Real I.D. Act for further clarification about the expanded need for corroborating documents.)

27.2.8 Supporting Documentation Format – Official Records

The Immigration Regulations set forth onerous requirements for authenticating official records from other countries. On the one hand, this is logical. The Immigration Judge does not have the expertise to determine whether or not a foreign government record is authentic, particularly when the record is in a foreign language and may come from a very different culture. The problem, however, is that the regulations place a burden on the asylum applicant who has fled his country in fear to have his documents authenticated by the very government from which he has fled. In practice this means contacting a family member or friend in the home country who is willing to go through several steps of authentication with local government officials leading up to an authentication stamp by the U.S. embassy.

This burden is particularly onerous on LGBT/H asylum applicants, many of whom have been disowned by family members because of their LGBT/H identity. If the applicant is still in contact with friends in the home country who are LGBT/H, it may be particularly dangerous for them to try get documents authenticated which concern a known LGBT/H person as doing so may “out” the friend to the government authorities.

Different Immigration Judges apply the regulations differently. Some Judges will allow unauthenticated documents into evidence and others will not. In any event it is important for the applicant to try to follow the authentication steps and document the efforts he made to do so if authentication is not possible. Also, always make 100% certain with your client that all documents he is submitting are genuine. In many countries it is easy to buy “official” documents, and your client may not understand how seriously DHS will take the submission of fraudulent documents. Sometimes the ICE attorney will send an official document to forensics to be tested for authenticity. This can include sending the document to the U.S. consulate in the applicant’s home country and making inquiries, for example, as to whether the police officer who signed the arrest record actually works in the station that issued the form. If your client submits any foreign documents, it is imperative that you make him understand that he must be 100% sure that they are real and he should check with his friend or family member who obtained them to be sure. Since the passage of the Real ID Act, (*See* Section #9), it is likely that if your client submits any false document, he will be found not credible and lose his case.

27.2.9 Submitting a Legal Brief

It is generally helpful to submit a legal brief along with supporting documents prior to the hearing date. The brief should not be overly long (probably no longer than 20 pages) and it should focus on the particular facts of the case as well as any thorny issues, or particular legal issues in the case. You should not spend an inordinate amount of time researching and writing the general standard for asylum, and can probably obtain a sample brief with boilerplate language for the introductory section from the organization that referred the case to you.

You should summarize the facts of your client’s past mistreatment, summarize the country conditions, and then lay out why your client’s facts meet the standard for asylum, withholding and/or CAT. Use bold

headings to make it as easy as possible for the reader to find the relevant sections, and clearly cite to the materials you've submitted. If your client has missed the one year filing deadline, lay out a clear argument for which exception she is claiming and how her facts fit that exception.

There is no requirement to submit a brief, and the brief does not become part of the record, but the brief provides one document the IJ and ICE attorney can read to see how strong the case is and what arguments you are making to address any difficult issues. The act of writing the brief will also be very helpful to the attorney in becoming fully familiar with all submitted materials and with crafting arguments to address legal issues in the case.

27.2.10 Contacting the Trial Attorney Prior to the Merits Hearing

It is always advisable to attempt to contact the ICE Trial Attorney 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 may be helpful in determining what the Trial Attorney sees as the weakness(es) in your case. Note, the attorney who appeared at the Master Calendar will probably not be the attorney for the Individual Hearing. Cases scheduled for Individual Hearings are assigned to ICE attorneys ten days prior to the Individual Hearing. If the case is adjourned after an Individual Hearing has commenced, the ICE attorney should not change.

Unlike other types of litigation, however, it is generally very difficult to have meaningful conversations with ICE counsel before the Individual Hearing date. Since ICE attorneys are generally not assigned to the case until ten days before the Individual Hearing, if there are issues to address before then, it may be difficult to find an attorney who will return a phone call or review the file. If there is a serious concern which must be addressed, it's a good idea to put it in writing and cc a copy to the Court, after leaving a couple of unanswered phone messages.

Sometimes it's possible to obtain stipulations from Trial Attorneys that clients are eligible for asylum or other relief (although the Judges may not believe themselves to be bound by agreements between the DHS and the respondent). 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 she will stipulate to eligibility and not oppose asylum or, failing that, if she will waive appeal if the respondent wins, thus ending the case immediately.

In some cases where the applicant has a very strong underlying claim, but has missed the one year filing deadline, the ICE attorney may agree not to oppose a grant of withholding of removal, though she would oppose a grant of asylum. In cases with one year filing deadline issues, you should thoroughly discuss, prior to the hearing date, the pros and cons of accepting an unopposed grant of withholding of removal as opposed to fighting a contested application for asylum. (*See* Section #32 on the benefits of asylum and Section #33 on the benefits of withholding status.)

27.2.11 Watching a Removal Proceeding

If you have never before attended an asylum hearing or a removal proceeding, it is an excellent idea to watch another case well in advance of your own hearing. If at all possible, you should try to watch a case that's before the same Judge as will be hearing your case so that you get a feel for the Judge's style. Removal proceedings are generally open to the public, though a respondent can request that asylum hearings can be closed. If you want to watch an asylum hearing, the organization which referred your case to you, or other local non-profits, can probably match you with an upcoming hearing to observe.

27.2.12 Adjourning an Individual Hearing

It is possible, but generally not encouraged, to adjourn an Individual Hearing date for good cause. The request for the adjournment must be made in writing and should be made as soon as possible after the need for the adjournment arises. Often you won't receive a response to the adjournment request until a day or two before the scheduled hearing, so it's safest to continue to prepare as if the adjournment will not be granted (although this may negate the purpose of the adjournment request.)

27.2.13 Preparing the Applicant

Unlike the asylum interview, removal proceedings are adversarial proceedings. Therefore, preparing the applicant fully for the hearing is crucial to the outcome of the case. You should try to speak with practitioners in this area to learn as much as possible about the Immigration Judge's style before the hearing. Some Judges are very controlling and will take over much of the questioning themselves, others are very passive, and still others may be "yellers" or abusive to litigants. It's best to know what to expect and prepare accordingly. The website www.asylumlaw.org contains a (somewhat dated) listing of statistics of asylum grant rates for Immigration Judges around the country. Remember this table is for all types of asylum cases so there is no way to know whether a particular IJ has a strong positive or negative record on LGBT/H cases.

If you do not litigate frequently, it's generally a good idea to write out direct questions before the hearing. One method for doing this is to begin with the final version of the declaration and go through it, breaking it down into open ended questions. Although strict evidentiary rules do not apply, the ICE attorney will object if you ask questions which are too leading in nature. It is also important to remember that if the applicant is applying for CAT and/or voluntary departure in addition to asylum and withholding, you must ask questions relating to those forms of relief. For CAT this means eliciting testimony about the applicant's future fear of torture, and for VD this means eliciting testimony that the client was present in the United States for at least a year before the NTA was issued, that he is a person of good moral character, has never failed to depart pursuant to a prior VD grant, has never been convicted of an aggravated felony, possesses travel documents, and actually intends to depart.

The styles of both IJs and ICE attorneys vary greatly. When IJs hear cases with unrepresented respondents, they ask the bulk of the questions, so IJs often become impatient with slow, methodical questioning by the respondent's attorney, and the IJ may jump in and ask questions to speed the process along. The client should be fully prepared to listen carefully to questions by the Judge and respond in the event that the IJ takes over the questioning from you. It is also important that you do not become flustered if this happens. The IJ will probably ask a few questions, then hand the questioning back over to you. If the IJ already covered something that you had intended to cover, don't just return to your written the

questions about the same incident or the IJ will become more impatient with you.

Some ICE attorneys view their role as carefully analyzing cases and meting out justice on a case by case basis, others see their role as trying to remove aliens, and others still seem like government bureaucrats who do not care much about the outcomes of their cases. It is best to prepare the applicant for the harshest cross imaginable. You should look for any weakness or discrepancy in the case and work with the client to come up with truthful explanations that damage the case as little as possible.

Often after preparing with the applicant using a list of direct questions, the applicant will ask for a copy of the questions so that he can “study” the questions and be sure of the answers. You should never give the client the questions to “study.” It is imperative at the hearing that the client think about the question and respond to the question by remembering the experience that he went through. If he memorizes the “correct” answers, his testimony will sound rote and unconvincing. The client should reread his declaration, I-589, and supporting documents. As with the asylum interview, it is often helpful to make a timeline (*See* Section #26.4) which covers significant incidents in the applicant’s life. The applicant should “study” the dates because discrepancies between the oral testimony and written testimony can lead to an adverse credibility finding.

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, often 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 recollection. You should you run through a mock hearing with your client and practice some cross-examination questions with him. After building trust with your client, it is important that you mentally prepare him to face seemingly hostile questioning from the ICE Attorney and Judge.

27.3 The Day of the Hearing

As with the asylum interview, the applicant should dress comfortably, but respectfully for the hearing. She should not feel compelled to wear a suit, but she should not wear jeans and a t-shirt either. Some Immigration Courts (notably New York’s) can have long lines with extensive security to enter the building. In New York, the attorney and client should meet outside the building together, and have the written hearing notice handy to show the security guards. The attorney should always arrange to meet the client at least 30 minutes before the scheduled hearing in case there is a problem getting into the building. Most federal buildings have cafes if it becomes necessary to kill time. If the respondent is not in Court within a few minutes after the scheduled hearing time, she can be ordered removed in absentia. Asylum hearings are confidential and the hearings are generally closed to the public. It is, however, possible for multiple members of the law firm team to attend the hearing.

27.3.1 Overbooking Individual Hearings

Because of the very full calendars which most Immigration Judges carry, sometimes they book more than one Individual Hearing for the same time slot, thinking that one of the cases may not be ready to proceed. If this happens, the litigants won't know until the day of the hearing, and they may be forced to wait for an hour or more to see the Judge, and/or the IJ may just adjourn the case to another day. There's really nothing to do about this but be flexible.

27.4 The Individual 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.

27.4.1 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.

27.4.2 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 (but *see*

See Section #27.1.2).

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 is simply out of the question, particularly in the case of an asylum seeker who fled for 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 she thinks it deserves. Particularly marginal evidence may be admitted by the Judge but viewed with a great deal of skepticism.

As discussed above (*see* Section #27.2.8) there are specific regulations which require authentication of official documents from other countries. Every effort should be made to comply with these regulations or explain why authentication was not possible. Some Judges will allow documents which have not been authenticated according to the regulations into evidence, other Judges will not.

27.4.3 Before Testimony Begins – Procedural 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. Make sure that everything you've submitted gets properly into the record as evidence.

27.4.4 Before Testimony Begins – Correcting and Updating Information

At the beginning of the hearing on the record, the respondent's attorney is generally given a chance to update or correct any information on the asylum application or other materials previously submitted. It is important to make certain that names, addresses, dates, A-numbers, etc. are up-to-date and correct. In addition, if you know 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.

Often times asylum seekers have submitted their own pro se applications before seeking legal 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 United States Judges and lawyers, such as political opinion claims, 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.

27.4.5 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 these circumstances, the Judge may instead reserve his ruling until

the attorney presents the evidence during the course of the case.

27.4.6 Before Testimony Begins – Conferencing the Case

Sometimes rather than launch directly into the hearing, the IJ will conference the case with the respondent's attorney and the ICE attorney. Other times the IJ will ask the two attorneys to discuss the case before going on the record to see if any agreements can be reached.

On rare occasion, with particularly compelling cases, the IJ will express her predisposition to grant the case before the hearing begins and will conference with the ICE attorney and respondent's attorney to see if there are any issues that the ICE attorney would need addressed in order to agree to a grant.

Sometimes on cases with one year filing deadline issues, the IJ or ICE attorney will offer to grant withholding of removal if the applicant agrees to withdraw his application for asylum, as though they are plea bargaining. For applicants with one year issues, the attorney should seriously discuss the pros and cons of winning withholding of removal as opposed to asylum before the hearing date because of this possibility. If the applicant has no colorable exception to the one year filing deadline, there may not be a downside to accepting such an offer. If, however, the applicant does have a chance of proving a one year exception and succeeding with asylum, he should not withdraw his asylum application and lose the possibility of appealing a denial. (*See* Section #33 on consequences of winning withholding.)

27.4.7 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. 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.

27.4.8 Examination of Witnesses

Examination of witnesses is largely the same as in most other courts. The respondent's attorney 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 producing the expert in person would be prohibitive, most of the Immigration Judges allow telephonic testimony by expert witnesses, however, you will have to submit a motion at least ten days prior to the hearing requesting leave to take testimony telephonically.

Generally, the respondent will testify first. If there are other witnesses (especially expert witnesses, or medical or mental health professionals) with pressing schedules, most IJs will allow them to testify first instead of your client. Any witnesses (other than the respondent) who have not yet testified must wait outside the court room. Thus, if a client intends to have his partner testify, he should be aware that his partner cannot be in the court room for moral support while the applicant himself is testifying. Witnesses

should be instructed to bring something to read and to have a full meal before coming to court because they may have to wait a couple of hours before they testify.

27.4.8.1 Direct Examination

Attorneys should be well prepared for direct examination and the client should be well rehearsed in how to conduct herself. The client should be advised to answer questions succinctly without engaging in long narratives, and should state clearly when she does not understand a question.

Since asylum hearings are brief, typically scheduled for two, three or four hour time slots, direct examination should be prepared with an eye on the clock. 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. Remember, however, never to take for granted that the Judge accepts that your client actually is LGBT. Even though background testimony about childhood taunts, or early relationships may not be particularly relevant to a later police detention, unless the Judge indicates before the start of the hearing that he is willing to accept that your client is LGBT, it is important to make a record documenting the client's sexual orientation or gender identity.

Leading questions are generally objected to, and the objections are generally sustained. It is important that you explain to your client in advance that you are required to ask open-ended questions in awkward format (such as, "did there come a time when you had a problem because of your sexual orientation?") You should prepare your client for this format of questions as well as for the possibility that on cross-examination she may be limited to "yes" or "no" answers.

27.4.8.2 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. While it is appropriate for your client to testify about relationships and affectional attachments to prove his sexual orientation, it would not be appropriate for an attorney to cross examine the applicant regarding specific sexual experiences. Likewise, if the attorney asks questions about how your client was infected with HIV, you should object unless the answer is directly relevant to the case.

Trial Attorneys will often cross exam the applicant about the possibility of internal relocation within the home country. The applicant should be prepared to explain why this is not possible. Also, if the applicant experienced harm from non-government actors, the Trial Attorney will almost certainly ask the applicant to explain why she did not seek government protection, or if she did seek government protection how she knows the inadequate response was related to her LGBT/H identity.

If the country conditions materials you submitted and/or the U.S. State Department report contains information about some improvement in LGBT/H rights in the applicant's country, or in certain areas of the applicant's country, she should be prepared to address why that slight improvement does not make her fear less objectively reasonable.

Generally, the Trial Attorney's cross-examination is relatively minimal. Redirect is permissible and strongly recommended where cross-examination has raised damaging issues.

27.4.8.3 Examination by the Immigration Judge

All the Immigration Judges will usually conduct their own extensive examination, generally after both direct and cross are completed by the attorneys. Some Judges, however, will interrupt direct and cross-examination repeatedly and extensively, which can disrupt the flow of the attorney's questions and rattle the client. The Judge's examination can present serious problems, since very often the questions are such that, if they were asked by an attorney in any other court proceeding, they would be subject to strong objections. However, since the Judge is doing the questioning, and typically believes that 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 an appeal, if necessary. 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 sense of the witness's credibility.

27.4.9 Making a Record

Immigration Judges have very full calendars and receive significant pressure from above to keep their calendars moving. IJs will allot different time slots for Individual Hearings depending on the complexity of the case, but they generally allow around two to four hours for the entire hearing. Thus there is often a tension for the respondent's attorney between keeping the IJ from becoming impatient and creating a complete record in the event that the case needs to be appealed. Even if the IJ has given indications that she will grant the case, it's important to make a record because ICE may reserve its right to appeal.

Immigration proceedings are recorded on tape recorders. It is therefore very important that you assist in making the record. If your client nods, instruct her to answer out loud. If your client points to a body part where she was beaten, make sure she explains out loud what she is pointing at.

27.4.10 Interpreters

The Court will supply an interpreter if your client has indicated that he is not fluent in English. The Court employs interpreters for common languages such as Spanish and Chinese languages. 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.

27.4.11 DHS's Case

Once the respondent has finished putting on his case, ICE can call rebuttal witnesses. In practice this almost never happens in asylum cases.

27.4.12 Closing Statements

Most IJs will allow both sides to make a closing statement before reaching a decision. It's a good idea to outline the closing statement before the hearing date, but it is also important to be flexible and address any negative facts that come out during testimony directly. By the time the attorneys are making closing arguments, the IJ's mind is probably pretty much made up, but if there is one issue which is a sticking point for the IJ, you may be able to make an argument to overcome the problem.

27.5 The Decision of the Immigration Judge

The Judge will generally issue an oral decision on the same day of the hearing. Sometimes, particularly if there is a complex or novel issue of law, the IJ will send a written decision in the mail or schedule a Master Calendar date for the respondent to return for the decision, but these situations are rare.

Most often the IJ will read the (long) decision, summarizing the facts, reading boilerplate language about the legal standards for the relief sought, and finally analyzing the facts in light of the law. If the applicant has applied for multiple forms of relief, such as asylum, withholding and CAT, the IJ will ordinarily analyze the facts in light of each standard and determine whether or not the applicant qualifies. It is often impossible to tell until the very end of the oral decision what relief, if any, the applicant has won. If the attorney has to appeal the decision, he will not have a written copy of the decision at the time that he must submit a detailed Notice of Appeal. It is therefore a good idea to take detailed notes during the reading of the decision paying careful attention to 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. When the Immigration Judge issues an oral decision, whether favorable or unfavorable, the respondent receives only a minute order form filled out and signed by the Judge.

27.5.1 Reserving/Waiving Appeal Rights

Once the IJ has read her decision, she will ask both the respondent's attorney and the ICE attorney whether they reserve or waive their right to appeal. If the respondent loses, he should always reserve his right to appeal. Even if he's uncertain whether he actually will appeal or not, reserving the right does not mean that he must actually appeal; waiving the right to appeal, however, means just that and the respondent can't change his mind later. If the respondent wins asylum there is no need for his attorney to reserve the right to appeal. If ICE also waives the right to appeal, then the decision is final. If ICE reserves its right to appeal, the respondent will not know for 30 days whether or not the decision is final. If the IJ denies asylum but grants withholding, you may decide to appeal. You should be aware, however,

that if you appeal the denial of one form of relief, the ICE attorney may appeal the relief that was granted.

The IJ will give both attorneys a pre-printed order form which will either order removal, or state the form of relief granted, as well as whether or not appeal rights were reserved. This form may be the client's only proof of immigration status until he receives a new I-94 or employment authorization document in the future.

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

28. Board of Immigration Appeals

An unsuccessful applicant may appeal to the Board of Immigration Appeals (BIA), an administrative body in Falls Church, Virginia, close to Washington, DC. While a BIA appeal is pending, the final order of removal is stayed.

28.1 Notice of Appeal

To appeal before the BIA, the applicant must file a Notice of Appeal and required fee (\$110 as of this writing, *see* www.usdoj.gov/eoir/appealtypes.htm for updates) with the Board of Immigration Appeals (“BIA”) so that is received within 30 days of the IJ’s decision. This deadline is very strictly enforced. A certificate of service must also be included with your Notice of Appeal, stating that service of the Notice was made on the Office of the Chief Counsel. All correspondence to the BIA must include a certificate of service to the Office of the Chief Counsel. It should also be sent by certified mail return receipt requested or via Federal Express or other overnight delivery service.

The Notice of Appeal (EOIR-26) www.usdoj.gov/eoir/eoirforms/2instru26.htm is a relatively straightforward form, but the grounds of appeal must be stated sufficiently to avoid summary dismissal. Even if the attorney does not intend to represent the applicant on appeal, she should consider assisting the applicant to fill out the Notice of Appeal. At the time the Notice of Appeal must be submitted, there will generally be written opinion by the IJ which makes it very difficult for a new attorney on the case to file the form. If the attorney does intend to represent the applicant on the BIA appeal, she must submit a new Notice of Appearance form, form EOIR-27 www.usdoj.gov/eoir/eoirforms/instru27.htm. Filing the Notice of Appeal automatically stays the removal order until the final decision by the BIA.

28.2 The Argument

BIA appeals are almost always done entirely on paper. While it is possible to request oral argument, the BIA almost never grants it. Several months (generally 6-18) after the Notice of Appeal has been filed, the attorney of record, or respondent if there is no attorney of record, will receive the transcript and record on appeal. Once the attorney has received this, he has 21 days to submit a written brief. He can request one adjournment for good cause which will give him an additional 21 days to file the brief.

Under regulations that became effective on September 25, 2002, the BIA has limited fact-finding ability on appeal, which heightens the need for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. With the streamlining procedure which is now in place with BIA appeals, under which the majority of decision are affirmed without opinion by a single BIA member, it is important to fully understand the circumstances under which a three member panel is required and to argue zealously for a three member panel.

Information on writing BIA appeals is beyond the scope of this manual, but two excellent resources are the BIA Practice Manual which is put out by [the BIA itself](#) and the American Immigration Law Foundation’s [practice advisory on BIA practice](#).

29. Federal Court Review

If the applicant again loses before the BIA, her only remaining recourse is to file a petition for review in the federal court of appeals in the circuit in which the case was originally tried. 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.

Unlike with BIA appeals, there is no automatic stay when a federal appeal is filed, so it is imperative for counsel to seek a stay of removal while the appeal is pending. It is not unheard of for the Deportation Branch of Immigration & Customs Enforcement (ICE) to move to quickly deport people. Keep your eyes out for what is called a “bag-and-baggage” letter requesting that your client report to ICE for deportation. As the BIA’s streamlining has increasingly eliminated meaningful review of the Immigration Judges’ decisions, more and more asylum cases are being appealed to federal court. If there is any reasonable and non-frivolous ground for appeal, the attorney should seriously consider filing a petition for review.

Federal Court appeals are beyond the scope of this manual, but, again, the reader is directed to the American Immigration Law Foundation’s practice advisories for [excellent information on a variety of federal court issues](#).

30. Detained Asylum Seekers

The procedure for representing detained asylum seekers is essentially the same as it is for representing non-detained asylum seekers.

Proceedings move at a greatly accelerated pace when asylum seekers are detained, however, so if an attorney takes on the case of a detained individual, she should be prepared to put in a considerable amount of work right away.

One of the greatest challenges of representing a detained asylum seeker is communicating with the client. Some detention facilities have systems in place whereby the attorney can leave a message for the client to call back and others do not. Some detention facilities allow detainees to use phone cards to call out, whereas other only allow detainees to make collect calls, which become very expensive very quickly for the recipient.

Most detention facilities have generous visiting hours for attorneys. Attorneys must be prepared, however, to prove that they are lawyers by bringing a court issued attorney i.d. card, or law firm letterhead listing them. Law graduates may have difficulty visiting detained clients unless they are accompanied by an admitted attorney.

Detention facilities provide relatively private rooms for attorney-client consultations. Some facilities allow attorneys to bring laptop computers to these meetings and others do not. It is more difficult to visit with detained clients to work on their declarations, but just as important as in any other case. Attorneys may also have to do more legwork in communicating with friends or family in the applicant's home country to obtain corroborating evidence since it may be impossible for the detainee to make international calls from the facility.

31. Obtaining an Employment Authorization Document

Although employment authorization is not an asylum applicant's automatic right, an asylum applicant may be authorized to work.

In addition, employment authorization may NOT be granted before 180 days after the date the asylum application was filed. The regulations allow the applicant to submit the EAD application once the asylum application has been pending for 150 days but DHS will not issue the EAD until at least 30 days later, for a total of 180 days. If an application for asylum is denied within the first 150 days, the applicant is generally ineligible for employment authorization.

In practice, there are a couple of ways that an applicant will receive employment authorization. First, although CIS generally schedules an interview within 45 days of receipt of the application sometimes CIS delays scheduling an interview, especially if the applicant lives far away from an Asylum Office and must be scheduled for a "circuit ride" by an Asylum Officer. Likewise, while decisions are generally issued by the Asylum Office two weeks after the interview, sometimes if there is a novel issue of law, the application is sent to "headquarters" before the Office can issue a decision. Under either of these circumstances, if more than 150 days elapse from receipt of the application, the applicant is eligible to apply for employment authorization.

If the applicant is unsuccessful at the Asylum Office and referred to removal proceedings, he can also apply for an EAD 150 days after the application was filed. The applicant should be aware, however, that any postponements requested by the applicant or his attorney will stop the clock. If, for example, the attorney requests a one month adjournment to gather corroborating documents, the clock will be stopped during this adjournment period. As a practical matter, it is often difficult to restart the clock once it's been stopped. You can find out how many days have elapsed since the filing of the application by calling the Immigration Court automated phone number 1-800-898-7180 and entering the applicant's alien registration number.

It is important to know that if you ask for a continuance or if your client has asked for a continuance of her case in the past, the "clock" will or has been stopped and it may not be possible to get the clock restarted, even if there is a further delay caused by the Court rather than by your client.

For an excellent report on the problems many asylum seekers face in obtaining employment authorization and the wrongful stopping of the "clock" in many cases, see [Up against the Asylum Clock: Fixing the Broken Employment Authorization Clock System](#).

For persons granted asylum, it is not necessary to obtain an EAD in order to work legally. (See March 10, 2003 INS Memo available at uscis.gov/graphics/lawsregs/handbook/Asylees031003.pdf.) Also, asylees will be able to obtain an unrestricted social security number which they can present as proof of status to work. ([See Social Security website](#).)

Also, on November 15, 2011, the Executive Office for Immigration Review (that is, the Immigration Court) issued [comprehensive guidance](#) on when the clock should stop, start, and the duties of immigration judges to explain what is happening with the clock.

31.1 Eligibility

Eligibility for employment authorization is defined in the negative. An asylum applicant must demonstrate all of the following:

1. That he has NOT been convicted of an “aggravated felony.”
2. That 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).
3. That he has NOT had his asylum application denied by an Asylum Officer or by an Immigration Judge within 150 days after applying for asylum. [Note: A referral of the asylum applicant to Immigration Court for removal proceedings is not considered a denial of the application and therefore does not prevent issuance of an EAD.]
4. That he has NOT asked for a continuance in Immigration Court before 180 days since the filing of the application.

31.2 When To File

The applicant should file “no earlier” than 150 days after the date when his completed asylum application was filed, with one exception. An applicant who has been recommended for approval may apply for employment authorization when she receives notice of the recommended approval. However, if the asylum application is returned as incomplete, the 150-day period does not begin to accrue until the USCIS receives a completed application. That means that any delay requested or caused by the applicant shall not be counted.

31.3 What To File

31.3.1 Application

To apply for work authorization, a client will need to file an Application for Employment Authorization (Form I-765) available at [the CIS website](#). 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 she may get a social security number.

If the application is filed before there has been a final decision on the applicant’s claim, the proper eligibility category is “c8 – asylum pending” and the application is mailed to the regional Service Center with jurisdiction over the applicant’s residence. If an asylum applicant wins “recommended approval” after her asylum interview, she can file for an EAD even if, as is generally the case, fewer than 150 days have elapsed since filing. An applicant with “recommended approval” is not legally permitted to work unless she has a valid EAD. The EAD application for an applicant with “recommended approval” is also filed under the “c8 – asylum pending category” with the local Service Center. It is not until an applicant has final approval that she is no longer required to have an EAD to work.

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

31.3.2 Proof of Pending Asylum Application

Along with the form I-765, the applicant must submit proof that the asylum application has been filed with the USCIS or Immigration Judge, or that it is pending before the BIA or federal court. Once an EAD has been issued, the applicant can continue to renew it even if he loses before the IJ, so long as he continues to pursue his appeals. If however, the IJ denies the case before the EAD is granted, then even if the application eventually reaches the 180 days after the removal order and appeals, he will not be able to get an EAD.

31.3.3 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 currently \$175.00. To make sure that the fee has not increased since this manual was printed, check [the CIS website](#).

If the applicant can demonstrate an "inability to pay" the filing fee, then he may file a fee waiver request. The applicant should submit an affidavit or declaration asking for the waiver, stating his merits for obtaining employment authorization, and demonstrating the reasons for his "inability to pay." He should also submit proof of his monthly income, if any, and monthly bills, such as rent, utility bills, phone bills etc. For more information, see uscis.gov/graphics/publicaffairs/newsrels/FeeWaiver03_29_04.pdf for further guidance on requesting a fee waiver. Any application filed with a fee waiver request should have "Fee Waiver" written in large letters on both the cover letter and envelope, to prevent a clerk from mistakenly returning the application for failure to pay the fee.

31.3.4 Photos

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

31.4 Where to File

The I-765 application must be filed at the appropriate USCIS Service Center (i.e. the Service Center with jurisdiction over the residence of the applicant) if the application is still pending. See uscis.gov/graphics/fieldoffices/service_centers/index.htm to find the appropriate Service Center for your location. Once asylum has been granted, applications are filed with the Nebraska Service Center.

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

31.5 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 her I-765 application is approved, then the applicant will receive a Notice of Approval.

The USCIS has 30 days from the I-765 application filing date to approve or deny the application. (See to “When to File” section #31.2 above for more information)

31.6 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. However, the renewal application must be filed 90 days before the previously issued employment authorization expires.

To renew, the applicant must file an I-765 form with the filing fee which is currently \$180.00 (See uscis.gov/graphics/formsfee/forms/index.htm for updated information on filing fees), or fee waiver request, along with proof that the applicant continues to pursue his asylum application. Such proof depends upon the stage of the applicant’s asylum application. A copy of the following may be appropriate proof:

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

31.7 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.

- 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.
- After Denial by an IJ, the BIA, or a Federal Court – The employment authorization terminates upon the expiration of the EAD, unless the applicant has filed an appropriate request for administrative or judicial review.

31.8 Asylees and EADs

Once an applicant is granted asylum, either with a final approval letter from the Asylum Office or from the Immigration Judge, she is legally permitted to work in the United States and is not required to have a valid EAD to work legally. (See <http://uscis.gov/graphics/lawsregs/handbook/Asylees031003.pdf>). Thus,

asylees can obtain unrestricted social security cards, that is cards without a notation that they are only valid with CIS employment authorization. Many asylees still apply for and obtain EADs, however, because they are a good form of identification to have, and may be necessary in order to obtain other identification such as state issued drivers' licenses or identification cards. An asylee applies for an EAD using a different eligibility code than an asylum seeker. Asylees use code "a5" and file with the Nebraska Service Center.

32. Asylee Status

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 least theoretically, 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 the asylee no longer fears 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.

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 apply for lawful permanent residence one year from the date on which they were granted asylum.

32.1 Change of Address

It is very important that asylum seekers and asylees keep CIS apprised of any changes in address. If your client's application for asylum is pending or has already been granted, she should file her change of address form with CIS. This form (AR-11) is available at uscis.gov/graphics/formsfee/forms/ar-11.htm. As with all forms sent to Immigration, the applicant should keep a copy of the form and mail it certified mail, return receipt requested. It is not generally necessary for the attorney to send in this form on the client's behalf.

If the applicant has a case pending in Immigration Court, he must use form EOIR 33 which is available at www.usdoj.gov/eoir/eoirforms/eoir33/ICadr33.htm. This form should also be copied and mailed certified mail, return receipt requested. A copy of the form must also be served on the ICE district counsel.

Even after an asylum applicant has won asylum, she must continue to inform CIS of address changes. This is especially important while her application for legal permanent residence is pending. If the applicant moves after filing for residency and later misses correspondence from CIS, her application could be denied and she could have to re-apply, adding several years to her wait to become a resident.

32.2 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 opposite sex spouse and unmarried children under 21 years of age. As with all other areas of immigration law, same sex marriages are not recognized for purposes of derivative asylum. Likewise,

transgender applicants may or may not have their marriages recognized, depending on how complete the transgender spouse's transition is and on what happens in this developing area of U.S. immigration law. (See www.immigrationequality.org/template.php?pageid=4 for updated information on this issue.)

Note: if the asylee won based on sexual orientation, but is still legally married to a spouse abroad, he is technically permitted to file a derivative application for her, but the application, acknowledging an ongoing opposite sex relationship, could lead to the underlying asylum application being reopened. If the applicant has minor children abroad, and testified about the opposite sex relationship that resulted in the children, he should be able to apply for derivative status for the children. The asylee must petition for immediate relatives within a two-year period after being granted asylum. This period may be extended for humanitarian reasons.

32.3 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). See uscis.gov/graphics/lawsregs/handbook/Asylees031003.pdf.

Your client is eligible for an unrestricted social security card that along with proof of identity is sufficient to establish that she is eligible to work in the United States. See www.ssa.gov/immigration/documents.htm. 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 Drivers' 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 recently decided that EADs would be automatically provided to persons granted asylum at the Asylum Office.

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.

32.4 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 most benefits until the appeal is complete or a final approval is granted. Some benefits, such as Safety Net benefits only require that an applicant demonstrate PRUCOL (“permanently residing under color of law”) status and a pending application may be sufficient for this purpose. Additionally, in many states, HIV-positive foreign nationals can receive HIV/AIDS treatment and medication under the AIDS Drug Assistance Program (ADAP) regardless of immigration status.

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. 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.

It is important for the asylee to understand that unlike most other foreign nationals who may apply for legal permanent residence, asylees are not required to prove that they are not likely to become a public charge. Thus, they can receive government financial benefits without jeopardizing their future ability to obtain permanent residence in the United States.

32.5 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.

32.6 Selective Service Registration

All males in the United States between 18 and 26 years of age are required to register for the draft. Asylees and asylum seekers are not exempt. Failure to register may have implications for your client when he applies to become a U.S. citizen. Information about the Selective Service can be found at

www.sss.gov. As a practical matter, since openly LGBT individuals cannot serve in the military, there is little chance that your client will be drafted.

32.7 International Travel

Asylees can travel outside the United States with refugee travel documents. It is essential that the asylee not return to her home country until she has become a U.S. citizen and can travel with a U.S. passport. If the asylee does return to her home country, DHS could refuse to allow her to reenter the United States on the grounds that she implicitly no longer fears persecution.

Asylees must only travel with a United States issued Refugee Travel Document. If an asylee travels with the passport issued by the country from which she has been granted asylum, she can be seen as availing herself of the protections of her government which could lead to a finding by the U.S. government that she no longer needs asylum protection.

While asylees may have technical grounds of inadmissibility (such as unlawful presence in the U.S. or prior entry with a false passport), these immigration violations do not generally put an asylee at risk if he or she travels abroad.

If, however, an asylee has any criminal convictions in the U.S., he or she should consult with an immigration attorney before traveling outside the U.S.

Asylees should understand, however, that even after obtaining legal permanent residence, they will have to use a Refugee Travel Document to travel abroad. It is only after an asylee becomes a U.S. citizen that he will be eligible for a U.S. passport. Asylees should also understand that until they obtain U.S. citizenship they cannot travel back to their countries. When they apply to naturalize, they will have to list all international travel after obtaining legal permanent residence in the United States, and a DHS Official could re-open the asylum grant upon learning that the applicant traveled back to his country.

Additionally, HIV-positive asylees could, at least theoretically, be denied entry into the United States because they technically remain “inadmissible” even with asylee status. Again, it is safest to wait until after obtaining lawful permanent residence status to travel outside the United States.

Individuals who have won withholding of removal or relief under the Convention against Torture, can never travel abroad. Leaving the United States would amount to self-enforcement of a removal order and they would not be permitted to re-enter the United States.

32.8 Asylee’s Adjustment of Status to Permanent Residence

After having been granted asylum, an asylee is eligible to apply to adjust her status to legal permanent residence (“green card”) with CIS one year after being granted asylum. Residents may submit petitions to sponsor certain family members – opposite sex spouses, minor children, and unmarried adult sons and daughters – for legal permanent residence.

To apply for adjustment of status, an asylee must prove that she: a) has been physically present in the

United States for one year after having been granted asylum; b) remains a “refugee” (i.e. with a “well-founded fear of persecution,” etc.); c) has not been firmly resettled in any foreign country, and; d) is not “inadmissible” or warrants a waiver of applicable grounds of “inadmissibility.”

The asylee must file the following documents with CIS:

- [Form I-485](#) and appropriate fee (or fee waiver request);
- Fingerprint fee (this fee cannot be waived);
- 2 passport style photographs;
- [Form G-325A](#);
- Evidence of asylee status (copy of I-94 and letter granting asylum or decision by Immigration Judge) ;
- Birth certificate (if available);
- Proof that applicant has been living in the United States for the last year (such as copy of lease, bills, pay stubs, or receipt of government benefits);
- Proof of legal change of name (if applicant has legally changed her name since winning asylee status.

Until a change in the law in May 2005, there was a cap on asylee adjustments, permitting CIS to process just 10,000 applications per year. This cap has now been eliminated, but there is still a long backlog, which may be four years or longer.

Unlike most applicants for legal permanent residence, asylees are not required to prove that they are not “likely to become a public charge.” Thus, if an asylee has been receiving means-tested benefits such as public assistance or SSI, this will not prevent his eligibility for legal permanent residence. Also, adjustment applicants may request a waiver of the filing fee for the adjustment application if they can demonstrate that paying the fee would result in financial hardship. For further guidance on CIS fee waiver criteria, see the following CIS memos: uscis.gov/graphics/publicaffairs/newsrels/FeeWaiver03_29_04.pdf and uscis.gov/graphics/lawsregs/handbook/FeeWaiverGd3404.pdf.

Eventually, after filing, the applicant will receive an interview notice along with a medical examination form that he will have to get completed for the interview as instructed. The medical examination requires an HIV test. Although HIV is a ground of inadmissibility, asylees and refugees are eligible to apply for a waiver on humanitarian grounds. An asylee files for a waiver [using form I-602](#) and the HIV waiver supplement as page two. While an asylee who seeks an HIV waiver is not required to demonstrate that he has private health insurance in order to obtain a waiver, he will have to submit evidence that he does not present a danger to the public health and that the risk of the spread of infection by admitting him as a resident is minimal. This generally means that the applicant should submit an affidavit explaining that he understands the modes of transmission of HIV and does not present a danger to the public health. The applicant’s treating physician should also submit a letter explaining that the applicant has been counseled about HIV transmission and that he is compliant with his treatment regimen.

Applicants for adjustment of status who entered the United States with fraudulent documents (such as a passport purchased on the black market) will also have to submit an application for a waiver of inadmissibility. This waiver would also be submitted on form I-602.

uscis.gov/graphics/formsfee/forms/i-602.htm .

Although the asylee's asylum application and supporting documentation are part of her file with the CIS Officer, the adjustment interview will focus on eligibility for adjustment to permanent residence, not on the underlying asylum claim. If, however, there is a reason for the Officer to suspect that the applicant no longer fears returning to her home country, (for example, if the applicant has traveled home to her country, or if asylum was granted based on the applicant's lesbian identity and she is now married to a man), then the Officer can ask questions about whether or not the applicant continues to meet the standard for asylee and/or whether or not the underlying asylum application was fraudulent.

32.9 Naturalization

A legal permanent resident is permitted to submit an application for naturalization to become a U.S. citizen five years after becoming a resident. However, once an asylee is granted adjustment to permanent residence, the date of admission is given as that of one year before the date of approval of the adjustment of status application, effectively reducing the wait to apply to naturalize to four years.

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 10 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.

33. Withholding Status

Withholding of removal is a very basic and minimal status to win.

Unlike asylum, individuals with withholding are not eligible to apply for legal permanent residence, they cannot obtain Refugee Travel Documents and cannot travel outside the United States, they cannot petition immediate relatives as derivatives, and they must have a valid CIS-issued employment authorization document in order to work lawfully in the United States.

Essentially, a grant of withholding means that the applicant is ordered removed but that enforcement of the order is “withheld” because the Judge has recognized that the applicant would more likely than not suffer persecution in his country if he’s returned. The status is not completely permanent; if ICE determines that country conditions have changed such that the withholding grantee would no longer be in danger if removed to his country, ICE can re-open the proceedings and seek to revoke the withholding grant. As a practical matter, this happens very rarely.

While withholding is a less than ideal status, for many applicants who have missed the one year filing deadline or who have a conviction which prevents a grant of asylum, withholding is a much better alternative than being removed to their home country. It’s also a better status to have in the United States than being undocumented because individuals with withholding are eligible for employment authorization, although they will need to renew the EAD annually.

Although withholding is a vastly inferior status to asylum in the immigration context, in other legal contexts individuals with withholding are treated similarly to those with asylum. Those with withholding status are eligible to receive welfare, Medicaid, Supplemental Security Income, and Food Stamps for up to seven years upon receiving their status, just as asylees are. They can also receive certain government housing subsidies and are eligible for Legal Services Corporation-funded legal services.

Withholding is far from ideal as an immigration status, but if an applicant has no other options, at least withholding will grant her the ability to work legally, obtain a social security number, receive benefits, and otherwise participate in American society.

Notes:

It may be possible for some people who win withholding to obtain legal permanent residence if they have a United State citizen immediate relative who can sponsor them for a “green card.” Of course, if the applicant had a citizen relative to sponsor her, she would probably already have applied for a “green card” through this route rather than applied for withholding. The most common immediate relative relationship which might arise after an individual has won withholding is through marriage. Same sex marriages are currently not recognized in the United States. ? There is some confusion about whether the Judge literally checks the Removal Order box on the Order form or not. Some Judges seem to simultaneously order the applicant removed and grant the withholding relief, while other Judges only check the withholding box. ? Many states, including New York, only issue drivers’ licenses and state i.d.s for the length of time on the EAD which means that a person with withholding status may also need to renew her state i.d. or license annually. ?

34. CAT Status

Relief under the Convention against Torture provides even less security than relief under withholding.

An applicant who has been granted CAT cannot be removed to the country in which he would face torture. A CAT grantee has no ability to obtain legal permanent residence, to travel abroad, or to sponsor family members. Moreover, CAT grantees are not guaranteed the ability to obtain employment authorization or even the right to be released from detention.

There are two forms of potential relief under CAT – withholding or deferral of removal. The same bars which apply to withholding of removal apply to CAT withholding. Thus, the only scenario in which an applicant might win CAT withholding rather than withholding of removal would be if he could prove it would be more likely than not that he would face torture in his country, but the torture would not be on account of one of the five protected characteristics.

The more common CAT relief which is sought is deferral of removal because there are no criminal bars to granting CAT deferral. If an applicant wins CAT deferral, however, ICE can continue to detain the individual, even after he has finished his criminal sentence, if ICE determines that he may be a danger to the community.

Individuals who have won CAT may be able to obtain employment authorization, but CIS is not required to issue an EAD. Individuals with CAT are also subject to a streamlined procedure to revoke the CAT grant. ICE is much more likely to re-open proceedings to seek to revoke CAT than it is to seek to revoke asylum or withholding.

Generally only individuals with serious criminal convictions and no other legal options apply for and receive CAT relief.

36. Important Resources

The Process

USCIS forms and offices: www.uscis.gov

EOIR forms and Immigration Court information including local rules: www.usdoj.gov/eoir

[USCIS Asylum Officer Lesson Plan on One Year Filing Deadline](#)

[USCIS Affirmative Asylum Procedures Manual](#)

[BIA Practitioner's Manual](#)

Asylum Office Contact Information

To determine the asylum office that has jurisdiction over your case, and to obtain contact information:

https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=ZSY

General Asylum Information

Asylumlaw.org

[UNHCR LGBTI Discussion Paper](#)

[UNHCR LGBTI Guidance Note](#)

AILA Asylum Primer, for sale at: www.ailapubs.org/booklist.html

Gender Based Asylum Claims: cgrs.uchastings.edu/

[Probononet](#)

[Human Rights First](#)

Country Conditions Information (U.S. Government)

[U.S. State Department Report on Human Rights](#)

[U.S. State Department Report on Religious Freedoms](#)

Country Conditions Information (NGOs/Private Organizations)

[Human Rights Watch](#)

[Amnesty International](#)

[International Gay and Lesbian Human Rights Commission](#) (IGLHRC):

[International Lesbian and Gay Association](#) (ILGA)

Sodomy Laws: sodomylaws.org

[LGBT Peace Corps Alums](#)

General LGBT Information (Media)

www.365gay.com

gaycitynews.com

www.advocate.com

www.glinn.com

wglb-tv.blogspot.com/2010/10/international-news-by-rex-wockner.html

gaytoday.com

www.gayuknews.com

www.thegully.com

www.globalgayz.com

anodis.com

www.enkidumagazine.com

www.naciongay.com

www.pinknews.co.uk/category/world-news

LGBT Africa

www.mask.org.za/?page=africabycountry

Zimbabwe

www.icon.co.za/stobbs/galz.htm

LGBT Americas

[World Policy Institute Report on LGBT Rights in the Americas \(2003\)](#)

Argentina

www.attta.org/

Brazil

www.ggb.org.br/

Jamaica

www.jflag.org/

Arab States/Middle East/Muslim States

www.glas.org/ahbab/

www.gaymiddleeast.com/

www.safraproject.org/

www.huriyahmag.com/

www.wluml.org/

Eastern Europe

community.middlebury.edu/~moss/EEGL.html

35. Glossary

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

The process of applying for legal permanent residence from within the United States as opposed to applying from abroad which is called "consular processing".

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.

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

Someone physically present in the U.S. who is not a U.S. citizen. Among others, the term includes: temporary visitors, legal permanent residents, and undocumented individuals. Many advocates feel this term has a negative connotation.

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.

Asylee

An individual who has won a claim for asylum. Asylees are eligible to work in the United States and may be able to travel internationally. One year after winning asylum, an asylee may apply for legal permanent residence.

Asylum

A form of relief for which nationals of other countries can apply if they have suffered persecution in their home countries or if they have a well-founded fear of future persecution on account of certain protected characteristics. Persecution on account of sexual orientation, transgender identity and HIV-positive status have been found to be grounds for asylum.

Asylum Office/Asylum Officer

This is the first level at which applications for asylum are heard. The asylum officer conducts an asylum interview and either recommends approval, issues a notice of intent to deny, or places the applicant in removal proceedings. If an applicant wins at this stage, he or she never has to go to Immigration Court.

Authorized stay

The amount of time an Immigration official allows a foreign national to remain in the U.S. The date is stamped on the foreign national's I-94. This is the date by which the foreign national must leave the U.S. or he or she will begin to accumulate unlawful presence here.

B1/B2 visa

The most common type of non-immigrant (temporary) visa to the United States. It is meant to be used for short term tourism or business (but not for working.) To qualify for this visa, an applicant must overcome a presumption of "immigrant intent" meaning that he or she must prove to the U.S. Consulate that he or she intends to return to his or her country after completing the tourism or business visit.

Beneficiary

In most applications for permanent, immigrant visas (family-based and employment based), the visa applicant is actually the family member or employer, not the foreign national. Instead, the foreign national is the beneficiary of the application. It is important to be aware that receiving immigration status in the United States is considered a benefit, not a right.

Board of Immigration Appeals or BIA

BIA is the administrative body that hears appeals from decisions of Immigration Judges in Immigration Court. While an appeal before the BIA is pending, the foreign national is permitted to remain in the U.S. even if he or she was ordered removed by the Immigration Court.

Bond

A sum of money which a detained foreign national posts with DHS in order to be permitted to be free from detention while his or her removal proceeding is pending.

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.

Change of status

The process by which a foreign national applies to change from one non-immigrant status (such as tourist) to another non-immigrant status (such as student.)

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. Citizen

A person holds U.S. citizenship if she or he was born in the United States, Guam, Puerto Rico, or the U.S. Virgin Islands regardless of the immigration status here of her or his parents. A non-citizen who becomes a lawful permanent resident may acquire citizenship through a legal process called naturalization. Children born to U.S. citizens abroad may also be U.S. citizens. Legal permanent resident children may obtain citizenship if their parents naturalize while they are minors. Citizens, even naturalized citizens, cannot be deported unless they committed fraud during the naturalization process.

Citizenship and Immigration Services or CIS

This is the "service" division of the newly created Department of Homeland Security. CIS handles

applications for visas, legal permanent residence, employment authorization, and naturalization. Its website is very useful. uscis.gov/graphics/

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.

Convention against Torture relief, or CAT

Allows foreign nationals to remain in the U.S. indefinitely if they can prove that they would be likely to face torture by their government if returned to their home country.

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.

Court of Appeals

Federal appeals court which has the authority to review decisions by the BIA.

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 she can satisfy the qualifications for asylum.

Customs and Border Protection or CBP

The division of the Department of Homeland Security which patrols the U.S. borders.

Deferred Action

A minimal humanitarian status which The Department of Homeland Security can grant in cases of extremely compelling humanitarian facts (such as a life-threatening illness). The status permits an individual to remain in the United States for a limited period of time (generally two years) after which point he or she must re-apply.

Department of Homeland Security or DHS

A Department, newly created in 2003 primarily to deal with the threat of terrorism. Most of the functions of the former INS were reorganized within CBP, CIS, and ICE within DHS.

Department of Justice or DOJ

Headed by the Attorney General, this Department oversees the BIA and Immigration Courts.

Department of State or DOS

A Department which runs consular offices abroad, which make decisions about non-immigrant visas and immigrant visas which are processed through U.S. consulates. DOS also administers the annual Diversity Visa Lottery.

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/removal

Removal, formerly called deportation, is a legal proceeding through which immigration officials seek to remove a foreign national from the United States for violating an immigration law or other U.S. law. These proceedings generally take place in Immigration Court before an Immigration Judge. A non-citizen cannot be deported without a hearing, unless he has been convicted of certain crimes, and is not an LPR.

Detention

The process by which the U.S. government holds foreign nationals in Immigration facilities, prisons, or jails while their removal proceedings are pending. 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.

Duration of Status or D/S

Indication on I-94 for certain types of non-immigrants including students and certain individuals with work visas. This means that the foreign national can legally remain in the U.S. as long as she or he

maintains the status (such as student or worker) which authorized the visa issuance.

Employment authorization document or EAD

EAD is the card issued by the Citizenship and Immigration Services which permits a foreign national to work legally in the U.S. EADs are a benefit which accompany another status, such as a work visa, or a pending asylum or “green card” application, they cannot be applied for without some underlying immigration status.

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 crosses the border between the U.S. and Mexico or Canada. This is a violation of the immigration laws.

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 of Immigration Review or EOIR

EOIR is the department which oversees Immigration Judges in Immigration Court. This is a part of the Department of Justice.

Expedited Removal

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

Green Card

This is the informal term for “an alien registration card” or Form I-551. It is proof that its holder has legal permanent resident status.

HIV exclusion (Ban ended January 2010)

In general, foreign nationals who are HIV-positive are forbidden to visit or immigrate to the United States unless they are eligible for certain narrow categories of waiver for this harsh rule. (Ban ended January of 2010.)

I-94

The small white card placed in the passport of foreign nationals when they visit the U.S. The card indicates how long the foreign national is authorized to stay in the U.S., either with a specific date by which the foreign national is supposed to leave, or with a notation such as D/S (duration of status) which means the person is permitted to remain in the U.S. as long as he or she maintains her status (such as student status.)

IJ

Immigration Judge

Illegal Alien

See "Undocumented".

Immediate Relative

For U.S. immigration purposes, immediate relatives of U.S. citizens are defined only as opposite sex spouses, minor children, and parents of adult children. U.S. citizens can sponsor foreign nationals who are immediate relatives without having to wait for a visa to become available.

Immigrant

This is a technical legal term which means a foreign national who has been granted permission to remain in the United States permanently, that is a "legal permanent resident" or "green card holder" and as such is distinguished from a "non-immigrant" who comes to the United States on a temporary visa. The term "immigrant" is often used more broadly to mean any person who is not a U.S. citizen.

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 Customs Enforcement or ICE

This is the enforcement branch of the Department of Homeland Security. This is the branch of DHS which includes deportation officers and trial attorneys in Immigration Court.

Immigration and Nationality Act (INA)

The immigration law that Congress originally enacted in 1952 and has modified repeatedly. This is the source for most law that governs immigration to the United States.

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. Agencies within DHS include: Border and Customs Patrol (BCP), Citizenship and Immigration Services (CIS), and Immigration and Customs Enforcement (ICE). Many forms issued by CIS and ICE still bear the logo of the now defunct INS.

Immigration Court

The administrative court which hears removal and deportation proceedings. Immigration Judges have the authority to grant foreign nationals legal status in the United States as well as the authority to order them removed (deported.) Appeals from the Immigration Court are heard by the Board of Immigration Appeals.

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.

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.

Native

A person born in a specific country.

National

A person owing permanent allegiance to a particular country.

Naturalization

The process by which a foreign national applies for and obtains U.S. citizenship. Only legal permanent residents may apply to naturalize, and generally only after they have held their “green card” for five years (spouses of U.S. citizens may apply earlier.)

Non-immigrant visa

A temporary visa, such as a tourist, student, or skilled worker visa. Its purpose is to allow a foreign national to come to the United States for a limited period of time and for a specific purpose, not to remain in the United States permanently. Many non-immigrant visas require applicants to prove that they do not intend to remain in the U.S. permanently by demonstrating strong economic and family ties to their home country.

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.

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.

Out of status

See “undocumented.”

Parole

This term has many different meanings under immigration law. It can refer to individuals who are permitted to enter the United States for a limited purpose, such as applying for asylum or to be placed in removal proceedings. It can also refer to the status that individuals who have been released from detention have.

Petitioner

A U.S. citizen or LPR who files a visa petition with the DHS so that 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.

Refugee

For refugee status, an applicant applies outside the United States and must meet the same standard of persecution as an asylum applicant. As a practical matter, it is much more difficult to win refugee status based on being LGBT or HIV positive than to win asylum.

Relief

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

Removal/deportation

Removal, formerly called deportation, is a legal proceeding through which immigration officials seek to remove a foreign national from the United States for violating an immigration law or other U.S. law. These proceedings generally take place in Immigration Court before an Immigration Judge.

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.

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).

Social Security Number

A number assigned to eligible individuals by the Social Security Administration of the U.S. federal government, primarily so that they can file taxes and pay into the Social Security system. In general, non-citizens can only obtain Social Security numbers if they are authorized by the Citizenship and Immigration Services to work in the U.S. Social Security cards can be unrestricted, or restricted, meaning its holder can only work with a CIS issued employment authorization document.

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 United States.

Tax Payer Identification Number

A number issued by the Social Security Administration (SSA) to individuals or entities who are not eligible for Social Security numbers. Some undocumented individuals have successfully used these to pay taxes. There is some risk, however, that SSA or the Internal Revenue Service may share information with the Department of Homeland Security about individuals who use these numbers.

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).

Three year/Ten year bar

Refers to a harsh change in the Immigration law which occurred in 1996 and now provides that any foreign national who accumulates more than six months of unlawful presence who then leaves the U.S. cannot return for three years. Likewise, any foreign national who accumulates more than one year of unlawful presence who then leaves the U.S. cannot return for ten years.

Undocumented

The term used to describe foreign nationals who are present in the U.S. without lawful status. The term can refer to those who entered the U.S. without inspection (by crossing the border), those who overstayed their allotted time here, or those who violated the terms of their legal status. With very limited exceptions (notably asylum and immediate relatives of U.S. citizen petitions) a person who is not in lawful status in the U.S. cannot change from being in the U.S. unlawfully to being here lawfully.

United States Citizenship And Immigration

The agency within the Department of Homeland Security Services (USCIS) responsible for adjudicating all applications for immigration benefits. Also known as CIS.

Unlawful presence

Time accumulated in the U.S. after a foreign national's authorized stay expires. This can lead to problems with the 3 year/10 year bar.

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 visa is a legal document that permits its holder to seek entry into the United States on either a temporary or a permanent basis. Legally, a visa merely permits the foreign national to board transportation to the U.S. Permission to enter the country may be granted or denied by immigration officials at the port of entry.

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.

Visa Waiver Program or VWP

A program through which nationals of certain countries, mostly Western European, may seek entry into the United States for up to 90 days without first obtaining a visa. Visa waiver entrants generally cannot change their status from within the U.S. VWP countries are listed at travel.state.gov/visa/tempvisitors_novisa_waiver.html#2

Voluntary Departure

A form of relief given to a foreign national in removal proceedings whereby he or she agrees to leave the United States voluntarily by a specific date rather than being deported directly by the U.S. government. The penalty on returning to the U.S. after departing voluntarily is generally less than if a person is removed at U.S. government expense. Prior to changes in the law in 1996, voluntary departure could also signify a form of humanitarian relief, similar

Immigration Equality