



Immigrants' Rights Project

ASYLUM MANUAL

FOR

PUBLIC COUNSEL'S VOLUNTEER ATTORNEYS

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Please Note

This manual is a guide to asylum practice and does not purport to discuss all aspects of immigration practice related to asylum proceedings. Immigration law changes frequently and attorneys must conduct independent research to learn of such changes. Additional sources should be consulted when more complex questions regarding current law and procedure arise. Many of these resources are referenced in this manual. In addition, IRP attorneys are available to help you with technical assistance on specific or complex issues.

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INTRODUCTION AND PURPOSE OF THIS MANUAL

The purpose of this manual is to provide practical support for *pro bono* attorneys representing clients in asylum cases. While every asylum case differs, the information and materials herein will provide a starting point to facilitate the application process. This manual was developed to assist attorneys specifically volunteering for Public Counsel and representing clients at the Los Angeles asylum office and/or the Los Angeles immigration court. Because local procedures differ throughout the country, please consult your local DHS and EOIR offices if you are assisting in other jurisdictions. Please also keep in mind that Los Angeles is within the Ninth Circuit Court of Appeals, and for that reason the manual's legal discussion is based on Ninth Circuit precedent.

ORGANIZATION

This manual is divided into three sections. The first section summarizes asylum law and briefly explains related forms of immigration relief known as withholding of removal and relief under the Convention Against Torture (CAT). The second section explains the affirmative asylum process. The last section contains information about defensive applications for asylum filed on behalf of clients already in removal proceedings before immigration court, either because the client was detained by immigration authorities or because the client applied affirmatively for asylum and was then referred to immigration court.

ADDITIONAL RESOURCES

Public Counsel strongly recommends that attorneys consult additional resources to learn more about the asylum process. Some frequently used resources include:

Government Guidance on Asylum Law and Procedures

- **USCIS Affirmative Asylum Procedures Manual November 2007 (Revised July 2010)**
http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/2007_AAPM.pdf
- **Asylum Officer Training Course on One Year Filing Deadline**
<http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf>
- **Asylum Officer Basic Training Course Lesson Modules** (on various legal topics and interviewing techniques)

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=2a1d1a877b4bc110VgnVCM1000004718190aRCRD&vgnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD> (scroll to the bottom of the page)

- **Immigration Court Practice Manual and Updates (Essential for Court Cases!)**

http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm

- **Immigration Judges' Bench Book**

<http://www.justice.gov/eoir/vll/benchbook/index.html>

- **Board of Immigration Appeals Practice Manual**

<http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm>

Websites for U.S. Citizenship and Immigration Services and Executive Office for Immigration Review (with Links to Required Forms)

- **Citizenship and Immigration Services**

<http://www.uscis.gov> (Click on Forms)

- **Executive Office for Immigration Review**

<http://www.usdoj.gov/eoir> (Click on Forms and/or Find Immigration Court)

Legal Resources

- **The Ninth Circuit Immigration Outline and the Ninth Circuit Immigration Outline Supplement**

<http://www.ca9.uscourts.gov/guides/>

- **ILRC's Asylum and Related Immigration Protections, 8th Edition**

<https://www.ilrc.org/publications/index.php>

- **EOIR Virtual Law Library**

<http://www.justice.gov/eoir/vll/libindex.html>

- **Board of Immigration Appeals Precedent Decisions**

http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html

- **Kurzban's Immigration Law Sourcebook, Twelfth Edition** (Ira J. Kurzban, American Immigration Council, 2010)

Resources for Specific Asylum Issues

- **Asylum Officer Basic Training Course: Guidelines for Children's Asylum Claims**

<http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>

- **Asylum Officer Basic Training Courses on Female Asylum Applicants and Gender Related Claims**

<http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>

- **UC Hastings College of Law's Center for Gender & Refugee Studies** – offers assistance and samples to attorneys with gender related asylum cases.

<http://cgrs.uchastings.edu>

- **Immigration Equality** – assists LGBT/HIV individuals. Among other resources, the website offers a manual for LGBT/HIV asylum cases.

<http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/>

- **AIDS and Law Exchange (AIDSLEX)** - Web resource on HIV, the law and human rights. It has a section on immigration and a growing E-library.

<http://www.aidslex.org/English/Home-Page/>

- **WOLA's Central American Gang-Related Asylum Resource Guide**

http://www.wola.org/publications/central_american_gang_related_asylum_guide

Country Condition Resources

- **U.S. State Department Reports on Human Rights**

<http://www.state.gov/g/drl/rls/hrrpt/>

- **U.S. State Department Report on Religious Freedoms**

<http://www.state.gov/g/drl/rls/irf/>

- **USCIS Resource Information Center**

<http://www.uscis.gov/> (Enter Country's Name in Search Box)

- **Human Rights Watch**

<http://www.hrw.org/>

- **Amnesty International**

<http://amnesty.org/>

Additional Resources

- **National Immigration Project of the National Lawyers Guild, Inc.** – offers resources, including a brief bank

<http://www.nationalimmigrationproject.org/>

- **Immigrant Legal Resource Center** – provides trainings, publications and expert “attorney of the day” consultations.

<http://www.ilrc.org/>

- **Asylumlaw.org** – offers information, samples, reports and a database of experts.

<http://www.asylumlaw.org/>

- **American Immigration Lawyers Association** – provides useful information including agency memoranda and practice advisories, though some documents are only available to members.

<http://www.aila.org/>

- **UNHCR Handbook**

<http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>

- **Probononet**

<http://www.probono.net/asylum/>

- **Human Rights First**

<http://www.humanrightsfirst.org/>

CHAPTER 1

INFORMATION ON THE *PRO BONO* PROGRAM OF PUBLIC COUNSEL'S IMMIGRANTS' RIGHTS PROJECT

§1.1 Public Counsel's Immigrants' Rights Project

Founded in 1970, Public Counsel is the largest *pro bono*, public interest law firm in the world and is dedicated to advancing equal justice by delivering free legal and social services to the most vulnerable members of our community. Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers' Committee for Civil Rights under Law. The Immigrants' Rights Project (IRP) is one of Public Counsel's nine legal projects and is staffed by five attorneys, one paralegal, and one administrative assistant.

IRP staff and volunteers provide *pro bono* representation to individuals from over 30 countries before the Department of Homeland Security, the Los Angeles immigration court, the Board of Immigration Appeals and the federal courts. Legal services are provided to victims of persecution seeking asylum in the United States; victims of domestic violence, violent crime and human trafficking; abandoned or abused immigrant children under juvenile court jurisdiction; and immigrants detained by the Department of Homeland Security in Orange County, California. Public Counsel's IRP attorneys also provide technical assistance and training on immigration law to attorneys and court staff throughout the United States, and pursue impact litigation to secure the rights of immigrants.

§1.2 IRP's Asylum Clients

IRP's asylum clients are non-citizens who have fled persecution and fear returning home because of the threat of future persecution. Many of our clients have survived extreme torture perpetrated by their governments. Others have been subjected to severe human rights violations by non-state actors, such as guerrilla groups and private citizens, in situations where their government is unable or unwilling to provide protection. Through IRP, volunteer attorneys have saved the lives of thousands of clients over the 25 years that IRP has existed. IRP's team of experienced immigration lawyers provides ongoing technical assistance to all volunteer attorneys who agree to represent our clients.

The clients IRP serve are referred to us in diverse ways. Some clients find Public Counsel from the list of *pro bono* legal services distributed by the immigration court. Others are referred by friends, relatives, or other legal or social service agencies. IRP's trained staff screens every client before deciding to accept a case and then places the case with a volunteer attorney. All of IRP's clients lack the financial ability to retain private counsel and have little hope of representing themselves effectively.

§1.3 Working with Asylum Applicants

Public Counsel encourages *pro bono* attorneys to represent asylum-seekers with care and compassion. Asylum-seekers often mistrust the law and lawyers, a feeling that stems from their experience with corruption and persecution in their country of origin. As a result, it may take time and effort to build a relationship of trust with your client so that she feels free to tell her entire story to you. By building a relationship of trust, respect and understanding with your client, you, in turn, facilitate the client's success before the asylum office or court.

Many asylum-seekers suffer from psychological problems arising from persecution in their home country. Such problems can affect an asylum-seeker's memory, testimony, and demeanor during proceedings, and all of the above create obstacles to prevailing on an asylum claim. The attorney must be very aware of these obstacles and facilitate a relationship of trust with the client to prepare adequately for an asylum hearing, whether before an asylum officer or immigration judge (IJ). From the initial meeting with your client, you can and should reassure your client by explaining the purpose and format of the meeting, and by stressing that all attorney-client communication is confidential. You should explain explicitly that no information will leave the office or be revealed to anyone – especially immigration authorities – without the client's prior consent. You should likewise assure a client that the immigration authorities must keep information about the asylum applicant and the claim confidential, and will not reveal information to representatives of the client's home government. It is important to learn a great deal about the client's background, including education, economic situation, and culture, as all of these factors will impact an adjudicator's assessment of the client's credibility.

§1.4 What IRP Expects from Volunteer Attorneys

In agreeing to provide assistance to an asylum seeker, IRP has first determined that the client's life is at stake. For this reason we treat every case seriously and ask that our volunteers do so as well. Our clients are most often successful when their attorneys have spent a great deal of time preparing their cases and preparing them for testimony. It is difficult to provide an estimate of the time required to handle an asylum case. However, the average time spent on an affirmative case (before the asylum office) is 80-100 hours and the average time spent on a court case is 150 hours. Both figures are rough estimates that vary considerably. We encourage teams of attorneys to work on a case if the time commitment is too great for a single attorney. Once a client is granted asylum, we recommend that volunteer attorneys refer their clients to other legal service agencies for all follow-up legal work that will be required.

We expect all volunteer attorneys to:

- stay with the case from the time of placement until the final decision on the merits of the asylum claim (from the asylum office if an affirmative case; from the immigration court if a court case)
- if the volunteer attorney, for unforeseen circumstances, cannot continue representation, locate *pro bono* counsel to substitute in as attorney of record

- communicate with Public Counsel if complex issues arise in a case and inform Public Counsel of the result in the case

§1.5 What Volunteer Attorneys Can Expect from IRP

Volunteer attorneys who accept an asylum case from IRP can expect to receive ongoing technical assistance from IRP's staff attorneys. Before an asylum case is assigned to a volunteer attorney, IRP's staff has completed an intake process, including a detailed interview of the client and assessment of potential bars to asylum or other red-flags, if any. When the case is assigned to a volunteer attorney, he or she will receive those intake documents and any notes generated by IRP staff.

IRP also provides volunteer attorneys with this manual as well as updates via e-mail regarding any changes in the law and other pertinent information. Most importantly, IRP's staff attorneys are available to provide technical assistance via e-mail, phone, or if necessary in person, to answer complex, case-related questions that may arise as the volunteer attorney progresses through the case. IRP appreciates your dedication to these clients and will work with you as you represent them.

§1.6 Contact Information for IRP Staff Attorneys

For general information on our asylum project and for technical assistance on non-detained asylum cases (referred by Public Counsel) please contact:

Judy London, Directing Attorney, (213) 385-2977 ext. 103, jlondon@publiccounsel.org
Katka Werth, Staff Attorney, (213) 385-2977 ext. 126, kwert@publiccounsel.org

For general information on our detention project and for technical assistance on individual asylum cases (referred by Public Counsel) where a client is detained by immigration authorities, please contact:

Talia Inlender, Staff Attorney, (213) 385-2977 ext. 235, tinlender@publiccounsel.org

For any questions regarding Special Immigrant Juvenile Status or child-specific asylum issues please contact:

Kristen Jackson, Senior Staff Attorney, (213) 385-2977 ext. 157, kjackson@publiccounsel.org

For any questions regarding immigration relief under the Violence Against Women Act, and U and T visa cases please contact:

Gina Amato, Senior Staff Attorney, (213) 385-2977 ext. 111, gamato@publiccounsel.org

CHAPTER 2

ASYLUM LAW

§2.1 Background

Federal law provides that individuals who have suffered persecution or fear persecution in their home countries can apply for asylum in the United States. This fundamental right is guaranteed by the 1951 United Nations Convention Relating to the Status of Refugees and implemented in the 1967 United Nations Protocol Relating to the Status of Refugees. The U.S. Congress codified refugee and asylee protection in 1980 through the Refugee Act, which is incorporated into federal law as §207 and §208 of the Immigration and Nationality Act (INA). To qualify for asylum, an applicant must be physically present in the United States.

The Attorney General may grant asylum to an applicant who can establish past persecution or a “well-founded fear” of future persecution in the home country on account of race, religion, nationality, political opinion, or membership in a particular social group. Asylum, however, is discretionary, which means an applicant may not be entitled to it even when eligible. In exercising discretion, a judge may take into account a number of negative factors, including, but not limited to, violations of immigration law (e.g., use of fraudulent documents) or criminal law. While judges rarely exercise discretion negatively to deny asylum, it does happen. It is therefore critical to know your client's complete criminal and immigration history.

Once granted asylum, an asylee is allowed to remain and work permanently in the United States, can obtain asylee status for a spouse and children (as long as the children were under 21 when the asylum claim was filed), and can apply for permanent residency and eventually, U.S. citizenship. The government can revoke an asylum grant, but in practice, such revocation is quite rare.

§2.2 Ways to Apply for Asylum

Within the United States, individuals fleeing persecution apply for asylum either affirmatively or defensively. All asylum applicants, affirmative and defensive, must file a Form I-589, Application for Asylum and for Withholding of Removal, together with supporting evidence in accordance with the instructions on the form.

Persons applying for asylum affirmatively are those who came to the United States either legally or illegally and have not been placed in removal proceedings by DHS. The asylum office, within the CIS branch of DHS, adjudicates all affirmative applications.

By contrast, if an individual is arrested by DHS or otherwise placed in removal proceedings, he or she may apply for asylum, withholding or removal, and/or relief under the UN Convention Against Torture as a defense to removal as well as other immigration relief if eligible. Defensive applications are heard before an IJ. It should be noted that if an individual's affirmative asylum

application is not granted by the asylum office and the individual is not in lawful immigration status, the client will be put into removal proceedings. The application will then be transferred to immigration court and proceed as a defensive application.

One exception to this jurisdictional division exists. With Congress' passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), CIS now has initial jurisdiction over all asylum applications filed by unaccompanied alien children (UACs), even if those children are already in removal proceedings. INA §208(b)(3)(C), 8 USC §1158(b)(3)(C). A UAC is defined as "a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom – (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." Homeland Security Act of 2002 §462(g)(2). If a UAC is in removal proceedings and CIS does not grant asylum, that child can reapply for asylum before the IJ.

The practical sections of this manual are separated into a section for affirmative applications, Chapter 3, and a section for defensive applications, Chapter 4, since the asylum process differs significantly between the two venues. Samples for an affirmative application can be found in Appendices 1, 2, and 7-9. Samples for a defensive application are in Appendices 2-4 and 6-10.

§2.3 Legal Test to Qualify for Asylum Protection

The Immigration and Nationality Act (INA) sets forth the legal test for asylum eligibility. A person may qualify for asylum if he or she meets the international definition of a refugee. INA §208(b)(1)(A). A refugee is defined as:

Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §101(a)(42)(A), 8 USC §1101(a)(42)(A).

Accordingly, individuals who can demonstrate that they have suffered past persecution or have a "well-founded fear of persecution" based on one of the five enumerated grounds can qualify for asylum protection. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in §101(a)(42)(A) of the Act.

A. Definition of Persecution

Neither the INA nor the accompanying regulations define persecution. Instead, federal courts and the Board of Immigration Appeals (BIA) have broadly defined persecution as "the

infliction of suffering or harm upon those who differ...in a way that is regarded as offensive.” *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). The Ninth Circuit has defined persecution as “an extreme concept, marked by the infliction of suffering or harm...in a way regarded as offensive.” *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (internal quotation marks and citations omitted). Threats to life or freedom are uniformly found to be persecution. Physical abuse, even when not life-threatening, also generally constitutes persecution. Persecution does not require that an applicant establish permanent or serious injuries. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998).

Mere harassment or discrimination does not constitute persecution. *Khouassany v. INS*, 208 F.3d 1096, 1100-1101 (9th Cir. 2000) (denying asylum where shop owner was repeatedly brought to office of secret police but not physically harmed); *Wakkary v. Holder*, 558 F.3d 1049, 1059-1060 (9th Cir. 2009) (Chinese Christian in Indonesia who was beaten by youths, robbed and threatened suffered discriminating treatment but evidence did not compel persecution finding). *But see Duarte de Guinac v. INS*, 179 F. 3d 1156 (9th Cir. 1999) (reversing BIA finding of discrimination where Quiche Indians were physically abused by Guatemalan Army).

In order for an applicant who suffered persecution to qualify for asylum, the source of the persecution must be the government, a quasi-official group, or persons or groups that the government is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). It can include, for example, guerrilla forces, death squads, paramilitary groups, clans, and abusive parents or spouses, where the evidence establishes that the government is unable or unwilling to control the persecutor.

B. Cumulative Effect of Harms Not Individually Rising to the Level of Persecution

The Ninth Circuit has held that the cumulative effect of harms and abuses that might not individually rise to the level of persecution, nevertheless, may be sufficient to support an asylum claim. *See Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (finding persecution where a Ukrainian Jew witnessed violent attacks and suffered extortion, harassment, and threats by anti-Semitic ultra-nationalists). The Ninth Circuit “look[s] at the totality of the circumstances in deciding whether a finding of persecution is compelled.” *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004) (finding persecution where a Chinese Christian was arrested, detained twice, physically abused, and forced to renounce his religion). *See also Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (“Where an asylum applicant suffers [physical harm] on more than one occasion, and . . . [is] victimized at different times over a period of years, the cumulative effect of the harms is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution.”); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005) (“The combination of sustained economic pressure, physical violence and threats against Petitioner and her close associates, and the restrictions on Petitioner’s ability to practice her religion cumulatively amount to persecution”).

The key question is whether, looking at the cumulative effect of all the incidents petitioner has suffered, the treatment she received rises to the level of persecution. *Surita v. INS*, 95 F.3d 814, 819 (9th Cir. 1996). Such aggregated harms might also include: arbitrary interference with a person's privacy, family, home or correspondence; relegation to substandard dwellings; exclusion from institutions of higher learning; enforced social or civil inactivity; passport denial; constant surveillance; and/or pressure to become an informer.

C. Legal Test for “Well-Founded” Fear of Future Persecution

To establish a “well-founded fear” of persecution, an asylum applicant need only show a *reasonable possibility* that he or she will be persecuted in the future. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The Supreme Court has stated that an applicant can sufficiently establish a well-founded fear when the probability of the persecution happening is less than 50 percent and that “establishing a 10 percent [10%] chance of being shot, tortured, or otherwise persecuted” is sufficient. *Id.* Often stated as a “one in ten” chance of future persecution, this is the established standard for establishing a well-founded fear of persecution.

To demonstrate well-founded fear the applicant must demonstrate both *subjective and objective* components. *Id.* To satisfy the subjective component, an applicant must show he or she personally fears returning to his or her country of origin. To satisfy the objective component, the applicant must do two things:

1. Present specific facts through objective evidence or persuasive, credible testimony; and
2. Show that, given the evidence presented, a reasonable person would fear persecution. *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987).

In *Matter of Mogharrabi*, the BIA set forth four elements which an applicant for asylum must show in order to establish a well-founded fear of persecution: (1) the applicant must possess a belief or characteristic a persecutor seeks to overcome in others by means of punishment; (2) the persecutor must be already aware, or could become aware, that the applicant possesses this belief or characteristic; (3) the persecutor must be capable of punishing the applicant; and (4) the persecutor must have the inclination to punish the applicant. *Id.* at 446; *See also INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

The BIA, in *Mogharrabi*, found that “the subjective component requires a showing that the alien’s fear is genuine.” *Id.* at 444, citing the Ninth Circuit’s decision in *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986). In practice, asylum cases are only occasionally denied for failure to show a subjective fear of persecution. Courts generally focus on the objective prong of the well-founded fear standard rather than the subjective prong. Nevertheless, it is still important to establish subjective fear in the asylum application, declarations, and during any hearing or interview.

D. Past Persecution

The definition of refugee incorporated by the asylum statute allows an applicant to qualify for asylum either by showing past persecution or a well-founded fear of future persecution. INA §101(a)(42)(A), 8 USC §1101(a)(42)(A). If an applicant establishes that he or she suffered actual past persecution, there arises a presumption of future persecution. 8 CFR §208.13(b)(1); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). The presumption, however, relates only to fear of harm based on the claim that gave rise to the original persecution, not to fear of harm based on different or a new ground. *Matter of A-T-*, 24 I&N Dec. 617, 622 (A.G. 2008); 8 CFR §208.13(b)(1).

The government has the burden of rebutting the presumption. The government may do so by establishing by a preponderance of the evidence either that conditions in the home country have changed to the extent that the applicant no longer has a well-founded fear, or by showing that by moving to another part of his or her country the applicant could avoid the persecution and that it would be reasonable to expect him or her to do so. 8 CFR §208.13(b)(1)(i). Abstract showings of “changed country conditions” do not automatically trump the specific evidence presented by the applicant. Rather, the government is “obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant’s fear of future persecution.” *Rios v. Ashcroft*, 287 F.3d 895, 901 (9th Cir. 2002) (quoting *Navas v. INS*, 217 F.3d 646, 662 (9th Cir. 2000)).

Even if the government succeeds in rebutting the presumption by establishing changed country conditions or the reasonableness of internal relocation, the applicant may still be afforded asylum protection if he or she can demonstrate compelling reasons for being unwilling or unable to return based on the severity of the past persecution suffered or a reasonable possibility of suffering other serious harm upon returning to the country of origin. *See* 8 CFR §208.13(b)(1)(iii). “Serious harm,” unlike persecution as defined by asylum, does not have to be based on one of the five enumerated grounds explained below. *Id.*

E. The Nexus Between Past or Feared Persecution and the Five Protected Grounds for Asylum

To establish asylum eligibility, an applicant must show a nexus between past or feared future persecution and one of the five protected grounds: race; religion; nationality; political opinion; or membership in a particular social group. In addition, an applicant must establish that a protected ground “was or will be *at least one central reason* for persecuting the applicant.” INA §208(b)(1)(B)(i), 8 USC §1158(b)(1)(B)(i).¹ To meet this “one central reason” requirement, applicants should demonstrate a clear nexus between the persecution and the protected ground and should take care to consider and highlight all direct and circumstantial evidence in the case which demonstrates a nexus.

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

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

1. Race

The term “race” includes “all kinds of ethnic groups that are referred to as ‘races’ in common usage.” United Nations High Commissioner on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 68 (1992) (UNHCR Handbook). For example, ethnic Albanians and Chechens would qualify as “races” under this definition. Claims of race and nationality persecution often overlap. *See Duarte de Guinac v. INS*, 179 F.3d 1156, 1160 n.5 (9th Cir. 1999) (Quiche Indian from Guatemala).

2. Religion

Persecution on account of religion can include the prohibition of public or private worship, membership in a particular religious community, or of religious instruction. UNHCR Handbook ¶ 72. Serious discrimination towards a person because of membership in a particular religion or religious community may also constitute persecution on account of religion. *Id.* An applicant cannot be required to practice his religious beliefs in private in order to escape persecution. *See Zhang v. Ashcroft*, 388 F.3d 713, 719 (9th Cir. 2004) (“[T]o require [petitioner] to practice his beliefs in secret is contrary to our basic principles of religious freedom and the protection of religious refugees.”).

3. Nationality

The term *nationality* includes citizenship or membership in an ethnic or linguistic group and often overlaps with race. UNHCR Handbook ¶ 74. Recent cases use the more precise term *ethnicity*, “which falls somewhere between and within the protected grounds of race and nationality.” *Shoafera v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotation marks omitted) (citing as an example the ethnic Amhara in Ethiopia); *see also Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (finding that Armenians from Nagorno-Karabakh had no well-founded fear); *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (regarding the persecution of Armenians in Azerbaijan).

4. Political Opinion

An applicant’s *actual* political opinion may qualify as a basis for persecution. Further, a political opinion *imputed* to the applicant may also serve as a basis for persecution. An “imputed opinion” is defined as an opinion that the persecutor believes the applicant to have regardless of whether this belief is correct. In addition to eligibility based on an imputed political opinion,

eligibility exists where the persecution is on account of an imputed race, religion, or membership in a social group. See USCIS Asylum Division's *Asylum Office Basic Training Course Lesson: Asylum Eligibility Part III: Nexus and the Five Protected Characteristics*, p. 15, revised March 23, 2009.²

“[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted ‘on account of’ a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted him (or that he faces the prospect of such persecution) *because of* his political opinion.” *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000) (internal citation omitted).

Although political opinion requires an active specific opinion or belief, it encompasses more than electoral politics and formal political ideology or action. It requires an IJ to consider the claim within a country's political context. *Castro v. Holder*, 597 F. 3d 93, 102-106 (2nd Cir. 2010) (reversing IJ's denial of asylum to Guatemalan police officer who reported drug corruption within the police, because the IJ failed to consider the claim within Guatemala's political context and its volatile political history); *Sagaydak v. Gonzalez*, 405 F.3d 1035, 1041-45 (9th Cir. 2005) (retaliation against government auditor for exposing corruption in a private company in the context of political reforms rooting out corruption in the Ukraine met both the imputed political opinion and "on account of" criteria for asylum).

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

5. Social Group

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

The Board of Immigration Appeals has said that members of a particular social group must share a “*common, immutable characteristic*.” *Matter of Acosta*, 19 I&N Dec.211, 233 (BIA 1985). In the Ninth Circuit, the definition of social group is more expansive. “[A] ‘particular social group’ is one united by a voluntary association, including a former association, or by an

² Available at

<http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf>.

innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (finding that Mexican gay men with female sexual identities constitute a particular social group). It “implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.” *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986) (stating that a family is a “prototypical example” of a social group, but young, working-class urban males of military age are not a social group.)

In 2007, the BIA introduced new criteria to the social group definition, emphasizing that a social group must have social visibility and sufficient particularity. *Matter of S-E-G*, 24 I&N Dec. 579, 588 (BIA 2008) (holding that young Salvadorans who have been subject to recruitment efforts by gangs, but have refused to join for personal, religious, or moral reasons, do not constitute a social group). The social visibility requirement mandates that “the shared characteristic of the group should generally be recognizable by others in the community.” *Id.* at 586. Similarly, the essence of the “particularity” requirement is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. The Ninth Circuit has agreed with the BIA that in determining the existence of social group, the court should consider “whether a group’s shared characteristics give members social visibility and whether the group can be defined with sufficient particularity to delineate its membership.” *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (holding that tattooed gang members do not constitute a social group). *But see Gatimi v. Holder*, 578 F.3d 611, 614-617 (7th Cir. 2009) (finding that the social visibility criteria makes “no sense”).

To date, groups found to satisfy the social group test include: homosexuals (*Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990)); Somali females (*Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005)); Christian women in Iran who did not adhere to the Islamic dress code (*Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002)); women who have escaped involuntary servitude after being abducted and confined by the FARC in Colombia (*Gomez-Zuluaga v. Att’y Gen. of the U.S.*, 527 F.3d 330, 345-49 (9th Cir. 2008)); highly educated individuals (*Ananeh-Firempong v. INS*, 766 F.2d 621, 623 (1st Cir. 1985)); former members of the national police (*Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988)); and union members (*Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988)). (This is a non-exhaustive list.)

In *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010), the Ninth Circuit held that the BIA erred in determining that women in Guatemala could not be a cognizable social group. Ms. Perdomo had argued that she feared persecution on account of being a young woman in Guatemala, based on the fact that women are murdered in Guatemala at a high rate, with impunity. The Ninth Circuit held that the size and breadth of a group does not preclude it from qualifying as a social group, that the BIA failed to apply both prongs of the *Hernandez-Montiel* definition to the social group claim, and the BIA’s decision was inconsistent with its own decisions.

F. Asylum Claims Involving Victims of Domestic Violence

Women often experience human rights abuses particular to their gender, including rape, molestation, domestic violence, sexual harassment and sexual slavery. Many of the serious harms faced by women are not inflicted in a public forum, but occur instead in the private realm of the home and family. Consequently, it remains a challenge for many adjudicators to recognize these claims as falling within the definition of a refugee, even under the most compelling circumstances.

On June 11, 1999, the BIA published *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded*, 24 I&N Dec. 629 (A.G. 2008). The initial 1999 BIA decision reversed the immigration court's grant of asylum to Rodi Alvarado, a Guatemalan woman who had been the victim of severe domestic violence and who feared that she would be at risk of continuing violence if she were returned to Guatemala. Ms. Alvarado appealed to the Ninth Circuit Court of Appeals. The case was stayed pending review by the Attorney General. On January 19, 2001, then-Attorney General Reno vacated the BIA's 1999 decision and remanded the case to the BIA with instructions to decide it after the government finalized its Proposed Rule addressing domestic violence based asylum claims. The Proposed Rule is still not finalized and remains under consideration by the DOJ. *See* 65 Fed. Reg. 76, 588 (Dec. 7, 2000).

In September 2008, then-Attorney General Mukasey lifted the stay on *R-A-* and directed the BIA to reconsider its decision in the case rather than wait further for action on the Proposed Rule. Because the case was litigated before recent BIA decisions requiring an asylum applicant to establish the social visibility and particularity of the social group to which she belongs (*see Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007), *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008)), the record in *R-A-* did not specifically address social visibility or particularity. Ms. Alvarado's attorneys asked DHS to join in a motion to remand the case back to the immigration court, so that Ms. Alvarado could present evidence on social visibility. DHS agreed and in December, 2008, the BIA remanded the case back to the immigration court. Back in court, DHS agreed with Ms. Alvarado's counsel that Ms. Alvarado had established eligibility for relief. On December 10, 2009, Rodi Alvarado was finally granted asylum.

Prior to the resolution of *R-A-*, attorneys under the Obama Administration filed a brief in a separate domestic violence based asylum case known as *Matter of L-R-*. (The respondent in *L-R-* was a Mexican citizen who suffered years of abuse from her "common-law" husband.) That brief articulates the government's position that a Mexican victim of domestic violence perpetrated by her domestic partner could articulate a social group (for the purpose of asylum eligibility) as "Mexican women in domestic relationships who are unable to leave" or as "Mexican women who are viewed as property by virtue of their positions within a domestic

relationship.”³ The immigration court granted asylum to L-R- in August of 2010, and the government did not appeal.

The government’s recommendations of asylum in both *R-A-* and *L-R-* evidence a clear signal that the government now recognizes the validity of domestic violence based asylum claims under a social group theory. Specifically, the government now agrees that domestic violence victims can establish persecution based on social group, where the group is defined in light of evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship. Attorneys handling a domestic violence based asylum claim should read the *L-R-* brief in its entirety. Because the law is still evolving rapidly in this area, volunteer attorneys are advised to contact Public Counsel to learn about potential updates to the discussion above.

G. Asylum Claims Involving Children

Children are particularly vulnerable to persecution by both government and non-governmental actors. Their claims can present issues distinct from those of adults and may require different evidentiary showings. Asylum claims involving children, or adults who suffered persecution as children, should be analyzed through a child-specific lens. *See Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (requiring the BIA to evaluate harm through the eyes of a seven and nine-year-old child, the respective ages of the then 22 and 24-year-old respondents when key events occurred).

For example, the level of harm needed to constitute persecution may be less for a child than for an adult, given children’s more limited physical and psychological development. *See* Jeff Weiss, Office of Int’l Affairs, INS, U.S. Dep’t of Justice, *Guidelines for Children’s Asylum Claims* (Dec. 10, 1998); *see also Hernandez-Ortiz*, 496 F.3d at 1045. Young people may experience child-focused forms of persecution, including family violence, child trafficking, forced under-age recruitment into armed conflict, child trafficking or labor, female genital circumcision, or forced or underage marriage.

While the subjective component of a well-founded fear still technically applies to children, the objective component (through the eyes of the “reasonable child”) may ultimately carry the most weight. DHS has instructed that “[t]he asylum officer should also attempt to gather as much objective evidence as possible to evaluate the child’s claim, to compensate for cases where the applicant’s subjective fear or accounting of past events is limited.” Asylum Officer Basic Training Course: Guidelines for Children’s Asylum Claims (AOBTC Guidelines) at 36.⁴

³ This brief can be downloaded from the website of the UC Hastings Center for Gender and Refugee Studies, at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>.

⁴ The AOBT Guidelines can be downloaded at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBT%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>

The analysis of the five protected grounds and the nexus requirement can also differ in children's cases. Children may not comprehend the reasons for their persecution and may have very limited knowledge of conditions in their home countries, yet may still qualify for asylum. INS Guidelines at 21, 27; UNHCR Guidelines on Unaccompanied Children Seeking Asylum at ¶ 8.6. Similarly, children may not understand or have very limited understanding of the concepts of race, religion, nationality, political opinion, or social group but still merit this relief. DHS has underscored that social groups in children's cases often may be defined, at least in part, by age, gender or family membership. AOBTC Guidelines at 45.

Credibility, so important in all asylum cases, takes on particular meaning in a child's case. Children cannot be expected to testify with the same degree of detail and accuracy as adults, and adjudicators must keep this in mind when assessing a child's credibility. David L. Neal, Office of the Chief Immigr. Judge, Exec. Office for Immigr. Rev., U.S. Dep't of Justice, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Children*, at 7 (May 22, 2007). Even more than with adults, trauma and cultural differences can influence a child's ability to communicate information and may make a child appear uncooperative or non-responsive. AOBTC Guidelines at 32; 1998 INS Guidelines at 14.

H. Internal Relocation

The government may defeat a finding of a well-founded fear of persecution by demonstrating that the applicant could avoid persecution by relocating to another part of his or her home country and that it would be reasonable to do so. 8 CFR §1208.13(b)(2)(ii). In determining whether an applicant could relocate, the Court or asylum office should consider ongoing civil strife; strength or weakness of government infrastructures; geographical limitations; and social or cultural constraints. 8 CFR §1208.13(b)(3). If the feared persecutor is the government or government-sponsored, or if the applicant has established past persecution, there is a presumption that internal relocation would not be reasonable, and the government can only overcome the presumption by establishing the reasonableness of internal relocation by a preponderance of evidence. *See* 8 CFR §1208.13(b)(3)(ii); *Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002). Where the government is not the feared persecutor or the applicant has not established past persecution, it is the applicant's burden to establish that it would not be reasonable to internally relocate. 8 CFR §1208.13(b)(3)(i).

I. Credibility and Meeting the Burden of Proof

Credibility is an issue for the trier of fact; thus the IJ determines, conclusively and explicitly, whether or not the petition is to be believed. *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 661 (9th Cir. 2003). An applicant can meet his or her burden of proof through the following methods.

1. Documentary Evidence

The Ninth Circuit has held that “the same standards governing credibility determinations by an IJ also apply to documentary evidence.” *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000). That is, “when rejecting the validity of a document admitted into evidence, an IJ must provide a specific, cogent reason for rejecting it, and this must bear a legitimate nexus to that rejection.” *Id.*

2. Presentation of a Detailed Written Application

The IJ must consider evidence contained in the applicant’s application for asylum. “Testimony is not required; an applicant may rest on her application, if she swears at the hearing that the contents of the application are true.” *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001), citing *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000). As a practical matter, it is extremely rare for a case to be granted without live testimony.

3. Oral Testimony

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

J. Real ID

On May 11, 2005, the REAL ID Act of 2005 (REAL ID) became law. REAL ID §101 is titled “Preventing Terrorists from Obtaining Relief from Removal.” REAL ID makes the following four changes to INA §208. Please note that the amendments apply to applications for asylum, withholding, and other applications for relief from removal made on or after May 11, 2005.

INA §208(b)(1) is amended with the addition of a new clause (B), entitled “Burden of Proof,” which requires that asylum applicants actively show that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least “**one central reason**” for their persecution. Similar changes are made to INA §241(b)(3) governing withholding of removal and INA §240 (c) governing other requests for relief from removal.

REAL ID’s amendments allow an IJ to make a credibility determination in an asylum case based on any inconsistency in the client’s application or testimony. This includes findings based

on indirect evidence such as the applicant's demeanor, the plausibility of the applicant's account, the consistency of oral and written statements, and inaccuracies and falsehoods in the statements. There is no presumption of credibility. However, absent an explicit adverse credibility determination, an applicant will have a rebuttable presumption of credibility on appeal. **Under Real ID, a judge can find an applicant not credible based on inconsistencies which are not material. (Under prior law of the Ninth Circuit, there was a materiality requirement.)**

IJs may now require applicants to provide corroborating evidence for otherwise credible testimony “unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” It is extremely difficult to overturn a judge's decision that corroborating evidence should have been provided. “No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence...unless the court finds...that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.” INA §242(b)(4)(B)(D), 8 USC §1252(b)(4).

REAL ID also expanded the definitions of “terrorist activity” and “terrorist organizations.” As a result of these changes, asylum applicants can trigger terrorism bars precluding a grant of asylum, even when their alleged terrorist activity was minimal and engaged in under duress. REAL ID expanded the definition of “non-designated” terrorist organization to include a “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in ‘any form of terrorist activity.’” It also expanded the definition of “terrorist activity” to include material support, which can consist of not only funds and weapons, but medical care and food. The relevant statutes are contained at §§208(b)(2)(A)(v); 212(a)(3)(B)(i)(i); and 212(a)(3)(B)(vi)(VI). A more detailed analysis of the effect of the terrorism-related bars to asylum and other immigration benefits can be found at §2.4(D), below, and at www.humanrightsfirst.org. Because of the severe consequences of terrorist activity, asylum attorneys must know the identity of every political organizations with which a client had contact at anytime, regardless of whether such contact was voluntary or under duress, and regardless of how minimal was the contact.

K. Fraud

Fraud can be an issue in asylum cases in a variety of situations and can have disastrous consequences for the applicant. Fraud is most common with respect to documents used to flee a country and to enter the United States. While generally fraud committed to flee persecution and enter the United States does not preclude a grant of asylum, and can in fact add to the credibility of a claim, it is very hard to overcome fraud committed in the process of seeking asylum after arriving in the United States.

1. Fraud Committed While Fleeing the Country of Origin or Upon Entering the United States

Many asylum applicants have used fraudulent documents to exit their country and to enter the U.S., or have misrepresented themselves or their intentions in order to obtain a visa to travel to the U.S. Often the applicant received travel documents with help from family, friends or sometimes strangers. It is not uncommon that an applicant has little information as to the authenticity of documents, whether government-issued documents or otherwise.

For example, many applicants enter the U.S. on an F-1 student visa or a B visitor visa with no intention to study or vacation even though they have declared such intention in front of a consular or customs officer and/or in a written visa application. Generally, this type of fraud engaged in to escape persecution, is not a bar to asylum and may even bolster the claim. *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1054 (9th Cir. 2002) (the use of false documents for travel is not a proper basis for an adverse credibility determination). Although an IJ may consider fraud as a negative factor in the exercise of discretion and in assessing credibility, the law again is generous to the asylum applicant. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987) (setting forth a “totality of the circumstances” test for exercising discretion and that in regard to past fraud, the seriousness of the applicant’s fraud engaged in to circumvent refugee procedures is a factor to be weighed (but the use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor, although fraudulent entry as U.S. citizen would be)).

What tends to harm an applicant's asylum case is not the fraud used to flee a country of persecution, but the failure to disclose this fraud during the asylum process. It is critical the clients understand the need to be completely honest as to how they escaped their country and entered the United States. Attorneys need to keep in mind that clients may be receiving poor legal advice from friends or relatives and may fear disclosing a fact, believing that such a disclosure will insure the denial of their claim. It is important for clients to understand that those who have lied to save their lives remain eligible for asylum.

2. Immigration Fraud after Entering the U.S.

i. Lying about Past Fraud

When an applicant lies about past fraud after being safely in the United States, his or her actions may impact the client’s credibility determination and are not as easily explained based on fear. As a result, the attorney must stress to the client the importance of honesty and candor in the asylum process. Both the attorney and the client should know that the U.S. government has many resources to uncover fraud in the visa and passport process. The government has access to significant databases and information including original visa applications, travel records, etc. Sometimes this documentation is provided to an applicant’s attorney in a response to a FOIA request but not always. The visa application is available at <https://evisaforms.state.gov/ds156.asp>. If your client ever applied for a visa, ask if she saved a copy of the visa application submitted to U.S. authorities. If not, ask your client to recall how

the visa application form was completed and file a FOIA request with the hope of obtaining a copy of the visa application. *See* sample DOS FOIA at Appendix 2F.

ii. Marriage or Other Types of Immigration Fraud

Immigration or other criminal fraud, even if not the subject of a criminal investigation or conviction, can lead to an adverse credibility finding or negative exercise of discretion, resulting in a denial of asylum.

Marriage fraud is a federal crime. Title 8, United States Code, §1325(c), states that any person who knowingly enters into a marriage contract for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than five years, or fined not more than \$250,000, or both. Title 18, United States Code §1001, states that whoever willfully and knowingly falsifies a material fact, makes a false statement or makes use of a false document will be fined up to \$10,000 or imprisoned up to five years, or both.

iii. Filing Frivolous Asylum Claim

The court may enter a finding that an applicant has filed a frivolous asylum application if it determines that the applicant deliberately fabricated any material element of the asylum application. 8 CFR §1208.20. A frivolous finding will render an alien permanently ineligible for relief under the INA. Such an alien remains eligible for relief under the Convention Against Torture (CAT).

§2.4 Bars to Asylum

A. Summary of Mandatory Bars to Asylum

Following are the ten mandatory “bars” that render an applicant ineligible for asylum. The one year deadline, criminal history, terrorism activity, and firm resettlement bars are discussed individually in detail below.

If any of these bars are identified in your case and have not already been discussed, please contact IRP attorneys.

1. Aliens who *did not file for asylum within one year of arrival in the U.S.*, unless they can show changed or extraordinary circumstances (INA §208(a)(2)(B), 8 C.F.R. §§208.4, 208.34);
2. Aliens who are *persecutors* of others on account of one of the protected grounds (INA §208(b)(2)(A)(i));
3. Aliens who are *firmly resettled* within the meaning of 8 C.F.R. §208.15 (INA §208(b)(2)(A)(vi));

4. Aliens who *previously filed for asylum* and were denied (INA §208(a)(2)(C));
5. Aliens convicted of an *aggravated felony* as defined by immigration law (INA §208(a)(2)(B)(i)); *see* INA §101(a)(43) for a list of crimes defined as aggravated felonies;
6. Aliens convicted of a “*particularly serious crime*” (INA §208(a)(2)(A)(ii));
7. Aliens who *pose a danger to the security of the United States* (INA §208(a)(2)(A)(iv));
8. Aliens described in INA §212(a)(3)(B)(i)(I)-(IV), (VI), or §237(a)(4)(B) relating to terrorist activity;
9. Aliens who committed a “*serious nonpolitical crime*” (INA §208(a)(2)(A)(ii));
10. Aliens who may be removed pursuant to a *bilateral or multilateral agreement* to a third country unless the Attorney General finds it is in the national interest to grant asylum. *See* INA §208(a)(2)(A).

B. The One Year Filing Deadline

Applicants must file an asylum application within one year of entry into the United States⁵ – unless the applicant is an unaccompanied minor. With the TVPRA’s passage, the one year deadline does not apply to UACs. INA §208(a)(2)(E), 78 USC §1158(a)(2)(E). An applicant must prove by clear and convincing evidence that he or she filed the asylum application within one year of arrival to the United States, or to the satisfaction of the asylum officer or IJ that the applicant qualifies for an exception. *See* 8 CFR §208.4(a)(2)(i). Regulations provide that the one year deadline assessment should be made on a case-by-case basis by the IJ or the asylum officer. *See* 8 CFR §208.4(a)(2). The one year deadline is extremely harsh, with only the following two exceptions.

1. Changed Circumstances

The first exception is a change in circumstances materially affecting the applicant’s eligibility for asylum. These include changes in the applicant’s country of origin or changes in the applicant’s circumstances such as changes in U.S. law or conversion to another religion. The applicant must file the application within a reasonable time after becoming aware of the change in circumstances. *See* CFR §208.4(a)(4).

⁵ For those who entered prior to April 1, 1997, the deadline for applying was April 1, 1998.

2. Extraordinary Circumstances

The second exception is extraordinary circumstances over which the applicant had no control and that kept the applicant from filing for asylum within a year of entry into the United States. Examples include: serious illness; a long period of mental or physical problems, including those caused by persecution suffered; the fact that the applicant is under age 18 and living without a parent or legal guardian (*Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002)); or ineffective assistance of counsel including a lawyer who failed to give notice of the one year deadline or who filed the application within one year with mistakes that caused it to be rejected for filing. The burden is on the applicant to prove the existence of extraordinary circumstances and the circumstances must be directly related to the applicant's failure to file the application within one year. *See* 8 CFR §208.4(a)(5). If your client failed to file within a year of entry into the United States, a critical resource for establishing an exception to the one year rule is the USCIS Asylum Division's *Asylum Officer Training Course on One Year Filing Deadline*, revised March 23, 2009.⁶

3. Calculating the One Year Deadline

The one year period is calculated from the date of the applicant's last arrival in the United States. The date of arrival is counted as day zero, so the first day in the calculation is the day after the last arrival. The one year period ends on the same calendar day the following year. For example, an applicant who arrives on September 21, 2009 and files on September 21, 2010, will have timely filed. If the last day for timely filing falls on a Saturday, Sunday or legal holiday, filing on the next business day will be considered timely. *See* 8 CFR §208.4(a); *Minasyan v. Mukasey*, 553 F.3d 1224 (9th Cir. 2009); and USCIS Asylum Division's *Asylum Officer Training Course on One Year Filing Deadline*, *supra*.

An affirmative asylum application is considered filed when *received* by the USCIS Service Center. However, an application can be considered timely if proven that it was mailed within the statutory one year period. *See* 8 CFR §208.4(a)(2)(ii). For defensive applications filed with the immigration court, the day the application is received by the court is considered the filing date.

Note that if you are filing an asylum application for the first time in immigration court, the filing must be at a court hearing rather than at a filing window. If your client's next hearing is scheduled more than a year from your client's date of entry, you should file a motion to advance the hearing date for the purpose of filing the asylum application within the one year period.

⁶ Available at

<http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf>

4. Proving One Year Deadline is Met if Entry without Inspection

Following the passage of the REAL ID Act, an applicant's credible but uncorroborated testimony of his date of entry into the U.S. may be insufficient to carry the applicant's burden of proof for the one year filing requirement. *Singh v. Holder*, 602 F.3d 982 (9th Cir. 2010) (otherwise credible asylum applicant denied asylum because he did not provide corroboration of his date of entry testimony). Moreover, an IJ is not required to give an applicant notice that his testimony on the one year issue requires corroboration. *Id.* at 988. As such, an asylum applicant who cannot provide some sort of official documentation of arrival into the country should provide more informal supporting documents. *Id.* at 990. The Ninth Circuit has listed various examples of supporting documents, including affidavits or letters from family, friends or traveling companions, receipts from gas stations, motels and restaurants, photographs providing dating information, and souvenirs of arrival in the United States. *Id.*

The asylum office teaches its officers that an applicant's testimony alone can be sufficiently clear and convincing to prove that an applicant arrived within one year before the filing date. USCIS Asylum Division, Asylum Officer Training Course on the One Year Filing Deadline (revised Mar. 23, 2009). However, as a practical matter, the Los Angeles asylum office is reluctant to find that an applicant timely filed for asylum where the applicant entered without inspection and presents only his own testimony to establish date of entry. To the extent possible, attorneys should use documentary evidence, as explained above, to establish date of arrival.

5. Proving One Year if Unsure of Exact Date of Entry

The Ninth Circuit Court of Appeals has determined that an applicant must demonstrate by clear and convincing evidence that the application was filed within one year after the date of the applicant's arrival in the U.S., but not necessarily prove the applicant's exact date of arrival. *Khunaverdians v. Mukasey*, 548 F.3d 760, 766 (9th Cir. 2008); *see also Lin v. Holder*, 610 F.3d 1093, 1096 (9th Cir. 2010).

6. Reliance on Alleged Arrival Date in Notice to Appear

If in a Notice to Appear the government alleges an asylum applicant's arrival date and the applicant subsequently admits the government allegation, the allegation is "considered a judicial admission rendering the arrival date undisputed." *Cinapian v. Holder*, 567 F.3d 1067 (9th Cir. 2009); *see also Hakopian v. Mukasey*, 551 F.3d 843, 847 (9th Cir. 2008). However, if the Notice to Appear is later amended or the entry date is subsequently contested by the government, the alleged arrival date is not to be considered a binding judicial admission. *Cortex-Pineda v. Holder*, 610 F.3d 1118, 1122 (9th Cir. 2010).

C. Criminal History Issues and Bars

A client's criminal record may affect his or her eligibility for asylum, withholding of removal under the INA, or withholding of removal under the Convention Against Torture (CAT). It is important to investigate a client's complete criminal history prior to applying for relief. IRP screens all clients for criminal history issues, but you may discover new information about your client's criminal history during the course of your representation. We recommend that attorneys obtain FBI and California Department of Justice criminal background checks for any client who has ever been arrested in the United States, as well as an FBI check for any client who entered the United States without inspection. For information on requesting a criminal background check for both detained and non detained clients, see Appendix 2I and Appendix 6A.

Important Note

If you determine during your representation of a client that he or she has a criminal history that was previously undisclosed or that he or she has been arrested for or convicted of a crime during the course of the representation, please contact us immediately so that we may assist you in analyzing the effect of such criminal history on your client's asylum eligibility. The immigration consequences of crimes can be very complicated and are always changing, and IRP can provide valuable expertise. You should also consult the Immigrant Legal Resource Center (ILRC)'s resources on the immigration consequences of crimes, which are available at its website, www.ilrc.org.

Some criminal convictions may constitute a bar to a client's applications for asylum or withholding of removal. Even if a conviction does not give rise to a statutory bar to relief, the conviction may still lead to the denial of asylum because asylum, unlike withholding of removal, is a discretionary form of relief. Thus, the asylum officer or IJ can deny asylum based on any combination of adverse factors, including past criminal activity. Moreover, a detained client's criminal history may serve as a bar to the client receiving bond or be the basis for a higher bond. Note that there is no bar based on criminal history for deferral of removal under CAT. Eligibility for withholding of removal and CAT relief is discussed below.

The following categories of crimes are especially likely to impact a client's application for relief and it is critical to investigate whether your client's convictions fall into these categories.

1. Aggravated Felonies

A client convicted of an "aggravated felony" will be ineligible to receive asylum and face other significant immigration consequences. Aggravated felonies in the immigration context are

distinct from felonies in the criminal context and are defined in INA §101(a)(43), 8 USC §1101(a)(43). They include, but are not limited to:

- Murder, rape, sexual abuse of a minor;
- Drug trafficking or any crime involving the distribution, importation or sale of drugs – including possession with intent to sell. However, note that simple possession alone is not an aggravated felony, nor generally is transportation of drugs;
- Crimes of violence as defined in 18 USC §16 if the sentence ordered by the court is more than 365 days. Note that the sentence counted is the sentence given by the judge NOT the actual time served;
- Crimes of theft (including receipt of stolen property) if the sentence ordered by the court is more than 365 days. Note again that the sentence counted is the sentence given by the judge NOT the actual time served;
- Alien smuggling, child pornography, trafficking in destructive devices, money laundering (over \$10,000), trafficking in firearms, national defense crimes, owning or managing a prostitution business, ransom demand, revealing the identity of an undercover agent, sabotage, slavery, treason;
- Fraud where the amount of loss to the victim exceeds \$10,000.00;
- Certain offenses involving firearms and explosive materials;
- The following are also included if the term of imprisonment is more than one year: bribery of a witness, commercial bribery, use or creation of false documents (except for the first offense if created for the purpose of aiding the person's spouse, child or parent), perjury, RICO and gambling offenses (if not a "purely political offense").

i. The Categorical and Modified Categorical Approach

To determine if a particular conviction is an aggravated felony, courts apply a two-step approach. First, courts look at the statute of conviction alone to determine if all convictions under the statute categorically fit into the generic definition of the crime described as an aggravated felony in the INA. If the statute is overbroad and criminalizes conduct that falls both into the generic definition of the crime and conduct that does not, courts will look to a limited set of documents contained in the record of conviction – generally the charging document, plea agreement, and minute order – in order to determine whether the immigrant was convicted of conduct that constitutes an aggravated felony. *See, e.g., Taylor v. U.S.*, 495 U.S. 575, 602 (1990); *Shepard v. United States*, 544 U.S. 13, 16 (2005); *Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005). *Cf. Nijhawan v. Holder*, 129 S.Ct. 2294 (2009).

The Ninth Circuit case law on the application of the categorical and modified categorical approach is complex and constantly evolving. *See U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc). Please contact Public Counsel for assistance in analyzing whether your client's conviction constitutes an aggravated felony under the categorical or modified categorical approach.

Conviction of an aggravated felony will also bar a detained immigrant from receiving bond from the IJ and may serve as a bar to other forms of relief, such as voluntary departure or cancellation of removal.

2. Particularly Serious Crimes

A client convicted of a particularly serious crime will be barred from receiving asylum. INA §208(b)(2)(A)(ii), 8 USC §1158(b)(2)(A)(ii). A conviction for a particularly serious crime will also prohibit a client from receiving withholding of removal under the INA or under CAT. INA §241(b)(3)(B)(ii), 8 USC §1231(b)(3)(B)(ii).

A client has a conviction for a particularly serious crime if the client:

- Is applying for *asylum* and has been convicted of an aggravated felony. INA §208(b)(2)(B)(i), 8 USC §1158(b)(2)(B)(i);
- Is applying for *withholding of removal* and “has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years.” INA §241(b)(3)(B), 8 USC §1231(b)(3)(B).

Adjudicators may determine that a crime that does not meet the above criteria is nonetheless a particularly serious crime. In making their determination, adjudicators must consider the following factors: the nature of the conviction; the circumstances and underlying facts of the conviction; the type of sentence imposed; and whether the type and circumstances of the crime indicate that the alien will be a danger to the community. *See Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). Drug trafficking offenses are *presumptively* particularly serious. *See Matter of Y-L-*, 23 I&N Dec. 270 (Op. Att’y Gen. 2002). Most particularly serious crimes are aggravated felonies, but not all aggravated felonies are particularly serious crimes. Occasionally, the government argues that a crime is particularly serious even though it is not defined as an aggravated felony. Particularly serious crimes usually involve violence or the risk of violence against a person.

Note

A client convicted of a particularly serious crime is not barred from receiving deferral of removal under CAT.

3. Crimes Involving Moral Turpitude (CMTs)

Conviction of a CMT may lead to a negative exercise of discretion in an asylum case or to the denial of bond for a detained client. The INA provides no definition of a CMT and it is often complicated to determine if a client’s conviction constitutes a CMT. Generally speaking, a CMT is a crime that is “inherently base, vile, or depraved” or contrary to societal moral standards. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1068 (9th Cir. 2007) (en banc), *overruled on other grounds by U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc).

The modified categorical approach is also used to determine if a crime is a CMT. First, look at the statute itself to determine if conviction under the statute necessarily involves conduct involving moral turpitude. If the statute criminalizes both morally turpitudinous conduct and conduct that does not involve moral turpitude, look to the record of conviction to determine if the immigrant was convicted or pled guilty to conduct involving moral turpitude. *Navarro-Lopez v. Gonzales*, 503 F.3d at 1068. *But see U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (overruling the “missing element” component of *Navarro-Lopez*’s analysis of the modified categorical approach).

Note

Please note that the Attorney General recently stated that courts may look beyond the record of conviction if, after applying the modified categorical approach, it is still unclear whether an immigrant was convicted of a CMT. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (Attorney General 2008). *Silva-Trevino* is extremely controversial and the 9th Circuit has yet to rule on its validity. Please consult with Public Counsel if you believe the modified categorical approach and *Silva-Trevino* are implicated by your client’s conviction.

Crimes likely to constitute CMTs include:

- Crimes of fraud;
- Theft crimes where the record of conviction shows intent to permanently deprive the owner of possession;
- Crimes with an intent to cause or threaten great bodily harm;
- Prostitution; and
- Rape and other sex offenses.

You should discuss with IRP staff whether your client’s conviction has been held to constitute a CMT. You should also consult ILRC’s chart on the immigration consequences of convictions, available online at: http://www.ilrc.org/files/cal_chart_2.10.pdf.

Note on Domestic Violence

In determining whether an immigrant convicted of domestic violence has been convicted of a CMT, it is important to determine the California Penal Code statute under which the client was convicted. Many domestic violence and assault provisions are only CMTs if the record of conviction establishes the use of more than *de minimis* force. For example, conviction under California Penal Code Section 243(e) is not categorically a CMT because it allows conviction based on offensive touching alone.

Note on Juvenile Delinquency Disposition

A case handled through a juvenile delinquency court does not qualify as a “conviction” for immigration purposes. *See Matter of Devison-Charles*, 22 I&N Dec. 1362, 1365-66 (BIA 2000). As a result, the bars to asylum that involve convictions (as opposed to mere commissions of acts) are not triggered by juvenile delinquency dispositions. These dispositions, however, can factor into the discretionary component of immigration relief. If you are working with a client who had any arrest or court involvement while under the age of 18, consult with IRP before filing any documents with CIS or the immigration court.

D. Impact of Terrorism Related Amendments to the INA

Congress recently enacted several pieces of legislation that attempt to keep terrorists from gaining immigration status in the United States as refugees or asylees. In practice these laws have resulted in the denial of asylum to many *victims* of terrorist activity. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. No. 107-56, 115 Stat. 272), the REAL ID Act of 2005, and Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (Pub. L. No. 109-13, 119 Stat. 231) amended the INA to expand the definitions of a terrorist organization and terrorist activity and thereby dramatically broadened the class of people who are barred for admission for terrorism related grounds. *See* INA §212(a)(3)(B), 8 USC §1182(a)(3)(B).

1. Terrorist Organizations and Activity Defined

A collection of people may now be considered a terrorist organization if they are a “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” terrorist activities. INA §212(a)(3)(B)(vi)(III), 8 USC §1182(a)(3)(B)(vi)(III). Terrorist activity includes any “threat, attempt, or conspiracy” to use “any...explosive, firearm, or other weapon or dangerous device (other than for mere personal or monetary gain), with intent to endanger...the safety of one or more individuals or to cause substantial damage to property.” INA §212(a)(3)(B)(iii)(V), 8 USC §1182(a)(3)(B)(iii)(V). A group’s activity is terrorist activity if it is “unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).” INA §212(a)(3)(B)(iii), 8 USC §1182(a)(3)(B)(iii). Terrorist activity also includes committing, inciting, preparing, and planning terrorist activities, soliciting funds, soliciting individuals, and providing material support for a “terrorist organization” or terrorist activity.

2. Impact of the Expanded Definitions

Under this framework, pro-democracy groups who struggle against a dictatorship can be considered terrorist groups because the actions they take against the regime oppressing them are against the law in the place where they are taking the action. For example, government attorneys

have admitted that under this definition, U.S. Marines operating in Iraq before the fall of Saddam Hussein would have qualified as a terrorist organization. *Matter of S-K-*, 23 I&N Dec. 936, 948 (BIA 2006) (Osuna, J., concurring).

3. Material Support

People who in any way support organizations considered terrorist groups are barred from receiving asylum. This material support bar can give rise to absurd legal results. In 2006, the BIA found that a Burmese woman who provided financial support to pro-democracy freedom fighters was barred from receiving asylum because she provided material support to a terrorist organization. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). Thus far, the courts have found no defenses to this bar. Duress, infancy, self-defense and mental incapacity do not excuse material support. Moreover, there is no *de minimus* exception. Providing a meal for a rebel fighter could trigger the bar. Being held hostage in one's home while members of a guerilla group occupy the home for the night could trigger the bar. Paying a fee to keep terrorists from killing your family could trigger the bar. The statutory language is, as one BIA Board member observed, "breathtaking in its scope." *S-K-* at 948 (Osuna, J., concurring).

4. Exemptions for Terrorism Related Bars

Although it is possible to obtain an exemption from DHS for certain types of terrorist activities, these exemptions are extremely difficult to obtain and are completely within the discretion of the DHS. For asylum seekers in removal proceedings, the exemptions can only be sought after the removal order becomes final. It is critical to understand that military training (even under duress), or membership in or support of any political organization the government characterizes as a terrorist organization, can give rise to a finding that an asylum applicant is barred from asylum.

Often a terrorism related bar is not raised by an asylum officer or IJ when the asylum-seeker is granted relief but instead is raised after a final grant of asylum at the I-730 stage (application for derivative asylum for asylee's spouse and minor children) or at the time the asylee seeks his or her adjustment of status (application for permanent residency) before USCIS. At this point, CIS places the I-730 asylee relative petition or the adjustment application on indefinite "hold" and information relating to the factual basis on which the government invokes the material support bar is not currently provided to the applicant or his counsel.

Attorneys representing asylum-seekers must keep these expanded definitions of terrorist groups and terrorist activity in mind as they prepare their clients' asylum claims, and must insure that after an asylum grant, a client seeks experienced legal counsel when filing asylee relative petitions and adjustment applications. Facts that previously would have bolstered applicants' claims for asylum and demonstrated persecution can now make them ineligible for asylum, or preclude them from adjusting to permanent residency. It is critical that attorneys question their clients about all past membership in political organizations and all past interactions with political

organizations that could possibly trigger the material support or other terrorism related bars. If you are concerned that your client's activities may have triggered a terrorism-related bar, you should contact Public Counsel. You can find additional information on exemptions to the terrorism related bars from the website www.humanrightsfirst.org.

E. Firm Resettlement Bar

“Firm resettlement” occurs when an applicant, prior to arrival in the U.S., entered another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.

The firm resettlement bar does not apply if the applicant's entry into the third country was a necessary consequence of his or her flight from persecution, if the applicant remained in that country only as long as necessary to arrange onward travel, or if the applicant did not establish significant ties in that country. Likewise, if the conditions of the applicant's residency in the third country were substantially and consciously restricted by the authority of the country of refuge, then the applicant was not in fact resettled. 8 CFR §208.15(a)-(b). Finally, firm resettlement does not apply to a person who settled in a third country but has a well-founded fear of remaining in that country. *Siong v. INS*, 376 F.3d 1030, 1040 (9th Cir. 2004).

1. Burden of Proof for Firm Resettlement

The government has the initial burden of proving that the applicant is firmly resettled. The Ninth Circuit adheres to the literal language of 8 CFR §208.15 and has rejected a “totality of the circumstances” approach in determining whether an applicant was firmly resettled in a third country. *Su Hwa She v. Holder*, 629 F.3d 958 (9th Cir. 2010); *see also Ali v. Ashcroft*, 394 F.3d 780, 789–90 (9th Cir. 2005). The Ninth Circuit focuses on the existence of an offer, either direct or indirect, made by the government of some type of permanent residence that would allow the alien to remain in that country indefinitely in some official status. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), *citing Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006) (*en banc*). If direct evidence is unobtainable and circumstantial evidence is received as a surrogate at the threshold stage, in order to shift the burden to the alien, the evidence must be of sufficient force to show that the alien's length of residence, intent, and ties in the third country indicate that the third country officially sanctions the alien's indefinite presence. 8 C.F.R. §§ 208.13(c)(2)(i)(B), 208.15; *Maharaj*, 450 F.3d at 976. The applicant may then rebut firm resettlement by demonstrating, by a preponderance of the evidence, that she meets a claim for one of the exceptions to the firm resettlement bar set forth in 8 CFR §208.15(a)-(b). *Su Hwa She v. Holder*, 629 F.3d 958, 962 (9th Cir. 2010), *citing Maharaj*, 450 F.3d at 976; *Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir.1998) (“A duration of residence in a third country sufficient to support an inference of permanent resettlement in the absence of evidence to the contrary shifts the burden of proving absence of firm resettlement to the applicant”).

§2.5 Alternatives to Asylum

A. Withholding of Removal

The CIS asylum office only adjudicates asylum applications under §208 of the INA. Only IJs can consider applications for related forms of relief including withholding of removal and relief under CAT. Withholding of Removal (INA §241(b)(3), 8 USC §1231(b)(3)) is critical if: 1) the client has committed an aggravated felony, making him or her ineligible for asylum; 2) there are negative factors in the client's past, such as criminal history, that create a statutory bar to asylum or make a discretionary grant of asylum unlikely; or 3) the client is ineligible for asylum because of other statutory bars, commonly the failure to file for asylum before the expiration of the one year deadline or firm resettlement.

Attorneys are advised always to seek withholding of removal and CAT relief for their asylum seeking clients who are in immigration court. (An applicant can apply for all of these remedies concurrently before the IJ.) Unlike asylum, withholding is a mandatory form of relief. If the IJ finds eligibility, there is no discretion and the judge must withhold removal. An individual granted withholding cannot be removed from the United States to the country from which he or she was fleeing persecution, but can be removed to a third country if one is available. (As a practical matter, it is extremely rare for the government to remove an individual granted withholding to a third country.) The individual can obtain employment authorization, but may not petition for derivative status for his or her spouse and children. The grantee may not adjust his or her status to legal permanent residency or apply for citizenship.

1. Burden of Proof for Withholding of Removal

To satisfy the test for withholding of removal, an applicant must show a clear probability of persecution by the government or a group the government cannot or will not control on account of one of the protected grounds. *INS v. Stevic*, 467 U.S. 407, 412 (1984). This is a more difficult burden to meet than for asylum, as the withholding applicant must show that the probability of persecution is "more likely than not" (a probability of greater than 50 percent). As in asylum law, however, if the applicant can show that he or she suffered past persecution, then he or she receives the benefit of a presumption of a clear probability of future persecution.

2. Bars to Eligibility for Withholding of Removal

An individual is not eligible for withholding of removal if:

- The applicant has persecuted others;
 - The applicant committed a serious nonpolitical crime outside the U.S.;
 - There are reasonable grounds to believe that the applicant is a danger to the security of the U.S., including aliens described in INA §237(a)(4)(B) (relating to terrorist activity);
- or

- The applicant has been convicted of a *particularly serious crime*. *Matter of S-S-*, 22 I&N Dec. 458 (BIA 1999) (overruled in part by *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002)) and *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).

Note that an aggravated felony conviction does not automatically bar an applicant from withholding of removal unless the crime also constitutes a particularly serious crime. See §2.4(C)(2), *supra*, for a discussion of particularly serious crimes.

B. United Nations Convention Against Torture (CAT)

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁷ prohibits the return of a person to another country where substantial grounds exist for believing that he/she would be in danger of being subjected to torture if returned. See Pub. L. No.105-277, §2242; *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); see also *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). A CAT claim may be raised even after a final order of removal/deportation has been issued.

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

The second type of CAT protection is called deferral of removal. Deferral is a more temporary form of relief which is appropriate for individuals who would likely be subject to torture, but who are ineligible for withholding of removal due to any of the bars such as persecution of others, terrorism, and certain crimes. Deferral under CAT is terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to his or her home country. Additionally, DHS can detain an individual granted deferral of removal under CAT if the person was already subject to detention.

The advantage of CAT relief is that an applicant is not required to establish that his or her fear of torture is on account of race, religion, nationality, political opinion, or membership in a social group. The scope of CAT is "both broader and narrower than that of a claim for asylum or [traditional] withholding of deportation: coverage is broader because a petitioner need not show that he or she would be tortured 'on account of' a protected ground; it is narrower, however, because the petitioner must show that it is 'more likely than not' that he or she will be tortured, and not simply persecuted upon removal to a given country." *Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001). Additionally, although conviction of a particularly serious crime bars

⁷ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). Although the U.S. signed the Convention in 1988, it did not take effect in the U.S. until Nov. 20, 1994. See U.N. Doc. 571 Leg/SER.E/13, IV.9 (1995).

withholding of removal under CAT, there are no bars to eligibility for deferral of removal under CAT.

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

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.” CAT, Art. 1, 8 CFR §208.18(a)(1). The BIA has interpreted the definition of torture as “an extreme form of cruel and inhuman punishment [that] does not include lesser forms of cruel, inhuman, or degrading treatment or punishment....” *Matter of J-E-*, 23 I&N Dec. 291, 305 (BIA 2002). The BIA also found that indefinite detention without further proof of torture does not constitute torture under this definition. *Id.*

The torture feared must be carried out by the applicant’s government or by an individual or group acting with the acquiescence of the government. Acquiescence has been narrowly defined and must include awareness of the torture and failure to intervene, thereby breaching a legal responsibility. 8 C.F.R. §208.18(a)(7). Although the BIA held in *Matter of S-V-*, 22 I&N Dec. 1306, 1312 (BIA 2000), that acquiescence requires actual knowledge of torture, the Ninth Circuit Court of Appeals disagreed. In *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003), the court held that it is sufficient to show that government officials “turn a blind eye” to the torture. *Id.* at 1196. *See also, Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006) (“it is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it”); *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005) (finding that for CAT relief an applicant “need only prove the government is aware of a third party’s tortuous activity and does nothing to prevent it”).

2. Proof of Torture

The standard of proof under CAT is higher than the standard for asylum. The alien must prove that it is “more likely than not” that he or she would be tortured if forced to return. *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002). The evidentiary proof for torture is very similar to the proof for asylum or withholding claims. All relevant considerations are to be taken into account,

including, where applicable, the existence of a “consistent pattern of gross, flagrant or mass violations of human rights.” *S-V-*, 22 I&N Dec. at 1313. The “more likely than not” standard requires the applicant to establish the elements of her claim by a preponderance of the evidence.

In assessing whether it is “more likely than not” that an applicant would be tortured, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

- Evidence of past torture inflicted upon the applicant, 8 CFR §208.16(c)(3)(i);
- Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured, 8 CFR §208.16(c)(3)(iii);
- Evidence of gross, flagrant or mass violations of human rights within the country of removal, 8 CFR §208.16(c)(3)(iii); and
- Other relevant information regarding conditions in the country of removal, 8 CFR §208.16(c)(3)(iv).

3. Procedure for Raising CAT Claims

Individuals seeking CAT relief must bring the claim before an IJ. If your client is filing for asylum before the asylum office, she should still request withholding of removal and CAT relief as alternatives by marking the appropriate boxes on the I-589 application, even though these claims will only be considered if the case is referred to court.

If your client already filed for asylum, but did not check the withholding of removal and/or CAT relief boxes on the original application, she should supplement the I-589 application with that request.

C. Voluntary Departure

Voluntary departure permits an individual, who is otherwise removable, to leave the U.S. at his or her own expense within a designated amount of time in order to avoid a final order of removal.⁸ INA §240B, 8 USC §1229c. Voluntary departure is not available in all cases. INA §240B(c), 8 USC §1229c(c).

Voluntary departure may be preferable to a removal order for a number of reasons.⁹ If an individual is issued a removal order he or she may be barred from reentering the United States

⁸ We do not recommend seeking this relief unless your client no longer fears persecution, is withdrawing all requests for relief, and seeks to return home.

⁹ The laws governing voluntary departure and the consequences of overstaying a voluntary departure order are extremely complex. Once on appeal, it is possible to withdraw a request for voluntary departure and may be advisable. If you represent an asylum applicant on appeal in a case in which voluntary departure has been granted by the immigration court, consult with IRP attorneys.

for up to ten years and may be subject to civil and criminal penalties if he or she reenters without proper authorization. In addition, an individual who was ordered removed after April 1, 1997 and is seeking admission is inadmissible for five years. *See* INA §212(a)(9)(A)(i), 8 USC §1182(a)(9)(A)(i). However, if an individual is granted voluntary departure and departs within the time ordered by the court, she will not be barred from legally reentering in the future and does not face the bars to relief that an individual with a removal order would face. A client should be aware that leaving the United States after being present without permission may trigger a 3 or 10 year bar to reentry. *See* INA §212(a)(9)(B)(i), 8 USC §1182(a)(9)(B)(i). Aliens granted voluntary departure who do not depart from the United States by the time set by the IJ are treated harshly; they are ineligible for any relief under INA sections 240A, 245, 248 and 249 for a period of 10 years. INA §240B(d), 8 USC §1229c(d).

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

1. Prior To or During the Master Calendar Hearing

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

- Waives or withdraws all other requests for relief;
- Concedes removability;
- Waives appeal of all issues;
- Has not been convicted of an aggravated felony and is not a security risk;
- Shows by clear and convincing evidence the intent and financial ability to depart; and
- Presents to DHS a valid passport or other travel document sufficient to show the ability to lawfully re-enter into his or her country of origin, unless such document is already in DHS's possession or is not needed in order to return. 8 CFR §1240.26(c).

If the individual meets these requirements, the IJ may grant a voluntary departure period of up to 120 days at the time of the Master Calendar hearing. *See* INA § 240B(a), 8 CFR §1240.26. The Judge may not grant voluntary departure beyond 30 days after the Master Calendar at which the case is initially scheduled, except pursuant to a stipulation from DHS. 8 CFR §1240.26(b)(E)(ii).

2. At the Conclusion of the Merits Hearing

An individual may apply for voluntary departure after the conclusion of proceedings, provided she:

- Shows physical presence for one year prior to the date the Notice to Appear was served;

- Shows good moral character for five years prior to the application;
- Has not been convicted of an aggravated felony and is not a security risk;
- Shows clear and convincing evidence that he/she intends and has the financial ability to depart;
- Pays the bond required by the Judge (of at least \$500); and
- Presents to DHS a valid passport or other travel document sufficient to show the ability to lawfully re-enter into his or her country of origin, unless such document is already in DHS's possession or is not needed in order to return. 8 CFR §1240.26(c).

If the individual meets these requirements, the IJ may grant voluntary departure for a period of up to 60 days. *See* INA §240B(b), 8 CFR §1240.26(e).

D. Cancellation of Removal for Non-Permanent Residents

Cancellation is a remedy which can be sought only before the immigration court. If granted, the applicant obtains permanent residency. It is available to applicants who: 1) have been physically present in the U.S. for a continuous period of at least 10 years preceding the date of their application; 2) have established good moral character for these 10 years; 3) have not been convicted of an offense under §§212(a)(2), 237(a)(2) or 237(a)(3), subject to paragraph (5); and 4) who establish that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a U.S. citizen or LPR. *See* INA §240A(b)(1); 8 U.S.C. §1229b. The accrual of the 10 years of continuous presence is cut off by the service of a Notice to Appear or the commission of certain crimes. The ten year period is also terminated by a single departure from the United States in excess of 90 days, or departures that in the aggregate exceed 180 days. INA §240A(d)(1) and (d)(2).

E. Temporary Protected Status (TPS)

Temporary Protected Status (TPS) is available for individuals from countries which the U.S. Attorney General has designated as too dangerous to which to return, provided that the individual was present in the United States on or before the date that the Attorney General made the designation. Individuals who qualify for TPS are permitted to work in the U.S. and may not be deported during the period of protection. Those who qualify for TPS must register with the U.S. government during designated registration periods to receive and/or maintain TPS status.

TPS is, as the name indicates, temporary. The Attorney General designates the amount of time, anywhere from 6 to 18 months, during which people from a particular country will be afforded protection. TPS designation may be renewed by the Attorney General if unsafe conditions in the country persist. At the end of a TPS program, the applicant may receive a Notice to Appear from DHS and be placed in removal proceedings. The attorney and client must therefore weigh the risks and benefits of applying for TPS.

Because TPS is granted for short periods of time, consult the CIS web site to verify which countries are currently designated for TPS. As of **October 2011**, the following countries are designated for TPS: El Salvador, Haiti, Honduras, Nicaragua, Somalia, and Sudan.

F. T Visas for Victims of Human Trafficking

In October 2000, Congress passed the Victims of Trafficking and Violence Protection Act (VTVPA). This law created a new T visa, intended to protect victims of “severe forms of trafficking.” This includes victims of sex trafficking, specifically the recruitment, harboring or transportation of a person for the purpose of commercial sex acts such as prostitution. It may also include the recruitment, harboring or transportation of a person for labor services, involuntary servitude, slavery or debt bondage through the use of force, fraud or coercion.

To be eligible for a T visa the applicant must show that he or she:

- Has been a victim of a severe form of trafficking;
- Is present in the United States on account of such trafficking;
- Has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or has not attained 15 years of age; and
- Would suffer extreme hardship involving unusual and severe harm if removed from the United States.

The VTVPA provides for 5,000 T visas to be awarded each year. It also provides that victims of trafficking who are detained should be housed in appropriate facilities, not in correctional facilities. It mandates DHS to provide necessary medical care and protection from traffickers. Victims of severe forms of trafficking are eligible for certain public benefits before obtaining a T visa. To be eligible for benefits, they must be certified as “victims of a severe form of trafficking” by the Office of Refugee Resettlement. Asylum seekers can pursue T visas while also seeking asylum. Please contact Public Counsel if you believe your client is a victim of trafficking.

G. U Visas for Immigrant Victims of Violent Crime

The VTVPA also created U visas that allow non-citizen victims of certain crimes to remain in the U.S.. Congress’ intent in creating the U visa was to encourage and protect victims of certain crimes to come forward to report the crime and assist in its investigation and prosecution. To qualify, an applicant must show that he or she:

- Suffered substantial physical or mental abuse as a result of having been a victim of “qualifying criminal activity”;
- Possesses credible and reliable information or knowledge of the details of the qualifying criminal activity upon which his or her petition is based; and

- Has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity.

The qualifying criminal activity must have occurred in the U.S., in U.S. territories or possessions, or violated a U.S. federal law that provides for extraterritorial jurisdiction. INA §101(a)(15)(U), 8 USC §1101(a)(15)(U); 8 CFR §214.14(b).

The qualifying criminal activity includes rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage situations, peonage, false imprisonment, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. INA §101(a)(15)(U)(iii), 8 USC §1101(a)(15)(U)(iii).

An applicant applying for a U visa must obtain and file with an application a certification from a law enforcement official verifying the applicant's cooperation with a criminal investigation. Upon approval of a U visa application, the applicant may obtain employment authorization. The annual limit on U visas is 10,000 per year. Once granted, U visa status lasts for up to four years but may be extended in certain situations. INA §214(p)(6), 8 USC 1184(p)(6). After three years of continuous U visa status, the client may be able to adjust status to lawful permanent residence. An adult U visa beneficiary can also obtain U visa status for a spouse and children under 21. A beneficiary who is under 21 can obtain status for his or her parents, spouse, children, and siblings who are under age 18 at the time of the principal beneficiary's filing. Please contact Public Counsel if you believe your client is eligible for a U visa.

H. VAWA for Abused Immigrants

The Violence Against Women Act (VAWA) was enacted in 1994 and has been amended several times since. It addresses the widespread problem faced by abused non-citizens who feel compelled to stay in abusive relationships because an abusive family member holds a vital key to their immigration status. Abusive spouses frequently use the family visa process as a way to control and abuse an undocumented spouse. VAWA allows victims of violence to gain lawful status without having to rely on an abusive spouse. Under VAWA, an abused spouse or child of a U.S. citizen or legal permanent resident or the abused parent of an adult U.S. citizen son or daughter can self-petition for lawful immigration status. Please contact Public Counsel if you believe your client is eligible for VAWA.

I. VAWA Cancellation of Removal

VAWA permits some abused non-citizens to apply for permanent resident status while in removal proceedings in immigration court. VAWA cancellation of removal requires that:

1. The non-citizen has been battered or subjected to extreme cruelty by a spouse, former spouse, or parent who is or has been a U.S. citizen or legal permanent resident;
2. The non-citizen has resided continuously in the U.S. for at least three years;
3. The non-citizen has been a person of good moral character for the three years; and
4. Removal from the U.S. would cause extreme hardship to the non-citizen, or his or her child or parent. *See* INA §240A(b)(2)(A).

J. Special Immigrant Juvenile Status (SIJS)

Children under the jurisdiction of a juvenile or state court and who cannot reunify with one or both of their parents may qualify to self-petition for Special Immigrant Juvenile Status (SIJS). To be eligible for SIJS, a child must meet the following criteria:

1. The child is dependent upon the juvenile court or has been legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court;
2. The child's reunification with one or both parents is not viable due to abuse, neglect, abandonment or similar basis found under state law;
3. It is not in the "best interest" of the child to be returned to her or her parents' previous country of nationality or country of last habitual residence.

A state or juvenile court judge must make these findings in a court order; without the order, the child cannot apply for SIJS. The SIJS application packet must be filed before the child turns 21 and while the child is still under the jurisdiction of the juvenile or state court. (Note that most juvenile or state court jurisdiction over children ends at the age of 18.) Please contact Public Counsel if you think that your client is eligible for SIJS, which is typically a much faster and easier form of immigration relief to obtain than asylum.

K. Family Based Petitions

Occasionally, an asylum applicant may be able to obtain lawful status through a U.S. citizen or lawful permanent resident relative. An applicant who entered the U.S. legally and then marries a U.S. citizen may be able to adjust status immediately in the United States. An applicant who did not enter legally but marries a U.S. citizen must go abroad to a visa interview at a U.S. consulate. This process is known as consular processing. A U.S. citizen can file a visa petition for a spouse, child or sibling. A lawful permanent resident can file a visa petition for a spouse or unmarried child. Whether a beneficiary of a visa petition can adjust status in the United States, and how long the beneficiary will have to wait to obtain status through the beneficiary's permanent resident or citizen relative, are very complex questions. If you client is or will be the beneficiary of a family based visa petition, please contact Public Counsel for advice.

CHAPTER 3

AFFIRMATIVE APPLICATIONS

§3.1 First Steps

IRP recommends that volunteer attorneys immediately begin the steps outlined below upon accepting an affirmative asylum case. This will ensure that any potential problems are identified at the outset of a case and timely addressed. These steps apply to affirmative applications before the asylum office. If your case is referred to immigration court, please refer to Chapter 4, below, which addresses defensive applications.

- A. Contact Your Client.** IRP will provide you with your client's contact information. Please contact your client as soon as possible to introduce yourself and arrange for a first attorney-client meeting. Clients are anxious to meet with you and eager to proceed with their cases.
- B. Retainer.** Volunteer attorneys should enter into a legal agreement with the client. Unless otherwise agreed, IRP does not have a separate retainer with the client. The volunteer attorney should define the scope of the services that will be provided as identified by IRP. For example, if your case is affirmative, be explicit in stating that representation is limited to representation before the Los Angeles asylum office. If your case is defensive, the retainer should specify that representation is limited to removal proceedings before the Los Angeles Immigration Court. The volunteer attorney is not obligated to represent the client beyond the agreed upon scope of the representation, but as a practical matter many volunteers choose to continue the representation when an affirmative asylum case is referred to immigration court, or a court case is appealed. A new retainer can be entered into at that juncture.

Once you submit a Notice of Appearance form, you are the attorney of record, not your law firm. Even if you leave your firm, you remain the attorney of record unless a new Notice of Appearance form is submitted by another attorney. (Defensive applications in immigration court require a Motion to Withdraw as Counsel of Record. *See* Appendix 4E.)

- C. Review File. EXAMINE EVERY PIECE OF PAPER.** IRP will provide you with a copy of all documents provided by the client at her initial intake interview at Public Counsel. Ask your client to show you all of those documents again and any other relevant documents that corroborate the client's story, document the client's immigration history, or identify the client, such as passports and birth certificates. Solicit details on the source of the documents and their accuracy. Asylum officers and government attorneys in immigration court may conduct an extensive review of all documents submitted by an asylum seeker, and have observed a great deal of fraud. Never introduce a document if you do not know its legal meaning or if you doubt its genuineness.

All documents are filed only as copies. Never file original documents, but do bring originals to the asylum interview. All documents issued by a foreign government may require authentication. See Chapter 3, §3.3(B)(5)(iii) below on authentication procedures.

- D. Calendar Your Client's One Year Deadline.** If your client has never before filed for asylum, make sure you calendar the deadline for the filing of the asylum application. It must be filed within a year of the client's entry into the United States, and the filing must be received by the USCIS no later than the day that marks the one year anniversary of the client's entry.
- E. Secure Interpreter.** If your client does not speak English or is more comfortable in another language, you will need to find an interpreter to translate for you during your case preparation as well as during the asylum interview before the asylum office. The asylum office does not provide interpreters. You must first question your client to determine what language she speaks best and then advise her to testify in her best language. The interpreter you bring to the asylum office does not need to be court certified, but must be a lawful permanent resident or U.S. citizen who is fluent in English and the foreign language. Ask your client whether she knows of anyone who is willing to interpret. If possible, avoid using family members or friends to interpret, as your client may not feel comfortable discussing her story in their presence. Preferably, the interpreter should be available during the entire course of the case. There may be staff at your law firm who speak the foreign language and are willing to interpret. Finally, you can contact Public Counsel to see if we have any referrals. Occasionally, a volunteer attorney needs to employ a professional interpreter when no volunteer interpreters can be found.
- F. Refer Client For Psychological Counseling.** If your client is a survivor of state-sponsored torture, please refer the client to the Program for Torture Victims (PTV), a nonprofit agency that provides free psychological counseling and evaluations, and medical exams. PTV therapists will evaluate, diagnose and treat your client if treatment is warranted. PTV staff will also prepare expert witness declarations and testify, though live testimony is rarely needed in affirmative cases before the asylum office. Contact PTV's case manager at 213-747-4944 ext. 252 to schedule an appointment. Tell her that you are handling a Public Counsel *pro bono* case. Many clients have limited knowledge relating to psychological counseling, or may have a preconception that psychologists are for "crazy" people. It is important to discuss with your client the reasons for the referral to PTV, and, if necessary, to explain what psychological counseling is. You should stress that PTV has expertise in the diagnosis and treatment of psychological consequences of torture, and that PTV experts can provide important information to support the client's asylum claim. Also, if your client has visible scars from torture, notify your client that PTV will arrange for a medical examination at no charge. If your client is a victim of persecution that is not state sponsored, such as cases involving domestic violence, contact IRP for other referrals.

- G. Seek Expert Witness on Country Conditions.** It may be useful to corroborate your client's claim with a declaration from an expert on country conditions, when such expertise is relevant to your client's claim and the information you seek to introduce into the record cannot be obtained elsewhere. (Whether you should utilize a conditions expert depends on the unique facts of your case.) Most experts are academics, but other professionals may assist as well. For help in locating an expert, go to the website www.asylumlaw.org. It is easy to register to gain access to the website's resources. Feel free to contact IRP for leads.
- H. Submit Freedom of Information Act Requests.** If your client had any interaction with DHS or applied for any other immigration benefit in the past, you should request a copy of your client's A file from the Department of Homeland Security through a request under the Freedom of Information Act (FOIA). Any non-citizen who applies for immigration benefits within the United States is assigned a nine digit A number and an A file is created. A FOIA request should also be made to the Department of State if your client applied for or was issued a U.S. visa abroad, and should be made to CBP if your client was ever detained at the border. Please note that responses to your FOIA requests may not arrive before the asylum interview due to significant delays on the part of the government agencies. It is nevertheless important to file the requests at the beginning of a case for future reference if the case is referred to immigration court. *See* Appendix 2 for sample FOIA requests.
- I. Submit Requests for Criminal Background Checks.** Criminal convictions have serious adverse consequences for immigrants. It is crucial to know your client's criminal history in detail. Please note that expungements do not alter criminal history for immigration purposes. If your client has resided in the United States for more than a few months and discloses an arrest history, you should submit a request for her background check to both the FBI and the California Department of Justice (DOJ). *See* §3.3(C), below, and Appendix 2 for more information on requesting criminal checks. For each criminal case that is identified, you should obtain a copy of the police report and a certified disposition from the pertinent criminal court. If your client's case was handled through juvenile delinquency proceedings, contact IRP for guidance. California law protects the confidentiality of juvenile records, and you will need to petition the relevant juvenile court for permission to review and disseminate any juvenile delinquency dispositions. Even if your client's criminal history does not bar her from seeking asylum it will be a factor in the adjudicator's exercise of discretion. Criminal background checks are usually not conducted in the client's home country, though every asylum applicant must disclose any and all criminal history in any country of residence. (We recommend that even if your client has no arrest history, you still obtain your client's FBI record. The asylum office will access that record but not provide you with a copy of it.).

J. Begin Interviewing Your Client. Many volunteer attorneys underestimate how much time with the client is necessary to adequately prepare. Interviewing the client in the process of preparing the I-589 and the declaration is the most important part of handling an asylum case. In interviewing asylum clients, you may encounter problems you are not accustomed to in dealing with other sorts of cases. For example, clients in asylum cases rarely speak English and are sometimes uneducated or unsophisticated. Additionally, many clients suffer from Post-Traumatic Stress Disorder (PTSD) or other psychological problems that make it difficult for them to disclose the details of their persecution. Lawyers in the U.S. often have a style of interviewing that can be threatening to survivors of trauma. An intense, rapid-fire approach, and an insistence on a logical chronology will not always succeed in eliciting relevant information. A standard approach to client interviewing may be very frightening to clients seeking asylum.

Cultural differences also create challenges to working effectively with clients. Some clients come from cultures where dates are not emphasized, or where a completely different calendar is used, such as in Ethiopia. Some clients are from cultures which have very different ideas about the role of women which present unique challenges for female attorneys. Clients may also have culturally specific ways of expressing emotion which are hard to interpret for those unfamiliar with the culture. From the attorney's point of view, these problems may manifest themselves in a variety of ways. For example:

- The client may have difficulty describing traumatic events and may find the experience so distasteful that she simply does not show up at the next appointment or resists efforts to provide greater detail;
- 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 conditions.

If you are having difficulties obtaining your client's cooperation, it can be very helpful to learn more about your client's cultural background. It can also be extremely helpful to consult with a mental health professional who has evaluated and/or treated your client, provided that your client consents to the release of information by the treatment provider. (You also need your client's consent to discuss the client's asylum case with treatment providers.) Finally, to establish your client's credibility, it may be critical to include in a declaration information about your client's cultural and educational background, any memory problems, as well as any psychological symptoms and diagnosis (e.g., PTSD). For more client interview practice pointers and strategies, see Appendix 10G.

§3.2 Timeline for Affirmative Asylum Applications

Timeline must take into consideration client's ONE YEAR DEADLINE. If the deadline is soon, filing a skeletal I-589 preserves the applicant's eligibility and allows for future supplementation. See Appendix 1H for a sample request to reschedule an asylum interview when additional time is needed for case preparation.

Before the ONE YEAR DEADLINE:

1. The filing of a complete I-589 (with required photos of applicant and included family members) will satisfy the one year filing requirement. However, if time permits, a proper filing should include the I-589 and G-28 (Notice of Appearance), client's declaration, appropriate supporting exhibits, a cover letter, and brief. How long it takes to complete this work depends on how complicated the case is and how much corroborating evidence is available. (In very straightforward cases, a brief may not be necessary. It is never required.) See Appendix 1 for a sample I-589 packet.

Approximately two weeks after filing:

1. Client and attorney should receive Notice of Receipt of I-589.
2. Client and attorney should receive Notice of Action – Appointment for Biometrics. Biometrics is a general term used by DHS which refers to fingerprinting and the gathering of other identifying information. An asylum applicant will not be interviewed unless the applicant appears at the biometrics appointment. Biometrics information is sent electronically to the asylum office, and you will not be provided a copy of this information.
3. Client and attorney should receive Notice of Action – Interview Appointment; cases are typically scheduled 3-4 weeks after the filing of the application.
4. Begin to prepare client for asylum interview.

Approximately two to three weeks after receiving Notice of Action with interview date:

1. Prepare client for asylum interview by conducting mock interview. If necessary, file additional supporting evidence and/or a supplemental declaration.
2. Attend asylum interview with client.

Exactly two weeks after asylum interview (client appears in person):

1. Receive asylum grant! (See Appendix 8 for post-grant information)
2. If asylum is not approved and client is in valid immigration status, receive Notice of Intent to Deny (NOID) with a three-week deadline to respond. The asylum office then issues a final decision either reversing its initial tentative denial or issues a final denial. If the client has a valid immigration status (such as a student visa), she will remain in that status.

3. If asylum is not approved and client is not in valid immigration status, receive Referral Notice which provides reasons for referral and a Notice to Appear (NTA), the government document charging client with immigration violations (typically not having legal status) and placing the client in removal proceedings. The NTA will provide notice of the time and date of the client's first hearing before the immigration court.
4. Occasionally, the asylum office notifies a client that a decision will not be ready within two weeks but will instead be mailed at a later date. This delay is sometimes caused by pending criminal background checks or the government's option to do further investigation. Another reason is that some asylum claims, including those based on domestic violence and those involving children seeking asylum, are sent to CIS headquarters in Washington, D.C. for special review. If your case is sent to headquarters, it typically takes at least six months to receive a decision.

§3.3 The Asylum Process

A. Affirmative Application – Overview of Documentary Requirements

This is an overview of an asylum application packet. Links are provided to the CIS forms for your convenience, and detailed instructions on how to complete the forms and on how to submit evidence follow the checklist. Appendix 1 contains samples of all the documents listed below in the overview. Please note that a complete asylum application includes a properly filed I-589 with the required photographs. If the case is time-sensitive, you can always file a standalone I-589 with photographs and a cover letter indicating that you will be supplementing the application with additional evidence.

1. *Cover Letter*. See Appendix 1A for a sample cover letter and Appendix 1I for a sample cover letter when filing a skeletal application;
2. *Notice of Appearance as Attorney*, Form G-28 signed by both the client and the attorney; <http://www.uscis.gov/files/form/g-28.pdf> (instructions and form). See Appendix 1B for a sample G-28;
3. *Application for Asylum*, Form I-589, completely filled out and signed by the client; <http://www.uscis.gov/files/form/I-589.pdf> (form); http://www.uscis.gov/files/form/I-589_Inst.pdf (instructions). See Appendix 1C for a sample I-589 and Appendix 1I for an I-589 sample when filing a skeletal application;
4. *Declaration* attached to the I-589 in which your client explains her case. See Appendices 1E(i) and (ii) for declaration samples. If the client does not read English, an interpreter should interpret the declaration from English into the client's best language before the client signs the declaration, and the interpreter should then sign a certificate of interpretation which follows the client's signature on the declaration (for a sample Certificate of Interpretation, see Appendix 1J);

5. *Index of Exhibits*, which lists all the exhibits and includes summaries of any articles describing country conditions. The Index of Exhibit should be paginated and contain exhibit letters on the side of the packet (and not below). *See* Appendix 1D for a sample index.
6. *Exhibits supporting the client's claim* may include a client's identification documents, medical records, declarations or letters from witnesses, newspaper articles, country reports from human rights and governmental organizations, and other documents the client has corroborating her claim. It is critical to provide documents to establish the client's identity and citizenship. Include English translations and certificates of translation for any documents written in a foreign language. (A sample Certificate of Translation is found at Appendix 1K.)
7. *Expert Declarations*. These can be from individuals such as academics or human rights activists who have knowledge regarding country conditions, and also from physicians and therapists who have evaluated or treated your client. Each expert has to submit her *curriculum vitae* together with her expert declaration, and these exhibits should be included in the Exhibit Packet. *See* Appendix 1F for a sample Expert Declaration and expert *curriculum vitae*.
8. *Brief* outlining the legal case for asylum based on your client's situation. *See* Appendices 1G and 3G for sample caption page and brief.
9. *Any evidence of claimed relationship* for all family members included in the application, such as marriage or birth certificates, should be included in the Exhibit Packet. (There may be cases where it is impossible to obtain such documents. Please contact IRP attorneys for advice if this is the case.
10. *One passport-style photograph* of every individual included in the application. (Photos are not required for family members who remain abroad.)

B. Affirmative Application – Documentary Evidence in Detail

1. Instructions for Completing the CIS Forms

Please follow the detailed instructions available for each form on the CIS website. Below are some hints for filling out the forms for asylum cases. Please also review the sample asylum application packet (Appendices 1B and 1C) included in this Manual for guidance on preparing the forms.

COMPLETING FORM G-28

Part 1.A: Check the box that says “USCIS” and write in “I-589.”

Part 1.B: State the client’s complete name as it is listed on her birth certificate or passport. Give the client’s complete home address.

A-Number or Receipt Number, if any: This refers to the client’s alien registration number (A number). Most clients applying for asylum affirmatively do not have A numbers unless they have previously applied for other immigration benefits or been detained by ICE. The A number has nine digits. The first number is often a zero. If the client does not have an A number, write “none.”

Check the box for “Applicant”.

Client signs it and dates it.

Part 2.A: Check the first box and write in “California” unless you are a member of a different bar.

Check one of the boxes regarding a court or administrative agency order and provide an explanation if needed.

Part 3: Fill in your complete name, state bar number, address, phone number, fax number and email address, and sign the form.

COMPLETING FORM I-589

Check the first box at the top of page 1 for Withholding of Removal under the Convention Against Torture

Part A. I. Information About You

1. A-Number: See instructions for Form G-28 above.

2. U.S. Social Security #: If the client has a valid Social Security number, state the number here. If the client does not have a Social Security Number, state “None.” If you are uncertain about the number’s validity, please contact Public Counsel.

3. Complete Last Name: State the client’s complete last name. Review client’s identification documents (birth certificate, passport) for accurate information. Be aware of various spellings especially if client’s native language uses a different alphabet. Note that clients often have multiple last names.

4. First Name: State the client’s first name.

5. Middle Name: State the client's middle name. If the client does not have a middle name enter "--" instead of none to avoid "none" becoming client's new middle name.

6. Aliases: List all names used by client including her maiden name, aliases, false names, different spellings or version of her name.

7. Address: Enter the client's home address and phone number.

8. Mailing Address: Enter the client's mailing address if different from home address. Confirm with client that her mailing address is reliable. Otherwise mail will be returned to USCIS as undeliverable.

9. Gender: Enter client's gender as stated on her birth certificate.

10. Marital Status: Enter client's marital status. Common law and religious marriages and divorces are generally considered valid for immigration purposes if recognized in the client's home country as valid. One exception is polygamy as it is against public policy. Proxy marriages are valid but proof of consummation is required. (Note: it will be hugely difficult to obtain asylee status for a spouse if that spouse was not listed on the I-589. Be sure to ascertain whether your client has a legally recognized spouse, whether residing here or abroad.)

11. Date of Birth: Enter the client's date of birth. Confirm accuracy with her identification documents. Note that many countries list dates in *day/month/year* order.

12. City and Country of Birth: Enter client's place and country of birth. Consult her birth certificate if available.

13. & 14. Citizenship, Present and at Birth: Enter client's citizenship. Enter multiple citizenships if applicable. Enter "Stateless" if applicable.

15. Race, Ethnic, or Tribal Group: List the client's information.

16. Religion: List the client's religious affiliation if any.

17. Check the applicable box. Most clients filing for affirmative asylum have never been in immigration court proceedings.

18. a. Enter the date when the client last left her country of citizenship.

b. Enter **the I-94 Number**. This number is located on the Arrival-Departure Record Form portion of which is usually stapled to client's passport. Only clients entering the U.S. legally on a nonimmigrant visa will have this Form. Enter "None" if your client entered without inspection or "Unknown" if client entered legally but has since lost the Form.

c. List all of the client's **entries into the U.S.** Under status enter the type of visa client used when entering (tourist, student). You can also use the numerical codes assigned to the different

types of visas (B1/B2, F1, J1, etc.). The relevant visa type can be found on the client's actual U.S. visa in her passport. If client entered without inspection enter "EWI." For "Date Status Expires" enter the date stamped in the client's passport by the U.S. immigration officer upon her last entry. The stamp can be found on the page adjacent to the U.S. visa and also on the Arrival-Departure Record, Form I-94. Note that this is not the same as the date when the visa expires. If the client entered without inspection enter "N/A."

19-21. Passport Information: Enter client's information. If client does not have a passport, enter "N/A."

22-24. Language Information: Note that you may need to add an explanation if the client is only partially fluent. It is not in the client's interest to write fluent in English unless the client is 100 percent fluent.

Part A. II. Information About Your Spouse and Children

Spouse

Check the box if the client is legally married. The client has to provide the following information for her spouse even if her spouse is present in the U.S. without legal status and/or does not want to be included in the asylum application.

1-14. Enter the relevant information about the client's spouse. See Part A.I. for instructions.

15. Check the appropriate box depending on the spouse's location. Do not forget to enter the spouse's location if not in the U.S. If the client is unsure about the spouse's location enter "Unknown."

16-19. Date, Place and Matter of Entry: Only fill out if the spouse is in the U.S. (through box 24). See Instructions for Part A.I. 18 a, b, and c above.

20. Enter the **spouse's current status** such as visitor or student. If the spouse entered legally but has since overstayed, enter for example "overstay visitor visa." If the spouse entered without inspection and is currently without any legal status, enter "None." If you have questions about your client's visa status, please contact Public Counsel.

21-23. See Instructions for Part A.I. 18 a.-c. above.

24. Check "Yes" if the spouse who is in the U.S. will be included in the client's asylum application as a derivative. If the spouse is included and the client is granted asylum, the spouse will also be granted asylum concurrently. If the spouse is not included (you check the "No" box in this section) and the client is granted asylum, the client can subsequently petition for the spouse to obtain asylee status by filing an I-730 petition with USCIS. The petition must be filed within two years of the client's asylum grant. Note the client has to be legally married to the

spouse on the day of the asylum grant. The spouse may also have an independent asylum claim and may want to file his or her own asylum application. Note that if the client is not granted asylum and is not in lawful immigration status, the client along with the spouse and any children *included* in the I-589 asylum application will be referred to court. In other words, the DHS will commence removal proceedings against all family members included in the I-589. The family members are not placed in removal proceedings if they were not included (but merely identified) in the I-589. Whether to file an independent asylum application for the spouse or whether to include the spouse and/or children in the client's application differs from case to case. Please consult IRP attorneys for guidance. You cannot include a spouse and child who is not in the United States, but once granted asylum, the beneficiary of an asylum grant can file an I-730 asylee petition to initiate the process of bringing family members residing abroad to the United States.

Children

Check the appropriate box regarding client's children and list the total number of children. All the client's children have to be identified regardless of their age, marital status, immigration status, or their current residence. Included on this list should be children born out of wedlock, stepchildren, and adopted children. Please clarify with your client whether her children are biological. Be aware that in many countries, especially in Africa, children often grow up in other relatives' households without any legal adoption process. Only children legally adopted on the day of the client's asylum grant will be eligible for derivative asylum. Out of the children listed on the I-589, only those children who are unmarried and under the age of 21 on the date the asylum application is filed will be eligible for derivative asylum. If your client has children who will soon be 21, it is critical that you file the asylum application before the oldest child reaches 21.

1-13. Enter each child's information. See Instructions above in the Spouse section for guidance.

14-20. Enter relevant information. See Part A.I. for instructions. If child was born in the U.S., enter "USC" (for U.S. Citizen) in box 18 and "N/A" for the remaining questions.

21. Check the appropriate box. See Instructions for box 24 in the Spouse sections. The same applies to each child.

Repeat for additional children on page 3. Use Form I-589 Supplement A if client has more than four children.

Part A.III. Information about Your Background

Please be as specific as possible. Pay special attention to the dates in this section. Make sure the dates add up and are consistent with the client's information contained in her declaration. Feel free to only use years if client is unsure about particular months. If information is not available do not leave the box empty. Use entries such as "unknown," "N/A" or "none." If you cannot fit all of the client's information in a given chart, use Form I-589 Supplement B.

- 1. List client's last address** before coming to the U.S.. If this is not the country where she fears persecution (which is usually her country of citizenship), then also list her last address in that country.
- 2. List the client's addresses during the last 5 years** starting with her current address. List them chronologically from the most recent.
- 3. List the client's information about her education.** Include information about all the schools she attended starting with the primary school and ending with any higher education schooling. List the schools chronologically starting with the most recent. Be aware of other names for types of schools in other countries. We recommend using the following terms if applicable: Primary or Elementary School, Middle School, Secondary or High School, University or College.
- 4. List the client's information about her employment during the last five years.** List the employers chronologically starting with the most recent. Include employments even if client does not have a valid employment authorization. If client is an independent contractor, you can enter "self-employed" under Name and Address of Employer.
- 5. List the required information about the client's parents and siblings.** Pay special attention to the spelling of the names. Half siblings should be included on this list. Be aware that some clients' parents may have been married several times and/or are in polygamous marriages. Therefore, some clients may not even know the exact number of their siblings or their names and locations. In such a case include a short explanation clarifying the situation. As mentioned above in the Children section, in certain countries cousins grow up together in the same household and are referred to as brothers or sisters. Clarify with your client that only biological or legally adopted siblings are listed.

Part B. Information About Your Application

- 1. Check the appropriate box.** Check multiple if applicable. Always check the Torture Convention box.
 - 1.A. & 1.B.** Check the appropriate box, most likely "Yes" and enter the following sentence in the box below: "Please see the attached declaration for more detail."
- 2. Check the appropriate box.** This question includes any information on criminal activity outside of the U.S. as well as any persecution suffered by the client and/or his family members based on any of the protected grounds. If the explanation is minimal, you can enter it in the box provided or enter "Please see the attached declaration for more detail." Family members usually include parents, the spouse, children and siblings. Other family members can also be included where appropriate.
- 3.A. & 3.B.** Check the appropriate boxes and provide explanation. Again you may choose to provide additional details in the declaration and should indicate that you are doing so. Read the

questions carefully and provide all required information. Note that these questions encompass organization memberships of the client and her family members. Pay particular attention to this information as CIS will rely on this information in determining whether a terrorism-related bar (including material support) could apply to your client. For a discussion of the terrorism-related bars, *see* §2.4(D) *supra*.

4. This question is relevant for your client's CAT claim. Most of Public Counsel's asylum cases are also eligible for relief under CAT.

Part C. Additional Information About Your Application

1. Check the appropriate box and provide explanation. Be aware that prior denial of an asylum application is a bar to asylum.

2.A. Check the appropriate box and provide explanation. Include any countries the client visited since leaving the country of persecution (usually her native country) before reaching the U.S. Include countries where the client's plane stopped for transit where applicable. Do not forget to include information on the client's spouse and children who are now in the U.S., if applicable.

2.B. Check the appropriate box and provide explanation. Be aware that resettlement in a third country is a bar to asylum. Do not forget to include information about the client's family members.

For both 2.A. and 2.B. provide all of the information requested regarding a stay in other countries. Public Counsel screens for all bars to asylum and had most likely flagged a resettlement issue with the *pro bono* attorney. Consult IRP attorneys if new information arises or you are unsure whether the bar applies to the client.

3. This question screens for the "**persecutor bar**" to asylum. If the client's answer is yes, contact IRP attorneys.

4. Check the appropriate box. If the answer is yes, you may want to provide the explanation in the declaration rather than in the small box provided to give the appropriate context. Be aware that **returning to the country of persecution** may diminish the client's claim.

5. Filing of an asylum application **one year** after the client's last arrival to the U.S. is a bar to asylum, unless the applicant is an unaccompanied alien child. The client may still qualify if her case falls within one of the two exceptions to the rule, changed circumstance or extraordinary circumstances. Please consult 2.4(B) and any relevant law on this issue. If the client does not fall within the exceptions, she may still be eligible for other types of relief such as Withholding of Removal under INA §241(b)(3) and/or relief under CAT. The jurisdiction to adjudicate these related claims lies exclusively with the immigration court.

6. Check the appropriate box and provide explanation. Note that this question includes any criminal activity for which the client has not been arrested or charged or convicted of. Be aware that certain criminal activity bars asylum. If IRP attorneys did not discuss with you the consequences of the client's criminal record, please contact them. The client's criminal record will also be a factor in the adjudicator's exercise of discretion. Please see the note on juvenile delinquency dispositions in §2.4(C)(3), *supra*, if your client was arrested or cited while she was under 18 years of age.

Part D. Your Signature

Staple the client's passport size photograph to the space provided. The photo must be taken not more than 30 days before you file your application. Write her name and A number if applicable in pencil on the back of the photo. Follow this pattern: "SMITH, John."

The client prints her complete name and writes it in her native alphabet if different than Roman alphabet.

Check "No" for question about family members assisting with the application.

Check "Yes" for someone else assisting with the application and complete Part E.

Check "No" for list of nonprofit providers unless the client received it. (This list is usually distributed by DHS or EOIR when an applicant is detained and/or placed in removal proceedings before an immigration court.)

The client signs and dates the application preferably with a blue pen. The signature has to fit within the brackets. Show client the order of the date mm/dd/yyyy. The client should review the entire application before signing. If the client does not speak English, translate the application to her in her native language.

Part E. Declaration of Person Preparing Form

The attorney fills out this portion of the form with her/his information.

Part F. and Part G. Leave these sections blank. Part F. will be completed by the asylum officer during the asylum interview. Part G. is completed before the IJ if the client ends up in removal proceedings before an IJ.

Form I-589, Supplements A & B

If you are using Supplements A and/or B do not forget to enter the client's information on top of every page and to include client's signature.

2. Client's Declaration

The declaration is the most critical document in the asylum packet. It presents the client's story to the adjudicator for the first time. It should be a compelling story, humanizing the client. You do not need to use your client's exact words to tell the client's story. However, the tone you use will hopefully reflect the educational level of your client. Avoid using legal terms (such as well-founded fear or persecution). It is critical that you insure that your client's declaration is accurate, and that it does contain or create the possibility of inconsistencies. It must be both internally consistent and consistent with other evidence you are introducing into the record. Under the Real ID Act, even immaterial inconsistencies can be the basis for a finding that an applicant is not credible. Every word provided in a declaration is therefore important. You should avoid including too much detail. The more details in a declaration, the more opportunity the government will have to elicit an inconsistency between the declaration and testimony at the asylum hearing. At the same time, there needs to be sufficient detail to establish credibility. Take into consideration that the client will be nervous during the interview so even if she is highly consistent and remembers a great deal of detail during attorney meetings, she may not have the same recall at the actual asylum interview. If possible, try to avoid exact dates, numbers, and direct quotations. When a client simply cannot recall much detail, either because of poor memory, psychological and/or physical consequences of trauma, or other reasons, it is important to explicitly identify the memory problems in a declaration.

It is likewise critical that the client carefully reviews the declaration before signing it. Be aware that clients often find it extremely difficult to read the declaration and be reminded of trauma which they would rather forget. Clients who were diagnosed with PTSD are especially likely to skip over the declaration. Explain to the client how important it is that every word in the declaration is accurate and inform the client of the consequences of inconsistencies. With clients who cannot read well or are reluctant to recall events, it is advisable to read the declaration to the client word by word. Some clients may prefer taking the declaration home to review, and you can ask them to make any corrections on the draft document. Use particular care when working with clients who are children or not literate. If your client is not fluent in English, you will need a competent translator to review the document with the client in your presence and sign a Certificate of Translation.

Do not forget to review the experts' reports, mainly the psychological report and any medical reports, for consistency with the declaration. It is also important that the client knows the contents of any psychological or medical report submitted.

3. Supporting Evidence

i. Identification Documents

Ask your client for all of her identification documents, such as passports, birth and marriage certificates, driver's licenses, political party membership cards, and other government issued or non-governmental IDs. The client's identity may be questioned, and the lack of proof on identity can give rise to a denial. Please refer to §3.3(B)(5)(iii) below for a more detailed

discussion of authentication issues. Although 8 CFR §287.6 creates a special procedure for the authentication of official government documents, this is not the exclusive procedure for authentication. *Khan. V. INS*, 237 F.3d 1143 (9th Cir. 2001). 8 CFR §287.6 requires an asylum applicant to communicate with an official from the applicant's country to establish the genuineness of a government document. The client may rightly conclude that communication with a government official may create further risks for the applicant and/or the applicant's family members in the home country. Additionally, voluntary communication with one's government may undercut an applicant's claim that the applicant fears persecution by the government. What is important is to decide what, if any, documents you will try to authenticate under 8 CFR §287.6 as that procedure can be time consuming. As a practical matter, asylum officers (unlike ICE attorneys in immigration court and immigration court judges) rarely ask or expect an applicant to comply with 8 C.F.R. §287.6. Regardless of whether you choose to authenticate official government documents, review all of the documents that your client has provided to you and make sure they are genuine and completely accurate. Question your client on the correctness of every document and ask how the client obtained each of them. If you have any doubt about the genuineness of a document, you should not submit it.

If a client used a fake identity document in the past, it may not create a problem if she acknowledges the fraud and offers a plausible explanation. For example, a client may have used a fake passport to flee her country and enter the U.S. because her government would not issue her a passport or would arrest her if her true identity were known. Note that fraud is not a mandatory bar to asylum but goes to the exercise of discretion. (See §2.3(K), above, for a more detailed discussion of the consequences of fraud.)

If a client does not have any identity documents you need to think through how the client can establish identity with the client's own testimony and testimony of other witnesses if available. You can also investigate the possibility of obtaining identity documents from the home country, but this is not always possible. During the affirmative asylum process, the asylum office accepts witness declarations and seldom asks that a witness testify in person. However, you may want to bring a witness to the interview and insist that an asylum officer hear testimony from your witness if the witness's information is particularly crucial in proving your case. (You should understand that attorneys very rarely present live witness testimony at asylum interviews, and instead tend to rely on sworn declarations. Asylum officers generally do not appreciate hearing live testimony from witnesses due to severe constraints on their time.) An asylum officer may not refuse a witness the opportunity to testify. See 8 CFR §208.9.

ii. Documents Supporting the Client's Claim

Even though an applicant's testimony alone can be sufficient to prove an asylum claim, in practice, corroborating evidence is essential. Such evidence may include medical records, police warrants or reports, membership cards for political parties, declarations from witnesses, or newspaper articles mentioning your client. The Real ID Act requires corroborating evidence unless the applicant does not have it and cannot reasonably obtain it. You should explore with your client what evidence has already been obtained, and what should be obtained. If you

identify evidence that is not “reasonably” available, it is critical to establish in the record the reasons why the evidence is not available. For instance, if it is your position that requesting a document (such as a death certificate) would endanger your client, you client should make this point in his or her declaration. If your client received medical care necessitated by the claimed persecution, the client should obtain evidence of the medical care or explain why either the record does not exist or cannot be obtained. It may be appropriate to utilize an expert to establish the risks involved in communicating with organizations in the applicant’s home country. There are many reasons why a specific piece of evidence is not reasonably available. What is critical is to identify and establish these reasons in the record.

Just as with identification documents, review every piece of corroborating evidence for authenticity and accuracy. Discuss with your client how she obtained each document and analyze carefully its source and the chain of custody. If you are submitting declarations from witnesses who are in the United States, speak with them at length about their sworn testimony to ensure complete accuracy. Witnesses who reside in the United States should state their immigration status if lawful. If a witness is a lawful permanent resident or asylum applicant, the witness should provide his A number. It is often very difficult to speak with witnesses living abroad who provide sworn declarations, but may be possible in certain cases.

Please note that for non-citizen witnesses who provide A numbers, ICE attorneys in immigration court frequently condition the witness’s testimony on the written waiver of the witness’s right to confidentiality of his or her A file. This issue is discussed in more detail in Appendix 3K. In contrast, the asylum office adjudicating affirmative cases does not require any waiver, and will accept written or sworn testimony from a non-citizen without conditions.

iii. Expert Reports

For asylum cases, experts are commonly used to establish country conditions and to establish psychological or medical conditions arising from persecution. A medical physician can corroborate that injuries are consistent with the claimed persecution. The psychological expert can provide a diagnosis such as PTSD which will be relevant to credibility and to the severity of past persecution, and may be relevant to establishing an exception to the one year deadline. Finally, some asylum clients are not good witnesses because of the psychological consequences of trauma. A psychological expert can explain factors which may impact the client’s memory or otherwise impact the client’s ability to testify adequately.

Expert testimony may also be essential to establishing specific facts material to asylum eligibility: the correct conversion of dates from an Ethiopian (Julian) calendar to our Western (Gregorian) calendar; establishing an applicant’s tribal, national identity or citizenship; authenticating a government document; cultural norms that could impact credibility; and existing legal protections available to domestic violence victims in a specific country.

You need to decide before utilizing an expert why you need the expert, and in what specific areas you want the expert to render an opinion. You need to analyze what information you want to provide to your expert that the expert will rely on in formulating an opinion.

You need to scrutinize your expert's written declaration: you can sabotage your case if inconsistencies arise between your expert's description of your client's history and evidence in the record. Finally, your client should understand the purpose and conclusions of the expert testimony, particularly if the expert testimony is from a medical/mental health provider.

iv. Country Condition Reports

Reports on conditions and human rights violations in your client's home country are essential to support your client's claim. The most common reports used are country specific human rights reports published annually by the U.S. Department of State. Nongovernmental organizations such as Human Rights Watch and Amnesty International also publish country reports and monitor human rights conditions. Sometimes, the most current information is found in newspapers or online publications. You should try to document present country conditions as well as conditions throughout the time that your client suffered or feared persecution. For a list of organizations and resources to research country conditions see Additional Resources at page 12, *supra*.

4. Brief

The asylum office does not require asylum applicants to submit briefs. However, we generally recommend filing a brief, as it is an opportunity to argue why your client merits a grant of asylum. The brief is particularly important if there are difficult legal issues in your case, such as the existence of an extraordinary circumstance warranting an exception to the one year filing deadline. Writing a brief will also help you to be more familiar with the relevant law and focus on the issues important to your client's claim. We recommend that the brief comply with §4.19 of the Immigration Court Practice Manual. That way, if an affirmative case is ultimately referred to court, the brief will need only minor revisions. (A brief for an affirmative case will not address withholding of removal or CAT relief, as the asylum office cannot adjudicate those forms of relief.)

5. Other Evidentiary Issues

i. Original Documents

Do not submit any original documents such as birth certificates, passports and marriage certificates to DHS by mail. You can submit copies and bring the original documents to the asylum interview. The asylum officer may wish to inspect them. Occasionally, the asylum officers request possession of the original documents. This is to examine the documents to detect fraud. Request a receipt with the asylum officer's signature for every document taken and be

sure that you maintain a complete copy of each document. It is recommended that the client keeps at least one form of original photo ID.

ii. Documents in Foreign Languages

All documents you wish to submit as part of your client's application that are written in a foreign language must be accompanied by a translation of the document in English. The translation should be properly certified. Certification can be accomplished by attaching a signed "Certificate of Translation" which affirms that the translator was fluent in both English and the original language and translated the documents to the best of their ability. The translator signs the certification under penalty of perjury. *See* Appendix 1K for a sample. Note that the translator does not have to be court certified and the certification does not have to be notarized.

iii. Authentication of Documents

Technically, the applicant has the burden of authenticating documents in an affirmative application. In practice, authentication is more scrutinized in immigration court and less likely to be an issue with an affirmative application. Asylum officers very rarely ask an applicant to authenticate an official record under 8 CFR §287.6 or in any other way. The regulation applies to official government documents and requires an applicant to contact the foreign government that issued the document. In asylum cases, that government is usually the persecutor. Thus there may be an additional risk for the applicant in seeking to authenticate a document under §287.6. The foreign government may or may not infer from the authentication request that your client is seeking asylum in the U.S. Many clients feel that this disclosure puts their family members in their home countries at risk. Similarly, the client, if ultimately deported, may be at additional risk as a result of the communication to a government office. For these reasons, the client needs to be part of the decision concerning authentication, and may feel that whatever risk authentication entails is outweighed by the benefits of having authenticated documents. If the client does not consent to authentication, and the asylum office objects to the introduction of the documents at issue on the ground of lack of proper authentication (this objection is highly unlikely at the affirmative asylum stage), you want to argue that the documents cannot be authenticated because such a process would disclose the client's identity to the government from which the client has fled, increasing the risk of future persecution or persecution of family members. You should also argue that there are other methods of authenticating. *See* 8 CFR §287.6; *Khan v. INS*, 237 F.3d 1143 (9th Cir. 2001).

The authentication process described in 8 CFR §287.6 depends whether the foreign government that issued the document in question is a signatory to the 1961 Hague Convention abolishing the Requirement of Legalization for Foreign Public Documents. The Convention provides for the simplified certification of public (including notarized) documents to be used in countries that have joined the convention. Documents destined for use in participating countries and their territories should be certified by one of the officials in the jurisdiction in which the document has been executed. Said official must have been designated as competent to issue certifications by "Apostille" (usually in the office of the State Secretary of State of his/her

counterpart) as provided for by the 1961 Hague Convention. For list of signatory countries see http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=41#mem. Contact the foreign government's embassy (most likely located in Washington D.C. but may have a local consulate office in Los Angeles) to inquire about their procedure on obtaining the certification and to identify the appropriate official. You will be required to send the original document to the embassy, most likely with a self-stamped envelope and a check covering a processing fee. In general, Public Counsel asks that you communicate with its staff before sending off an original for authentication. Such authentication is unlikely to be necessary in an affirmative case, but may be necessary in a defensive case in immigration court. If you do intend to send an original document to members of a foreign government for authentication, you should consider showing the original to the government **before** mailing it abroad for certification. (There is no guarantee you will see the original document again!)

If you do pursue authentication by a foreign government and the government is not a signatory to the 1961 Hague Convention, the authentication process will include an additional step of obtaining a second authentication from the U.S. Department of State. Again, begin by contacting the foreign government's embassy in the United States. Ask for the appropriate official in the embassy who is from the "diplomatic list" (i.e., "blue book"), to provide the proper authentication including signature and affixation of the embassy seal. The embassy will ask you to send the document to be authenticated together with a self-addressed return envelope and a check with the appropriate fee. After receiving the authenticated document from the foreign embassy, copy it for your files and send the original to the U.S. Department of State for further authentication with a cover letter and \$8.00 fee. The cover letter should include both your name and your client's name and your telephone number, address, email address, and name of the country where the document will be used. Include a self-addressed stamped envelope for faster return of the documents. The address is: U.S. Department of State Authentications Office 518 23rd Street, NW SA-1 Columbia Plaza Washington, DC 20520. See the State Department website for additional information. <http://www.state.gov/m/a/auth/>. You should also call the Authentications Office telephone number 202-647-5002 for a recording of the most up-to-date requirements and fees. This office does not accept telephone calls but is reachable via e-mail at aoprsgsmauth@state.gov. Estimate approximately 2-5 months to complete both authentications. We recommend that you do not disclose to agents of the foreign government that your client is seeking asylum in the United States.

C. Government's Biometrics Procedure and Criminal Background Checks

Every asylum applicant and dependents between the ages of 14 and 79 are subject to the U.S. government's biometrics procedures. For affirmative asylum applications, upon submission of the I-589, the USCIS will mail the applicant an appointment notice (DHS Form I-797C, Notice of Action) with a time and date for the applicant to appear at a particular Application Support Center (ASC) for biometrics processing, which consists of fingerprinting and photographing the applicant. A copy of the appointment notice is also mailed to the attorney of record. Please confirm the receipt of the notice with your client to ensure compliance. The client will need a

government issued, non-expired photo ID and the original appointment notice to complete the biometrics. If your client does not have an ID, contact IRP attorneys immediately for guidance. After the client takes her fingerprints, the DHS will complete a thorough background check that includes an FBI criminal check. The results are not available to the client or her attorney. Therefore, attorneys should conduct a separate background check to obtain a client's criminal history.

If your client has a criminal history in the U.S. or has been detained by the immigration authorities, we recommend that your client obtain his or her FBI and California Department of Justice (CA DOJ) records. The FBI record should display any arrests by immigration authorities as well as arrests by law enforcement in the U.S., if the client was fingerprinted upon arrest. The CA DOJ record reflects arrests by law enforcement in California, but does not reflect arrests by immigration authorities. The Central American Resource Center (CARECEN) is a nonprofit organization that will assist your client with an FBI record request. Instruct your client to bring to CARECEN a photo ID and a money order for \$18.00 to cover the cost of the FBI criminal record request to CARECEN. Your client may request that the results be sent directly to her address or to your office address. CARECEN requests a donation of \$25 for providing this service. CARECEN is located at 2845 West 7th Street, Los Angeles, CA 90005, and is open from 9am – 4pm Monday and Wednesday and Friday 9 am – 12 pm. The telephone number is (213) 385-7800.

To obtain a copy of your client's CA DOJ record, your client must go to a "Live Scan" service site to request his or her DOJ record. Instruct your client to bring a photo ID, a money order for \$32.00 to cover the cost of California DOJ criminal record request, and the cover sheet included in Appendix 2H to a live scan service site. These sites charge a service fee of approximately \$20. A list of live scan sites including opening hours, fees and acceptable forms of payment is available at <http://ag.ca.gov/fingerprints/publications/contact.php>.

If your client has never been arrested by immigration agents or the police in the United States, you may choose to forgo the criminal background checks, especially if the client does not have resources to pay for the additional fees. Again, this decision must be made with input from your client.

D. Filing the Affirmative Application

For detailed instructions and the most up-to-date information, review the CIS Form I-589 instructions on the CIS website (www.uscis.gov). CIS procedures change frequently, as does the form that can be downloaded from the website. An affirmative application for asylum will include all the documents listed in §3.3(A), *supra*. Where appropriate, the documents will include an original signature. Again, do not file any original documents other than the client's signed application and declaration. To complete the submission, add two photocopies of the entire "original" asylum application packet. If the client is including dependents (spouse and/or children), the packet will also include an additional copy of the client's I-589 and declaration with the dependents' photograph attached.

The current procedure to file an affirmative asylum application is to send it by certified mail to the USCIS California Service Center, PO Box 10589, Laguna Niguel, CA 92607-0589. (Again, CIS frequently changes filing instructions, so always review the most recent instructions for filing which can be found at www.uscis.gov.) The Los Angeles asylum office has jurisdiction over all asylum applications filed by applicants residing in southern California. If your client resides elsewhere review the Filing Instructions for the appropriate CIS office. Be aware that the California Service Center does not provide a street address so certain courier services such as FedEx will not be able to deliver the application. For overnight mail use the U.S. Postal Service.

Once your application is properly filed with the CIS office in Laguna Niguel, CIS will send you and your client a receipt indicating the filing date, and subsequently will send both a Notice for your client to appear for biometrics processing and a Notice with the time and date of the asylum interview. The Laguna Niguel CIS office forwards the application to the Los Angeles asylum office in Anaheim, California. If you wish to supplement your filing with additional evidence, you should mail the filing in duplicate to the attention of Mary Winkler at the asylum office. You should include a cover letter asking that this supplemental material be forwarded to your client's file prior to his or her interview. The asylum office has a street address in Anaheim so you can use a private courier service to deliver supplemental filings. You should nevertheless bring extra copies to the interview. If you wish to reschedule your client's interview, you can do so by sending a request via fax to the attention of Mary Winkler at Fax No. (714) 808-8155. You can find a list of telephone numbers for Mary Winkler and other contacts at the asylum office at Appendix 9A.

In certain cases, asylum applicants have good reason to prefer either a female or a male asylum officer. For instance, a victim of child sexual abuse by an older male may only be willing to disclose details of the abuse to a female officer. The asylum office typically grants request for a male or female officer. Contact Public Counsel for information on how to make such a request prior to your client's interview.

While waiting for the asylum interview, remind your client not to compromise her status as an applicant by traveling outside the United States or failing to communicate with you about changes in address or phone number. If your client's address changes after the filing of the asylum application but before the interview, the client must complete and file a change of address Form AR-11, available from the CIS website, and must also notify the asylum office directly. If your client moves outside of Southern California, the asylum office may lose jurisdiction over the asylum application, and transfer the case to the appropriate new jurisdiction.

E. Asylum Interview

The asylum interview will take place at the Los Angeles asylum office, located at 1585 S. Manchester Avenue, Anaheim, CA 92802. The office is just off the I-5 freeway next to Disneyland. There is a free parking lot adjacent to the office building. Check with your client

whether she is able to drive herself to Anaheim. Most clients are not able to drive and will rely on family or friends for transportation. If the client is not fluent in English, she must bring her own interpreter. Ensure that the designated driver and interpreter know the directions, and date and time of the interview. It is important that your client have your cell phone number on the date of the interview to notify you of any unexpected delays.

All visitors wishing to enter the asylum office must pass through a security check, which is similar to the checks at most courts. Everyone will have to present a photo ID to enter. (If your client lacks a photo ID, none will be required provided that the client is with you.) You will also need the original appointment notice and your State Bar card. No food apart from water is allowed in the building. The building is usually heavily air-conditioned so bring something warm to wear. Under recently revised policies, the asylum office now allows attorneys to bring into the building cell phones and laptop computers, as long as camera devices are never used and the cell phone is turned off during the asylum interview. It is a good idea to ask an asylum officer's permission to take notes on a laptop, and insure that any sound devices on the laptop are turned off. Applicants can also bring in cell phones but must have the phone turned off while interacting with any staff at the office.

After entering the building and clearing security, you and your client must check in at the front desk. The client will be asked to file a short questionnaire and then will be called to a window in the waiting room to take a photo and provide digital fingerprints. Interpreters must also check in and complete a brief form.

Interviews are scheduled as early as 6:30 a.m.. Once checked in, expect to wait up to two hours. Once the asylum officer handling your client's case is ready, he or she will come to the waiting room and call your client by the last three digits of the client's Alien number. The asylum officer will then conduct the interview in his or her office.

A typical asylum interview lasts approximately two to three hours. It is generally shorter if the applicant testifies without an interpreter. Before starting an interview, the asylum officer will put on the phone a "translation monitor" whose role is to ensure correct translation, if an interpreter is present. You should explain to your client before the interview starts that the monitor is required to keep all information strictly confidential. The asylum officer will start by placing your client and interpreter under oath and informing your client of the confidentiality of the asylum process. Then she will check the client's identity and her place of residence to confirm the Los Asylum Office's jurisdiction over the case. The interpreter and the attorney will also have to show their identification to the asylum officer. The asylum officer then carefully reviews the I-589 form with your client to ensure that all the information is correct and accurate. If an error is identified, the applicant (with assistance from counsel) can correct the I-589 and will be asked to initial all corrections before the end of the interview. If an attorney believes that an application requires *significant* changes or updates, the best practice is to prepare a written amendment (with a supplemental declaration, if necessary) prior to the day of the interview. You can deliver the amendment to the asylum officer at the start of the asylum interview. If you

do supplement the record, it is important to have an adequate explanation for any significant corrections which are made after the initial filing.

After reviewing the I-589, the asylum officer will ask the client questions regarding her experiences and the reasons she fears returning to her home country. Sometimes the questions are open-ended, i.e., “why are you afraid to return to Ethiopia?” Other times, the questions are specific, i.e., “what happened to you on March 11, 2008?” Instruct your client to listen very carefully to the question and answer exactly what is being asked. Tell your client to answer only the questions asked and not to elaborate. Your client should be advised to tell the asylum officer when he or she does not understand a question and never to guess. Some asylum officers will make your client feel comfortable, others can be hostile. It is crucial that you take detailed notes during the interview as there will be no independent transcript created. Special arrangements have to be made if more than one attorney will attend the interview. Contact IRP for instructions.

In preparation for the interview, make sure your client is familiar with the I-589, the declaration and all supporting documents submitted. It is essential to conduct a mock interview with your client. We recommend that a colleague whom your client does not know play the role of the asylum officer (though this may not be advisable for an extremely traumatized client). A mock interview will give your client a better idea what to expect and make her feel more comfortable on the day of the actual interview.

The attorney’s role at the asylum interview is to ensure its fairness. In rare cases, it is appropriate to ask to speak to a duty officer or refuse to continue with an interview because of egregious conduct on the part of an asylum officer. This is rare but does happen. How do you recognize egregious conduct? You will know it when you see it. Officers are carefully trained to be sensitive and to keep in mind cultural differences when interviewing asylum applicants. An officer who repeatedly misstates the applicant’s testimony is clearly prejudicing the testimony, and you should object to erroneous statements by the officer. Sometimes, what is egregious is more subtle, and yet a style of interviewing creates such a hostile environment that a fair interview is impossible. However, egregious conduct is not the norm. The other role the attorney plays, in addition to ensuring fairness, is to elicit all relevant testimony. Most asylum officers will not allow attorneys to ask questions until the asylum officer is finished with all of his or her questions. You should follow this rule, unless to do so prejudices your client. If questions are vague or aimed at confusing the client, or testimony misrepresented, you should object and seek to clarify the record. At the end of the interview, you should seek permission to question the client if you believe that relevant testimony has not yet been elicited. Finally, you can ask and should be granted the opportunity to address the legal issues in the case. This is not the setting to make a lengthy closing argument. That said, it is often useful to summarize in a persuasive and concise way why your client has established asylum eligibility. If there is a distinct legal issue, you may want to address only that issue, recognizing that you will not be helping your client if you are unduly argumentative with the asylum officer or take up too much of the officer’s time.

You can read more about the asylum interview process in the USCIS Affirmative Asylum Procedures Manual pages 19-34. This CIS Manual was created for the asylum officers and includes step-by-step instructions on how to conduct an Asylum Interview from the asylum officer's perspective. See above section, "Government Guidance on Asylum Law and Procedures," under "Additional Resources," for the link to this document.

1. Decision

If your client is not in lawful immigration status on the date of the asylum interview, the asylum office usually asks the client to return to pick up the asylum decision two weeks from the interview date. A client who is not fluent in English should pick up the decision with an interpreter, but there is no need for the attorney to accompany the client. Occasionally, the asylum officer notifies an applicant at the conclusion of an interview that the decision will be mailed out. This is often because the case is in a category that is referred to headquarters for further review and a decision will take several months to be finalized. You can request that the decision be mailed to your client if there are compelling reasons to do so.

If your client is in lawful immigration status on the interview date, the asylum officer will mail a decision to the applicant. The decision will either be a grant or a Notice of Intent to Deny (NOID). This Notice will provide you with a deadline for responding in writing to the government's intention to deny the case.

For information on benefits for asylees and other post asylum grant referrals please see §4.8 below.

2. Special Procedural Considerations for Asylum Claims Involving Children

If your client is under the age of 18, you should be aware of some procedural issues specific to children's affirmative asylum cases.

DHS has taken the position that it must determine whether a child's parents know of and consent to their child's applying for asylum – that is, unless the parents are the child's persecutors – before issuing a decision on a child's I-589. Asylum Officer Basic Training Course: Guidelines for Children's Asylum Claims at 20-21. As a result, you should consider whether you want to include evidence of this knowledge and consent in the client's materials. You should also prepare to address this issue at the asylum interview.

If your client is in removal proceedings but her I-589 is before the asylum office because she filed it while she was an unaccompanied alien child (UAC), you should also be prepared for the asylum officer to question the child to determine whether she was, in fact, a UAC on the date she filed the I-589. This will likely include questions about the child's parents, their locations and their immigration status (if in the United States) as well as questions about any legal guardians the child might have. See Section 4.6(F) below for more information on handling I-589s for unaccompanied children in removal proceedings.

Although asylum interviews are typically “closed,” DHS has instructed its officers that they should allow “trusted adults” (in addition to the child’s attorney and interpreter) into the asylum interview with the child if that would be helpful. AOBTC at 19-21. If your client is a very young child or is particularly traumatized, you may consider having a child’s relative or therapist provide testimony to the asylum officer in lieu of the child’s doing so. Contact Public Counsel if you would like to discuss this option.

Most asylum seekers pick up the asylum office’s decision on their I-589 two weeks after the interview. Each asylum case involving a minor principal applicant (that is, a child under 18 who is asserting the claim to asylum on his or her own behalf) must be sent to DHS Asylum Headquarters in Washington, DC for additional review. As a result, the asylum office will typically mail you a decision on the I-589 within months, not weeks, of the asylum interview.

CHAPTER 4

DEFENSIVE ASYLUM APPLICATIONS

This chapter describes the process for representing clients before immigration court in defensive asylum applications. A defensive asylum application is one in which the applicant has already been placed in removal proceedings and seeks asylum and any other available relief before the IJ. Individuals are generally placed in removal proceedings in one of two ways:

- they are referred to an IJ by the CIS Asylum Office after they have been determined to be ineligible for asylum at the end of the affirmative asylum process;

OR

- they were apprehended in the United States without proper legal documents or in violation of their immigration status;

OR

- they were apprehended at a U.S. port of entry by Customs and Border Patrol (CBP) trying to enter the United States without proper documentation, were placed in the expedited removal process, and were found to have a credible fear of persecution by an asylum officer. If your client was placed in removal proceedings following apprehension and a credible fear interview, it is critical that you obtain a copy of and review the Sworn Statement recorded by immigration authorities at the credible fear interview.

For those clients who are referred by the asylum office to the immigration court, the asylum office provides a Notice of Referral which briefly identifies the grounds on which the asylum office has found the applicant ineligible for asylum. Generally, judges pay little attention to the

Notice of Referral and the asylum claim is reviewed in court *de novo*. In contrast, the ICE trial attorney is much more likely to raise the grounds set forth in the Notice of Referral and may even seek to bring in an asylum officer to testify in court where credibility is at issue.

§4.1 Essential Steps in Preparing an Asylum Case in Immigration Court

IRP recommends that volunteer attorneys immediately review the steps outlined below upon accepting a defensive asylum case and make a timeline for completing these steps. This will ensure that any potential problems are identified early in a case and timely addressed.

- A. Contact Your Client.** IRP will provide you with your client's contact information. Please contact your client as soon as possible to introduce yourself and arrange for a first meeting. Clients are anxious to meet with you and eager to proceed with their cases. If your client is in detention, Appendix 6C contains site-specific information on how to visit your detained client. The ICE website also contains information on visiting clients at the local detention facilities (<http://www.ice.gov/detention-facilities/>).
- B. Retainer.** Volunteer attorneys should have a signed retainer with the client. Unless otherwise agreed, IRP does not have a separate retainer with the client. The attorney should define the scope of the services that will be provided, which is generally representation of the client in removal proceedings before the Los Angeles immigration court. (You cannot represent a client in removal proceedings only in regard to an asylum claim. Once you appear in immigration court, you are obligated to pursue all available relief for the client. Generally, the *pro bono* clients referred by Public Counsel only have eligibility for asylum, withholding of removal and CAT relief. Please contact Public Counsel if you have questions about other forms of relief.) You should explicitly limit your representation so that there is no misunderstanding in the future. For example, you should state that the agreed services do not include representation on appeal before the BIA in the event the asylum and related claims are denied. While volunteer attorneys are not obligated to represent the client beyond the initial scope of the case, many attorneys later choose to continue the representation on appeal and enter into a new retainer agreement at that juncture.

Please keep in mind that once you submit a Notice of Appearance form, you are the attorney of record, not your law firm. Even if you leave your firm, you remain the attorney of record until a substitution motion is granted by the court.

- C. Review the File.** EXAMINE EVERY PIECE OF PAPER. IRP will provide you with a copy of all documents provided by the client at her initial intake interview with IRP. Ask your client to see all of those documents again as well as other relevant documents that corroborate the client's claim, including identity documents and any documentation relating to any application made to immigration authorities, including visa applications made to the U.S. Department of State. Solicit information on the source of the documents and their legitimacy, understanding that the courts have seen a great deal of

document fraud, and that ICE attorneys frequently conduct an extensive investigation of all documents submitted by an asylum seeker. Never introduce a document if you doubt its genuineness. All documents are filed only as copies. Never file original documents, but do bring originals to court hearings in the event that the ICE attorney or IJ wants to inspect them. Please note that all government issued documents may require authentication. Section 3.3(B)(5)(iii), above, describes authentication procedures for official records.

- D. Calendar Your Client's One Year Deadline.** If your client has never before filed for asylum, make sure you calendar the deadline for the filing of the asylum application. It must be filed within a year of the client's entry into the United States, and the filing must be at a noticed court hearing with the client present in court.
- E. Review the Notice to Appear (NTA).** The NTA will indicate when you and your client must appear at immigration court to respond and plead to the allegations and charges contained in the NTA, which is the charging document prepared by DHS. Carefully review the allegations and charges on the NTA with your client to ensure accuracy. This manual does not discuss challenges to allegations and charges of removability contained in the NTA. If you identify errors in the NTA or believe that your client has grounds to contest removability, you should contact IRP.¹⁰ If you fail to make objections, you will likely be waiving any future challenges. See §4.6(C), *infra*, for detailed instructions on how to plead at the master calendar hearing.
- F. Review Any Pre-Existing Asylum Applications.** If your client applied affirmatively to the asylum office and was then referred to immigration court, or if your client filed an asylum application in court before retaining you, be sure to review the previously filed application and all submitted evidence carefully with your client. The asylum officer sends that application and supporting evidence to the court. It is important to identify inconsistencies or errors in previously filed documents at the beginning of your representation. Often, language barriers or lack of adequate legal representation have resulted in incorrect information on previously submitted documents. *Minor corrections can be made to the application and explained at the time of the merits hearing.* More significant errors should be corrected by filing a supplement to the asylum application and/or the client's declaration. Keep in mind that under the Real ID Act any inconsistencies between any written and/or oral statements may result in an adverse credibility finding which would cause a denial of the application for asylum. (See §2.3(J), above, for a more in-depth discussion of Real ID.) There is no requirement that the inconsistency be material to the claim. In rare cases, it may be advisable to withdraw

¹⁰ It is the government's burden to establish an alien's removability. In some cases, attorneys choose to deny all allegations and charges, forcing the government to bring forth evidence to meet its burden of proof. An alien can move to suppress evidence when there are grounds for such a motion. When IRP refers an asylum case to a volunteer attorney, an IRP staff attorney has determined that it is in the applicant's interest to concede removability and pursue asylum and related relief. Contact an IRP attorney if you believe you should be contesting allegations and/or charges contained in the NTA.

a previously filed asylum application and file a completely new one with the immigration court. In all cases, it is critical that inconsistencies are identified and adequately explained.

- G. Secure Interpreter.** If your client does not speak English or is more comfortable in another language, you will need to find an interpreter to translate for you during your case preparation. Your client may speak several languages with various degree of fluency. Some clients incorrectly believe that judges prefer testimony in English. Your client should always testify in his or her best language. The interpreter used for case preparation does not need to be court certified. Anyone who is fluent in English and the foreign language will suffice. Ask your client whether she knows of anyone who is willing to translate. If possible, avoid using family members to interpret as your client may not feel comfortable discussing her story in their presence. The immigration court provides certified interpreters for all of its hearings. Nevertheless, instruct your client to inform you immediately if there are any problems in court with the interpretation.
- H. Consider Referring Client For Psychological Counseling and Securing Mental Health Expert.** If your client has suffered severe torture, she will most likely benefit from mental health treatment. Frequently, an expert witness diagnosing an applicant's mental health status can provide important corroboration of the applicant's claim. Sometimes, clients who have not suffered persecution but rather fear future persecution also can benefit from counseling and/or expert evaluation. After assessing whether referral to mental health providers is appropriate, you should help your client access appropriate services. If your client is a survivor of state-sponsored torture, please refer her to Program for Torture Victims (PTV), a nonprofit agency that provides free psychological counseling, evaluation and medical exams. PTV therapists will also prepare expert witness declarations, testify in immigration court, and facilitate medical evaluation and treatment if appropriate. PTV's contact is the agency's case manager at (213) 747-4944, ext. 252. PTV is not funded to provide services to clients who are victims of torture by non-governmental actors. For example, a domestic violence survivor fearing further persecution from a family member cannot obtain services from PTV. If your case falls into this category, you should try to find mental health services from the Referral List at Appendix 9F and can also contact Public Counsel. It is not always possible to find an expert psychologist willing to provide *pro bono* assistance, but some treatment providers will significantly reduce their fees if made aware that your work is *pro bono*. Whenever referring a client to a mental health provider, it is important that you explain the purpose of the referral. In many cultures, there is a lack of understanding as to the therapeutic value of psychological evaluation and therapy, as well as a lack of knowledge as to how a mental health provider may help a case through expert testimony.
- I. Seek Expert Witnesses on Country Conditions.** It may be useful to corroborate your client's story with an expert's declaration and/or testimony before immigration court. You should analyze your case after reviewing country condition information to determine

if an expert witness would be helpful. Many experts are university professors and you can try contacting local universities as well as Public Counsel for leads. The website www.asylumlaw.org has an expert database. Generally, we do not utilize an expert on country conditions when widely available information corroborates conditions described by a client. That said, there are many cases in which such expert testimony is clearly essential. *See* §4.4(B), *infra*, and Appendix 3J for more tips on how to work with an expert.

J. Submit Freedom of Information Act (FOIA) Requests. If your client was referred to immigration court from the asylum office, was subject to a credible or reasonable fear determination upon entry to the United States, or applied for any other immigration benefit in the past, you should request a copy of your client's file from the Department of Homeland Security through a FOIA Request.¹¹ Cases actively pending before immigration court are placed on an expedited "NTA track." A sample FOIA request for an immigration court case is included in Appendix 2B. FOIA requests to other agencies may be warranted depending on your client's immigration history, such as a request to the U.S. Department of State if the client ever applied for a U.S. visa abroad, to Customs and Border Patrol (CBP) if the client was detained upon entry to the U.S., to Immigration and Customs Enforcement (ICE) if your client was ever in immigration detention of any kind, or to the Executive Office for Immigration Review (EOIR) if your client had ever been in removal proceedings in the past or had an appeal before the BIA. *See* Appendix 2 for sample FOIA requests.

K. Submit Requests for Criminal Background Checks. Criminal convictions have serious adverse consequences for immigrants. Therefore it is crucial to know your client's criminal history in detail. Please note that expungements do not alter criminal history for immigration purposes. The best practice is to do criminal background checks for all asylum clients who have resided in the United States for more than six months, even when a client denies any prior arrest history. That said, if you choose not to do these background checks, you should discuss the decision with your client and explain that the government always does its own background checks and will most likely learn of any prior involvement the client has had with law enforcement or immigration agents. The FBI background check should reveal any arrests of the client by immigration authorities for immigration violations (such as apprehensions at or near the border) as well as arrests by local law enforcement. To access your client's criminal history, you should submit requests for a background check to both the FBI and the California Department of Justice (DOJ). *See* §4.5 below for more information on how to conduct these checks for both detained and non-detained clients. For each criminal case that is identified by the FBI and/or the DOJ, you should obtain a copy of the police report and a certified disposition

¹¹ The Ninth Circuit recently held that due process is violated where an alien is not provided with a copy of the alien's A file, but instead required to obtain such records through a FOIA request. *Dent v. Holder*, No. 09-71987, (9th Cir. 2010). At present, ICE Office of Chief Counsel has not issued any guidance on this issue, and a petition for rehearing is pending. IRP recommends asking ICE opposing counsel to provide a copy of your client's A file if the government does not provide this copy within 90 days of the filing of a FOIA request.

from the pertinent criminal court. Even if your client's criminal history does not bar her from seeking asylum, it will be a factor in the exercise of discretion. Criminal background checks are usually not conducted in the client's home country though every asylum applicant must disclose any and all criminal history in any country of residence. Regardless as to whether you obtain background checks from the FBI and the DOJ, your client will be required to appear at a government office for biometrics processing. Biometrics is a general term used by DHS that refers to fingerprinting and the gathering of other identifying information. Biometrics information and records identified from it are sent electronically to the ICE trial attorney, and you will not be provided a copy of this information. The procedure for obtaining a biometrics appointment is described below at §4.5, *infra*. For detained cases, the government will arrange for biometrics processing, and you do not need to be involved in the process. Whenever your client has a criminal history, you should discuss the affect of such history on the client's claims for immigration relief with IRP staff.

L. Review the Immigration Court Practice Manual, available at www.usdoj.gov/eoir. The manual describes the procedures and requirements for immigration court practice. It is binding on all parties who appear before immigration court, unless the IJ directs otherwise in a particular case. You should strictly comply with all filing requirements set forth in the manual.

M. Begin Interviewing Your Client. Many volunteer attorneys underestimate how much time with the client is necessary to adequately prepare. Interviewing the client in the process of preparing or supplementing the I-589 and the declaration is the most difficult and important part of handling an asylum case. In interviewing asylum clients, you may encounter problems you are not accustomed to in dealing with other sorts of cases. For example, clients in asylum cases rarely speak English and are sometimes uneducated or unsophisticated. Additionally, many clients suffer from PTSD or other psychological problems as a result of what they have suffered in their home countries and the abrupt separation from their families and culture. They may have great difficulty remembering details or disclosing traumatic events from their past.

Cultural differences also create challenges in the process of case preparation. For examples, in certain cultures, calendars or clocks have little value. Clients frequently may not be able to remember what month an event happened – or even what year – simply because they have never made a habit of observing, much less recalling dates. In some cultures, it may be a taboo to speak of the dead, causing clients to withhold important information from you. What is important is to be aware of these cultural differences so that you can question your client in an appropriate manner.

From the lawyer's point of view, cultural and psychological issues impacting case preparation may manifest themselves in a variety of ways. For example:

- The client may have difficulty describing traumatic events and may find the experience so upsetting that she simply does not show up at the next appointment or resists efforts to go over the story again;
- Economic distress may prevent the client from arriving at attorney meetings. The client may not have bus money or may not be able to take time off work, but may be embarrassed to disclose this information;
- The client may display inappropriate behavior or affect while talking about things that happened to her. The most obvious example is the tendency of many people to relate horrifying events in a flat, seemingly emotionless voice.

Because of the anxiety carried by many asylum applicants, it is very helpful to begin an interview by explaining to your client how long the interview will last and describing generally the type of information you hope to obtain from your client (for example, a rough chronology of events; more background information on the client's education and employment history; or more detail on the actual persecution.) You may want to explicitly ask your client if she is ready to discuss the details of the persecution she has suffered or fears. If you are having trouble obtaining important information from your client and the client is seeing a therapist, you may want to discuss with the therapist how to work with your client most effectively. For more client interview practice pointers and strategies, see Appendix 10G.

N. Review the Court File. Often, clients have not kept copies of previously filed asylum applications or supporting documents which they may have filed with either the asylum office or immigration court before retaining you. Sometimes a client does not even have a copy of the NTA which contains the allegations and charges of removability. You can hopefully obtain copies of every document which your client has filed with DHS or the immigration court through a FOIA request. However, it can take months to receive a response from a FOIA request. It therefore may be critical to review the court's file as soon as possible so that you know what information the court has. You can review the court's file and listen to a recording of any prior court proceedings at the 15th floor of the immigration court building once you file your Notice of Entry of Appearance (EOIR-28). A sample request to review the court file is at Appendix 3F.

§4.2 The Immigration Court Process: What Happens When

It is difficult to predict how long it takes to obtain a final decision from the immigration court. A rough estimate is between one and five years for a non-detained client. Cases for detained clients move much more quickly and take anywhere from three to twelve months. Recently, cases are moving much more quickly so it is hard to predict how the timeframes for adjudicating cases may change in the future.

If your client has never filed for asylum, calendar the client's ONE YEAR DEADLINE. If the deadline is soon, you can file a "skeletal" I-589 to meet the deadline. You can supplement the application later. You may need to file a motion to advance if the next court hearing is scheduled for a date which falls more than one year from your client's date of entry. You can only file the I-589 at a noticed court hearing with the applicant present. You should contact IRP attorneys if you have questions about filing a motion to advance. (See §2 4(B) for more information on the one year filing deadline)

A. Initial Master Calendar Hearing

At this hearing, the client, through counsel, pleads to the immigration charges, requests available relief, and discusses with the IJ whether additional evidence will be provided. If an asylum application needs to be filed or a previously filed application supplemented, the IJ typically schedules a filing hearing. Most IJs will grant attorneys who have non-detained clients three to five months to prepare the filing. If the client is in detention, a filing hearing will likely be set about a two to four weeks after the master calendar hearing. This timeframe will obviously vary from case to case and among IJs.

If your detained client is eligible for bond, you should also request a bond hearing at the initial master calendar hearing. Appendix 6B has information regarding bond hearings.

Note that at the master calendar, if you seek asylum, the IJ should ask if you waive time. (Rules require that judges adjudicate asylum cases within 180 days of the filing of an asylum application, but this deadline can be waived.) If you do waive time, the IJ may not schedule another hearing for many months or even over a year. If you do not waive time, the IJ will give you the IJ's first available hearing date, which is still likely to be months in the future but before the accrual of the 180 days.

An asylum seeker is only eligible for employment authorization if no decision on a case is made 180 days from the date the applicant first filed for asylum. Whenever the applicant "delays" a case by requesting preparation time (or simply waiving time), the clock which counts the 180 days stops until the next court hearing. These rules are profoundly unfair, as any request you make for additional time will have the affect of stopping the asylum clock until the next scheduled hearing. For example, if at your first hearing in court your client's asylum claim (previously filed with the asylum office) has been pending for 140 days, and you waive time, the clock will stop at 140 days until the next hearing which could be an entire year in the future. (You can find out how many days your client has accrued on the "asylum clock" by calling 1-800-898-7180. You need to enter your client's A number and then select "case processing information.") Your client will be very concerned about the impact of delays on his or her ability to work, but should also understand that you may need additional time to prepare the case thoroughly. For clarification about the "employment clock" and how your requests for time to prepare your case may affect it, please refer to Appendices 7A and 7C.

B. Filing Hearing (also called a Master Calendar Hearing)

If the IJ has set a hearing for the purpose of filing the asylum application and/or supplemental documents, the attorney must appear in court with the client for the filing. At the

time the attorney files documents with the court, the attorney serves a copy of each item being filed to the ICE trial attorney. The attorney simply hands the ICE trial attorney the documents before or after approaching the judge. After the documents are accepted by the IJ, the IJ will set a date for the merits hearing. A merits hearing for non-detained cases is usually set anywhere from six to eighteen months from the filing hearing. (If the applicant has not waived time, the merits will be scheduled within 180 days of the initial filing.) For detained cases, the merits hearing is generally set two to four months from the filing hearing. Make sure you know the availability of your client, witnesses and experts to avoid selecting a hearing date and later discovering that a witness is unavailable.

Frequently, attorneys obtain additional evidence after an in-court filing of an asylum application, or even after the filing of supplemental documents. The Immigration Court Practice Manual allows supplemental evidence to be filed up to 15 days prior to a merits hearing. Unless the IJ orders otherwise, you should comply with the 15 day deadline.

C. Merits Hearing (also known as an Individual Hearing)

Typically, a merits hearing lasts only a morning or afternoon. However, it is not uncommon that testimony of your client and witnesses takes longer than expected and the hearing is then continued to another date. Continued merits hearings are scheduled anywhere from days to months from the first merits hearing, depending on the IJ's calendar.

D. Decision and Appeal Deadline

The IJ typically renders an oral decision at the end of the merits hearing. Occasionally, an IJ issues a written decision which is either mailed or provided at a future hearing. After the decision is rendered, the IJ asks each side whether they waive or reserve appeal. If either side reserves appeal, both parties have 30 days to appeal the IJ's decision to the BIA by the filing of a Notice of Appeal. *See* Appendix 5 for a sample Notice of Appeal. If no Notice is filed, the decision becomes a final order. You should explain to your non-detained client before the merits hearing that she is not at risk of detention and/or deportation in the event that her claims for relief are denied. As long as the client reserves the right to appeal, the client will not be detained or deported during the 30 day period. Similarly, as long as a properly Notice of Appeal is timely filed with the BIA, a non-detained client is not subject to detention or deportation through the pendency of the appeal.

If your client is detained and the judge grants relief but the government reserves appeal, ICE will generally continue to detain the client. You should contact IRP's detention attorney to discuss strategy after a grant of relief to a detained client.

§4.3 Filing for Asylum in Court: An Overview of Documentary Requirements

The documents you file for a client seeking asylum, withholding of removal, and CAT relief are very similar to the requirements for an affirmative asylum application, and you should follow

the instructions for completing an affirmative application at §3.3, *supra*. Note that there is no separate application for withholding of removal and CAT claims. You simply file one I-589 application in support of the three claims. The major difference for defensive applications filed in court is that attorneys must strictly adhere to the Immigration Court Practice Manual, and attorneys must be aware of the additional requirements listed below. Also, keep in mind that if you represent a family and have included a spouse and/or children under 21 in the principal applicant's I-589, these family members will be granted asylum if the principal is (assuming the entire family has been placed in removal proceedings). But if the relief granted is withholding or CAT relief (and not asylum), there are no derivative benefits. Your client's spouse and children under 21, who are also before the court, will need their own I-589 applications to be eligible for withholding or CAT. Please speak with an IRP attorney if you have questions.

An I-589 application is always filed at a noticed hearing in court, with your client present. Briefs, motions, and supplemental evidence (discussed in detail below) may be filed at the court clerk's office, unless the IJ orders that specific evidence be filed at a noticed court hearing. (If the IJ does not clearly indicate whether to file documents in court or at the filing window, you should ask the IJ to clarify this issue before the close of your hearing.) Every separately captioned filing must have a proof of service attached to it. If you are filing documents with the court at the clerk's office, the address is 606 S. Olive Street, 15th Floor, Los Angeles, CA 90014. You serve copies of filing on ICE Office of Chief Counsel at 606 S. Olive Street, 8th Floor, Los Angeles, CA 90014. We strongly advise volunteer attorneys to do their own filings with the court on the 15th floor. Attorney services are rarely familiar with immigration court rules and policies. If there is a defect with a filing, the court clerk will want to speak with the attorney of record to address the defect.

A. Caption Page and General Filing Rules

Your asylum application, the brief and supporting exhibits (with an index) should each have a separate caption page which complies with the Immigration Court Practice Manual. A current version of the manual can be downloaded from www.justice.gov/eoir. The manual is updated periodically, and it is critical that you review the current version to confirm filing requirements. At present, the manual provides that unless otherwise ordered, a brief and supplemental exhibits can be filed (15) days before the merits hearing. The original I-589 is always filed in court with the applicant present. The I-589 application (except in those cases where in application was previously filed with the asylum office or when your client is an unaccompanied minor) should be filed in court with the IJ along with one complete copy, and one copy served on the ICE trial attorney. In subsequent filings with the court, you need not provide the IJ with additional copies of the documents you file. A sample I-589 packet for court, including appearance forms, supporting documents and a pre-hearing brief, is at Appendix 3. Please also see samples at Appendices 1B, 1C, 1E and 1F. Discussion on specific filing procedures for unaccompanied children in removal proceedings is at Section 4.6(F), below.

B. Notice of Appearance Before DHS (G-28) and Notice of Appearance Before EOIR (EOIR-28)

You will not be recognized as attorney of record until you file a Notice of Appearance form. The EOIR-28 form must be filed at or before your first appearance in immigration court. If filing the form at your first court appearance, you can give it to the court clerk when you enter the court room. You serve a copy on the ICE trial attorney. You must also provide a signed G-28 Form to the ICE trial attorney, but do not have to serve a copy of this form on the court. You should only have to file these forms once. You can download the G-28 form from the CIS website at www.uscis.gov/files/form/g-28.pdf, and the EOIR-28 form from the EOIR website at www.justice.gov/eoir/eoirforms/eoir28.pdf. You will find sample G-28 and EOIR 28 forms at Appendix 1B and 3A.

In preparing appearance forms, always make sure you use the name spelling contained in the Notice of Appearance served on your client, and that you write down the correct A number, which is also found on the Notice to Appear. If the name spelling is incorrect, you should write your client's name correctly, but also add the name as spelled on the Notice to Appear, as well as any other names used by your client on the forms. Write "aka" (for "also known as") next to each other name you add. Although the EOIR-28 form does not require the respondent's signature, the G-28 form does, and we recommend that you obtain several signed G-28 forms from your client in the event that you need extra forms in the future.

C. Completing the I-589 and Declaration

If your client previously filed an I-589 affirmatively with the asylum office, that office will refer the application and all supporting exhibits previously filed to the immigration court, and the IJ will ask if you intend to rely on that application. If that application is significantly flawed, which typically happens because the client lacked adequate representation or had no representation, you should consider withdrawing the application and filing a new application, or correcting any errors with a supplemental declaration from your client. Do not rely on the accuracy of previously filed applications or declarations. Many clients are initially assisted by family members or acquaintances who do not provide competent advice, and who in some cases, perpetrate fraud. You need to review every previously filed document with your client. If your client's previously filed documents have incorrect information or need clarification, you can file a supplemental declaration to correct the prior document. Make sure that more inconsistencies are not created by a subsequent declaration. Any supplemental declaration must be consistent with all other evidence filed with the court. Also, if you are correcting errors in the record, it is critical to identify and correct every error, and explain why the error occurred. Remember that under Real ID, a judge can make a negative credibility finding based on inconsistencies that are not material to the asylum claim. Because of the requirement of filing an I-589 within a year of entry, it may not be advisable for a client to withdraw an asylum application and file a new one unless the IJ agrees that the original filing date will be preserved. Most often, attorneys agree to rely on the prior application, but supplement it with a new declaration which corrects any errors in the prior documents and/or provides additional information about the claim. **It is critical that you are aware of issues created by the Real ID Act which are discussed in detail at §2.3(J), *supra*.**

If your client was detained by ICE and placed in removal proceedings, the client probably did not have an opportunity to file for asylum, and you will be submitting an initial application. (Always ask your client if a previously asylum application was ever filed.) In some respects, this is easier as there is no possibility of inconsistent statements in a prior filing. For instructions on completing an original I-589, please refer to Chapter 3, §3.3, *supra*. If the judge sets a deadline for returning to court to file the asylum application, at a minimum you are required to file a completed I-589 form. Often, additional evidence is obtained and filed after the initial filing of the I-589. The practice manual allows the filing of evidence up to 15 days before your client's merits hearing, unless the IJ has set an earlier deadline. (Unless otherwise ordered by the IJ, these supplemental documents are filed at the court filing window on the 15th floor of the immigration court building.) When filing an initial I-589 in court, you must ensure that you file within one year of your client's entry into the United States. If the IJ sets a hearing for the filing of an I-589 on a date after the one year deadline, you should raise the issue with the IJ and request an earlier hearing, as you cannot file an I-589 at the filing window.

D. Criminal History Chart (if Your Client has a Criminal History)

If your client has ever been convicted of a crime, you should generally file with the court a criminal history chart which describes the case number, charges, disposition, and immigration consequence of all known criminal cases against your client. A criminal history chart is recommended, though not required, by the Immigration Court Practice Manual. You should also obtain certified court records for each case, including any charging documents, plea agreements, and minute orders. Please call Public Counsel to discuss what documents to include in your submission to the court. See Appendix 3D for a sample criminal history chart.

E. Prehearing Brief

Most IJs appreciate reviewing a pre-hearing brief. (The brief is not always required, but the Immigration Court Practice Manual encourages the filing of such briefs even when not required by an IJ.) Unlike filing a brief with the asylum office, immigration court briefs must strictly comply with the Immigration Court Practice Manual. *See* Immigration Court Practice Manual, §4.19. You should avoid too much specificity in your brief, as your client has not yet testified, and it will not help your cause if your brief has facts which your client ultimately does not corroborate. Also keep in mind that the brief should give the judge a roadmap to a grant of relief. Unless you have identified a complex legal issue, your brief should not require an extensive analysis of the law. Tell a persuasive story as to why your client should be granted asylum (or in the alternative withholding of removal and/or CAT relief.) We suggest that you file your brief closer in time to the actual merits hearing as new facts or legal issues may arise during the pendency of the proceedings. Some IJs will set a deadline for the filing of briefs. If the IJ does not set a deadline, you can file it up to 15 days before the merits hearing. We suggest filing briefs at least 30 days before a merits hearing so that the court and ICE have adequate time to review it. A sample prehearing brief is at Appendix 3B.

F. Certificate of Service upon the ICE Office of Chief Counsel

You must attach a Certificate of Service to anything you file with the IJ, whether the filing is in court or at the filing window. A sample Certificate of Service is attached to all sample motions in Appendix 4.

G. Supporting Evidence

In general, the same supporting evidence that is explained in Chapter 3, relating to affirmative asylum applications, is required in defensive asylum applications presented in immigration court. The main difference is the fact that the application in court is adjudicated in an adversarial setting, and every piece of evidence is subject to much greater scrutiny. It is rare for the asylum office to investigate the genuineness of documents or object to evidence. In contrast, your client who is in court is likely to face objections to evidence, an investigation into the genuineness of official records (if filed), and lengthy cross-examination. The government also may call witnesses to support the government's contentions, although this rarely happens. In sum, the required preparation for court cases is more labor intensive because of what is at stake and because there is an ICE attorney who may oppose relief for your client.

In immigration court, the evidence rules are much more flexible than in state or federal courts. "The general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matter and is fundamentally fair so as not to deprive the alien of due process of law." IJ Benchbook, (Oct. 2001), Ch. 1, at I.A.2., available at www.usdoj.gov/eoir/statspub/bencbook.pdf; see also *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995.)

Although the Federal Rules of Evidence do not govern immigration proceedings, they nevertheless may be useful in determining whether an evidentiary ruling violates an applicant's right to a fundamentally fair hearing. Generally, hearsay is admissible in immigration court, which is why attorneys rely on declarations and/or other written statements (letters, e-mail messages, newspaper articles) to corroborate claims.

1. Requirement to Translate Documents in a Foreign Language

All documents that are written in a foreign language must be accompanied by a complete English translation or will not be admitted into evidence. You file with the court the document written in its original language, the English translation, and a signed "Certificate of Translation," which affirms that the translator was fluent in both English and the original language and translated the document to the best of her ability. The translator signs the certificate under penalty of perjury. Each foreign language document requires a separate certificate with an original signature. Appendix 1K is a sample Certificate of Translation. Note that the translator does not have to be court certified, and the certificate does not have to be notarized.

If your client does not speak English but you are preparing the client's declaration in English, you should include a Certificate of Interpretation attached to the declaration that indicates that the declaration was verbally translated into the applicant's language before the applicant signed it. A sample Certificate of Interpretation is at Appendix 1J.

2. Admissibility of Declarations

Declarations are generally admissible. Because the overriding principle in removal proceedings is fairness, hearsay is admissible, and nearly all judges admit, in addition to sworn declarations, e-mail messages, handwritten letters, and faxed documents if they can be sufficiently authenticated. An IJ may admit a document but give it less weight if cross-examination of the author is not possible. *See Xiaoguang Gu v. Gonzalez*, 429 F.3d 1209 (9th Cir. 2005). You should be prepared to lay a foundation for whatever evidence you seek to be admitted. Typically, you lay that foundation in your direct examination, though some judges will ask you to do so before examining your first witness. Again, the Federal Rules of Evidence do not apply to removal proceedings, so the requirements for establishing foundation are looser.

The standard for credibility of documents should be the same as credibility of testimony and therefore, any adverse decision must be "based on specific, cogent reasons that bear a legitimate nexus to the finding." *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000) (reversing IJ's decision that document lacked credibility based on ambiguous decision from Forensic Document Laboratory).

3. Authentication of Official Records

Technically, the applicant has the burden of authenticating documents. Note that this section discusses official records, which are defined as documents issued by a foreign government. The government routinely objects to the introduction of official records if not authenticated pursuant to 8 C.F.R. §287.6. This section requires authentication by the foreign government that issued the document. In asylum cases, most clients fear persecution from their government (rather than a private actor). Such clients may fear that contacting agents of their government for authentication of official documents may create a risk of persecution for their family members who remain in the home country. In addition, clients may fear that contacting government agents for the purpose of authentication will bring them to the attention of authorities. If the client is ultimately denied relief and deported, the client may then have created additional risks of persecution through the authentication requests. Thus, many clients will not agree to authenticate official documents through the procedure set forth in 8 C.F.R. §287.6. If the client does not consent to authentication, and the trial attorney objects to the introduction of the documents at issue on the ground of lack of proper authentication, you should argue that the documents cannot be authenticated through the foreign government because such a process would disclose the client's identity to the government from which the client has fled, increasing the risk of future persecution of the client or of his family members. You should also argue that there are other methods of authenticating, e.g., through testimony. *See Khan v. INS*, 237 F.3d 1143 (9th Cir. 2001). The Ninth Circuit held in *Cordon de Ruano v. INS* that passports do not

need to be authenticated under 8 C.F.R. 287.6 as that regulation applies only to copies of official records. *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977).

If you do choose to comply with the authentication process under 8 CFR §287.6, you can find a more in depth explanation of that process at §3.3(B)(5)(iii), *supra*.

4. Original Documents

Do not submit any original documents such as birth certificates, passports, and marriage certificates to the court when filing. Provide the court with copies and bring the original documents to court with you to present upon request. The trial attorney may request that certain documents be sent to the government's forensic lab for investigation. This request is typically made in immigration court. Please be aware that a forensics investigation usually takes from 9-12 months. We recommend that you discuss with the trial attorney at the outset of the case whether the government has any objections to the documents you seek to admit, and make a written record of this conversation to avoid any delays later in the case. (The goal is to avoid finally arriving at a merits hearing, only to have government suddenly request a year continuance for a forensics investigation.) If you are handing over original documents at the request of an ICE attorney, you should request a receipt with the ICE attorney's signature for every document provided. It is recommended that your client keep at least one form of an original photo ID.

5. Admissibility of Government's Documentary Evidence

The government has greater constraints on the admissibility of written statements than the asylum applicant. These constraints derive from the applicant's due process right to full and fair hearing. An applicant has the right to cross-examine witnesses presented by the government. INA §242(b)(3); 8 CFR §1240.10(a)(4). Arguably, the admission of declarations offered by the government without allowing cross-examination of the declarant abridges this right. The issue of the admissibility of asylum officer notes is less clear cut. The regulations provide that the record in an asylum case includes all information provided by the applicant as well as any comments submitted by the Department of State or by the Service. *See* 8 C.F.R. §1208.9(f). You can argue that asylum officer notes should be excluded under INA §240(b)(4)(B) if the government has not produced the author of the notes for cross-examination. There is also caselaw holding that inconsistencies between an officer's notes and testimony in immigration court is insufficient to support an adverse credibility holding. *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005). However, the *Singh* case was decided before the effective date of *Real ID* which allows any inconsistencies to be the basis of a finding of no credibility.

§4.4. Witnesses

A. Lay Witnesses

Witnesses may provide useful evidence establishing your client's identity and/or corroborating material facts relevant to your client's claims. Because hearsay is admissible in immigration court, attorneys typically help witnesses prepare sworn declarations and file them along with other evidence supporting the asylum claim prior to a merits hearing. This allows you as the attorney to have more control over what facts are presented to the court, but you can elicit additional information on direct examination. Whenever you plan on calling a witness to testify, you should prepare them thoroughly for an aggressive cross-examination. If you submit a witness declaration from someone residing in the Los Angeles area, but you do not intend on making the witness available for cross-examination, you should be prepared to face objections from the government and explain why the witness is unavailable. Judges do not expect witnesses who reside abroad or even outside of the Los Angeles area to appear in court to testify, and typically admit witness declarations over the government's objections. However, IJs may give less weight to a declaration where the witness is not available for cross-examination.

In some cases, you may choose to have a witness testify without first filing a written declaration. (This happens most frequently when a witness is discovered shortly before a merits hearing.) Any witness who will be testifying in immigration court should have legal status in the United States. If the witness is not a U.S. citizen (e.g. the witness is a permanent resident or asylee), the government may request that you provide the government (prior to the merits hearing) the client's signed waiver of the right to confidentiality of his or her A file as a condition of the government's agreement to such testimony. Public Counsel is not aware of any legal authority allowing the government to condition witness testimony on a waiver of the witness's right to confidentiality. This practice has a chilling effect as witnesses are frightened to testify if they believe their testimony will open the door to the government possibly impeaching them and then seeking to revoke their immigration benefits. However, there may be cases where your witness agrees to waive confidentiality and there is nothing gained by objecting to this requirement. For a more in depth discussion of this issue, please review the memorandum attached as Appendix 3K. (Please note that this memorandum was written in 2004, and there may be additional legal developments since its publication.) If you choose to provide a witness's written waiver, you should do so far in advance of a merits hearing or you may face an unwanted continuance. It can take the government weeks and even months to obtain an A file after receipt of a waiver from a non-citizen witness. You should also refer a witness to independent counsel for advice on whether or not the witness should sign a waiver of the right to confidentiality of his or her immigration file. Contact IRP if you need help finding independent counsel.

While there is no requirement that your client present witnesses, you could run into a problem if an IJ ultimately decides that a witness who you did not bring to court was "reasonably available" and had non-duplicative, material evidence. In *Sidhu v. INS*, 220 F.3d 1085 (9th Cir. 2000), the court held that "where the IJ has reason to question the applicant's credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review." This case was decided before the enactment of Real ID. The lesson from *Sidhu*, particularly in light of Real ID, is to establish in your record why a witness who will not be testifying is not "reasonably available." The witness at issue in *Sidhu* was the applicant's

father who lived in the applicant's home in Los Angeles, and no explanation was offered for his failure to appear in court.

B. Expert Witnesses

Please see Chapter 3, §3.3, *supra*, for a discussion of the use of experts to support asylum claims. There is no requirement in immigration court that you “designate” an expert in accordance with state or federal court rules, but attorneys typically ask a series of qualifying questions to establish the witness's expertise. In immigration court, you must comply with the practice manual's requirement of identifying expert witnesses on a witness list. Rule 3.3(g) of the manual requires the identifying of all witnesses, and in regard to expert witnesses, requires that you include the name of the witness, A# if applicable, a written summary of the testimony, estimated length of testimony, the language in which witness will testify in, and the expert's CV.

If you wish to have an expert testify telephonically, you should make an oral motion at a master calendar hearing or file a written motion at least 15 days before the merits hearing, unless the IJ sets an earlier deadline. Ask the IJ at the time he or she sets the merits about any special requirements for telephonic testimony. Note that most judges will require you to provide a calling card so that the call to the expert is at your expense. *See* §4.15(o)(iii) of the Immigration Court Practice Manual for additional guidelines for telephonic appearances. (A sample Motion for Telephonic Testimony is at Appendix 4C.)

If you cannot obtain a commitment from an expert to testify in person or telephonically, you can still introduce into evidence the expert's sworn written testimony. A declaration written by an expert witness is admissible in immigration court to support an applicant's claim so long as it is “relevant, material, and noncumulative.” *Matter of Exame*, 18 I & N Dec. 303, 305 (BIA 1982). The 5th Amendment guarantees aliens due process in removal proceedings. *Baires v. INS*, 856 F.2d 89 (9th Cir. 1988). The IJ must allow an applicant to present relevant expert testimony and the exclusion of such relevant testimony is a due process violation. *Lopez-Amanzor v. Gonzalez*, 405 F.3d 1049 (9th Cir. 2005). While you are likely to face an objection if you submit an expert's declaration but do not produce the expert in person for cross-examination, the judge will most likely admit the affidavit based on the authority cited above, but give less weight to the evidence.

§4.5 Government's Biometrics Procedure & Criminal Background Checks

A. Non-detained Clients

Every asylum applicant and a dependent between the ages of 14 and 79 are subject to the U.S. government's biometrics procedures. Biometrics processing refers to the government's gathering of fingerprints and other identifying information. Biometrics fees are waived for asylum applicants. In court cases for non-detained aliens, it is the applicant's obligation to initiate the biometrics process. For non-detained clients, the attorney needs to follow the

biometrics instructions at Appendix 3G. (These instructions are handed out at court whenever an asylum application is filed.) The instructions ask you to send the first three pages of the completed Form I-589, together with a signed G-28 and a copy of the biometrics instructions to the CIS Nebraska Service Center (NSC). The NSC will then send you and your client a receipt and an appointment notice (DHS Form I-797C, Notice of Action) stating the time and place where your client must appear for biometrics. The government office is called an Application Support Center (ASC). When you receive a copy of the appointment notice, you should immediately contact your client to confirm the client's receipt of the notice. The client will need to bring to the appointment a government issued, non-expired identification document containing the client's photograph (such as a passport) and the original appointment notice to the ASC. If your client does not have an appropriate identity document, contact IRP attorneys for guidance. As proof that the biometrics were completed, the DHS will date stamp the appointment notice. Make a copy of this stamped notice for your records. After the client completes this process, the DHS will complete a thorough background check that includes an FBI criminal check. The results are sent directly to the ICE trial attorney and are not available to the client and her attorney. The biometrics requirement is taken extremely seriously by IJs! Your client's failure to appear for biometrics processing can result in extensive delays and even a denial of relief. We recommend calendaring all dates relevant to biometrics processing and always bringing to court hearings the date stamped biometrics appointment notice as proof of compliance.

While in proceedings before the immigration court, the client's biometrics information expires every 15 months. This means that every 15 months, the client must appear at an ASC for new fingerprinting so that DHS can run current checks. If your client's biometrics will expire before the final merits hearing, you should obtain a new biometrics appointment 60 days before the 15 month period runs. Your client can obtain a new biometrics appointment notice by going to Room 1001 at the Los Angeles USCIS District Office at 300 North Los Angeles Street, Los Angeles, 90012. No InfoPass appointment is necessary. The client must appear in person at Room 1001 and should ask a guard which line to stand in to obtain a biometrics appointment for an immigration court case. The client must bring to the USCIS office a valid photo ID, the original notice from the court indicating the date of the next court hearing, proof that her asylum claim is pending before the Los Angeles immigration court (when an initial request is made to the NSC for a biometrics appointment, the NSC sends a Receipt Notice which verifies the pendency of an I-589 application), and a copy of any previously issued biometrics appointment notice. CIS will then issue a new biometrics appointment notice. Please calendar biometrics deadlines and make sure that your client gives you proof of appearing for the biometrics which is the appointment notice date stamped by the ASC. Finally, when you send the client for the appointment, it is helpful to send the client with a letter addressed to CIS explaining that the client has an asylum application pending in immigration court and that therefore no biometrics fees are required. A sample letter is included at Appendix 3H.

Because you will not receive the results of the government's record check relating to your client's criminal and immigration history, we recommend that your client also obtain her FBI background check. As noted above, the FBI record should include prior arrests by immigration authorities as well arrests by police. Instructions on how to obtain your client's FBI and

California DOJ record are at Appendix 2. It can take four to eight weeks to receive the results of these record requests. If you learn of any criminal or immigration history that was not previously disclosed, contact an IRP attorney for advice.

B. Detained Clients

If your client is detained by DHS, the above biometrics procedures do not apply. It is ICE's responsibility to obtain biometrics information from your client. But if you wish to obtain your client's FBI and California DOJ records, you will need to ask your client's assigned deportation officer at ICE to take the client's fingerprints and provide you with two sets of fingerprint cards.¹² You will then submit these cards along with appropriate fees and requests to the FBI and the California DOJ. Please see Appendix 6A for more detailed instructions on obtaining background checks for detained clients at Santa Ana. If you have difficulty obtaining cooperation with your detained client's deportation officer or your client is detained at another facility, you should contact IRP's detention attorney.¹³

§4.6 General Tips for Immigration Court¹⁴

- When the IJ enters or leaves the courtroom, everyone should stand.
- Sit when addressing the Court.
- Address the judge as "Your Honor," or "Judge Smith" or "the Court." E.g., "May I hand the Court my Notice of Entry of Appearance?"
- Ask permission before handing a document to the Court ("may I approach?").
- Address opposing counsel by name or refer to them as the "government attorney," the "trial attorney," or "ICE counsel."
- Do not speak or read non court-related documents while sitting in the back of the courtroom.
- Have your cell phone and client's cell phone off when in the courtroom.
- Cases are usually called by "the last three," meaning the last three digits of the client's A number.
- Appropriate off-the-record preliminary conversations include:
 - Saying good morning before the IJ goes on the record;
 - Introducing yourself to the ICE counsel and handing documents to ICE counsel if you are serving your Notice of Appearance and/or court filings;
 - Some IJs, before going on the record, may ask questions regarding the number of witnesses, the length of time you think you need to present our testimony, etc.;
 - Some IJs will also ask what the case is about. Be prepared to respond briefly, e.g. "This is a Rwandan asylum claim." Or, if the case has been remanded by the BIA or Court of Appeals, briefly describe the procedural status of the case.

¹² A list of contacts for *pro bono* attorneys handling detention cases is attached at Appendix 9E.

¹³ For information about visiting procedures at various ICE facilities see <http://www.ice.gov/detention-facilities/index.htm>

¹⁴ Adopted from Esperanza's Immigrant Rights Project's Pro Bono Guide. Reprinted with permission.

- ICE counsel may ask that witnesses, including experts, be sequestered. Prepare your witnesses, if any, for this possibility.
- Some IJs go on the record without giving anyone an opportunity to say anything. If this occurs, and you have preliminary issues you would like to discuss, wait until after the judge announces the case and request the IJ's permission to address an issue.
- If an IJ for whatever reason has decided not to go forward with the case, the IJ usually informs you of this in an off-the-record conversation. A new hearing date will often be agreed upon in an off-the-record conversation and then the IJ will go on the record, announce that the hearing is being continued, and give notice of the new hearing date and time.
- If ICE is seeking a last-minute continuance of the hearing, ICE will often raise this at this point as well.
- "Going on the record" refers to the moment when the IJ turns on the recording equipment. This recording creates the record for appeal so make sure you say anything you want preserved for appeal while the tape recorder is on. You may clarify with the judge whether you are "on the record."
- Note that there are microphones at counsel tables. These microphones record your voice, but they do not amplify your voice. Speak loudly and clearly. Make sure the microphone is pointed in your general direction. The microphone at respondent's counsel table is usually shared with the interpreter, so it should be pointed between you and the interpreter.
- You will see/hear the IJ turn on the recording equipment. The IJ will then announce the case: "This is Judge X in Los Angeles, California on March 15, 2011, in the removal hearing of John Smith, Case number A012-345-678."
- The IJ will then typically ask for counsel to state his/her appearance. The IJ may say: "Appearing for the respondent:" and then pause. You would then state your appearance.
- To make your appearance, say: "Angela Attorney, from XYZ Law Firm, appearing *pro bono* for the respondent." If the EOIR-28 Notice of Entry of Appearance form has not yet been submitted, tell the IJ that you have an EOIR-28 in your name and ask if you may give it to the Court. The IJ will tell you to approach to hand him/her the EOIR-28 or tell you to hand it to the clerk. ICE counsel will also state his/her appearance.
- The IJ will then direct several questions to the respondent. Most judges will ask the respondent if he/she understands the court interpreter, if the respondent still resides at the address provided on the EOIR-28, and if the respondent consents to representation by attorney appearing in court.
- If the client has moved and an EOIR-33 Change of Address form has not already been submitted to the Court, hand the IJ the EOIR-33 form at this time (and a copy to ICE counsel). Be prepared to be reprimanded if the client moved more than 5 days ago. EOIR-33s must be filed within 5 days of an address change and require the Respondent's signature.
- The IJ will then inquire if the parties are ready to proceed and, if so, begin.

A. Master Calendar Hearing

1. Meeting the Client at Court

i. Non-detained Cases

The most important fact to remember is that once you arrive at immigration court downtown, located at 606 S. Olive Street, it can take half an hour to get to your designated courtroom because the elevators are notoriously slow! Please warn your client about this. For an 8:30 a.m. hearing, you should have your client meet outside the courtroom no later than 8:00 a.m., always anticipating that the client may be late. Make sure your client knows where to meet you including the courtroom letter and the floor. Everyone passes through a metal detector before entering the court area. You will not be allowed into the court area if you have food, a video camera, or dangerous devices (such as pepper spray). You can bring a cell phone into the court, but it must be turned off. Once the client is on the correct floor, all the courts are labeled by a letter on the door. If you prefer, you can meet your client outside the front entrance of the court building, but you will then need to allow more time to go upstairs. We advise all attorneys to bring the cell phone number of the client to court, in the event that the client cannot be located. Remember to turn off your cell phone before entering the court.

ii. Detained Cases

If your client is in detention, your hearing may occur in Room 4330 of the Federal Building at 300 N. Los Angeles St. To enter the Federal Building, you will need to present your identification and pass through a metal detector. There is sometimes a very long line to enter the Federal Building, but attorneys can use a shorter line at the entrance to Room 1001, adjacent to the main entrance. You should show the guard your State Bar card to gain entrance. The Notice to Appear indicates the location of your client's hearing. Detained cases are also heard at the immigration court building at 606 S. Olive Street. In some detention cases, the respondent is not brought to court, but appears instead on a video screen. (In this case, the client is at an ICE Office at or near the detention facility.) To confirm where your detained client has court, review the Notice to Appear. You can also call the court's automated system at 1-800-898-7180.

If the hearing is not a video hearing, it is ICE's responsible to transport your client from detention to the immigration court. If you need to speak with your client before the hearing, you can visit your client at the B-18 holding area or request to speak briefly with the client in the back of the courtroom. The entrance to B-18 is located on the northern side of the Federal Building on Aliso Street. You will see a large driveway with an open cement door on the side of the building. If you enter through that door, you will go through a hall way until you reach B-18. Ring the bell for assistance and be prepared to present the guards with a signed form G-28 in order to meet with your client. Note that you will need to arrive at B-18 at least a half hour before your hearing in order to have time to speak with the client. You will not be given access to your client unless you present your Bar card.

If you are representing a detained client, you should review the client's criminal history to determine if your client is eligible for bond, and if so, seek a bond hearing. Please see Appendix 6B for a sample motion requesting a release or a bond hearing before the IJ.

B. Entering the Court Room

Your client will take a seat in the back of the courtroom. You will hand your green EOIR-28 form to the IJ's clerk who sits adjacent to IJ. If you have already submitted the form on a prior occasion, you do not need to submit another one. In either case, tell the court clerk your client's "A" number and that you and your client are present. In general, cases are called in the order in which they check in. (Courts should give priority to *pro bono* counsel so always inform the clerk that you are appearing *pro bono*.) Wait for the IJ to call your case by "A" number or name. The government will only recognize you as the attorney if you provide a signed G-28 form. Simply hand this form to the ICE attorney at your first appearance. You only have to do this at your initial appearance, as it should go into the government's file. You do not need to provide a copy of the G-28 to the judge.

C. Pleading at the Master Calendar Hearing

When called, your client will sit next to the interpreter (if necessary) and you will sit next to the client. The ICE attorney will sit at the other table. If you represent a family, the entire family must approach the table. The IJ may inform you that at subsequent hearings, only the lead asylum applicant need be present. If the IJ does not so inform you, ask if the presence of children can be waived at future hearings, as this will insure that children do not needlessly miss school. (In some cases, testimony from children may be essential.) You and your client sit rather than stand in immigration court.

The IJ will go "on the record" by turning on a recording machine. The IJ may ask if you acknowledge service of Notice to Appear (NTA) and waive reading of the charges. Assuming you have already reviewed the NTA, you should acknowledge this and waive reading of charges. The IJ may then make the NTA an exhibit on the record, or may do so at a subsequent hearing. The IJ will then ask how you plead. In almost all situations, Public Counsel has made the determination not to contest removability before assigning the case to a volunteer attorney. Only in rare situations will removability be contested.¹⁵ **ASSUMING YOU HAVE REVIEWED THE NTA WITH YOUR CLIENT, AND ALL ALLEGATIONS ARE CORRECT**, say the following:

Respondent admits the allegations and concedes removability. As relief, respondent is seeking asylum, withholding of removal, relief under the Convention Against Torture, (and in the alternative, voluntary departure).

¹⁵ If you believe the facts alleged in the NTA are erroneous or for other reasons, you seek to deny allegations and/or charges of removability, please discuss these issues with an IRP attorney before your first court hearing.

Recall that a client **only** qualifies for voluntary departure if he or she has resided in the United States for at least a year prior to the service of the Notice to Appear and has not been convicted of an aggravated felony. If you are not certain on whether your client should seek voluntary departure, consult with a Public Counsel attorney.

The IJ will then ask what country you designate for deportation if this becomes necessary. You say:

Respondent declines to designate.

The IJ will then designate the country of origin.

If your client has not previously filed an asylum application, the IJ will set a date for filing a complete application at the next court hearing. (Your client needs to appear with you at every scheduled court hearing.) The volunteer attorney must be certain that the hearing date for the asylum application filing is prior to the client's one year filing deadline. Generally, an IJ will allow an attorney two to three months to prepare the asylum claim, but sometimes the next hearing is not scheduled for many more months. Unless the IJ specifically asks that all supplemental evidence be filed, you are not required to file more than the complete I-589 form and will be allowed to file supplemental evidence and a brief in the future.

If you intend to rely on an asylum application which your client previously filed with the asylum office, you can indicate to the IJ that this is the case. The IJ will then typically set a merits hearing. The IJ will ask if you waive time, or ask if you want an "expedited" hearing. Asylum applicants have the right to request an expedited hearing because the law requires the court to adjudicate an asylum applicant's claim within 180 days from the date that the application is received by either USCIS or the immigration court if the claim was not previously filed with the asylum office. INA §208(d)(5)(A)(iii). If you do not waive time, the merits hearing will be set in the near future within the 180 day period, though it is impossible to predict how soon in the future. Most attorneys need substantial preparation time to prepare and file additional documents, and thus waive time. As noted above, waiving time may be problematic for your client because regulations do not allow asylum seekers to qualify for work permits unless their claims have remained pending for 180 days. Delay by the applicant stops the accrual of the 180 days and waiving time is deemed to be a delay caused by the applicant. The "asylum clock" will stop until the next court hearing. It will restart if, at the subsequent hearing, you are ready to proceed without requesting additional time. To find out how many days have elapsed since your client filed for asylum, call 1-800-898-7180, and enter your client's "A" number. Select "Case Processing Information" from the automated menu. An automated message should tell you how many days towards the 180 days your client currently has. The rules relating to the asylum clock and work permit eligibility are complex. See Appendix 7A for a more detailed discussion of the asylum clock issue.

If your client wants an expedited hearing date, the IJ will offer one expedited date. You may want to inform the IJ you are not waiving time and then assess if the date you are given will allow

you adequate time to prepare. If not, you can then decide to go ahead and waive time, and you will be given a much more distant hearing date. In Los Angeles asylum claims that are not expedited are often not scheduled for an additional 18 months.

Once the IJ has scheduled the merits hearing, you can assume that your deadline for filing supplemental documents is 15 days before the merits hearing, unless the IJ sets a different deadline. You can file such documents at the filing window on the 15th floor. If, at the conclusion of your master calendar hearing, there is any doubt in your mind as to the IJ's instructions, you should ask for clarification.

Please note that some IJs will not set a hearing date if you indicate that you intend to file supplemental documents. Some IJs prefer to schedule another master calendar hearing for the purpose of filing the supplemental documents, and at that next hearing will schedule the merits hearing.

Whenever a hearing is concluded, the IJ's clerk will hand you or the ICE attorney the Notice of the next court date and a copy for opposing counsel. The person handed the Notice is expected to hand the extra copy to opposing counsel. Remember to do this before leaving the court room!

D. Subsequent Master Calendar Hearings and Deadlines

If the IJ requires you to file documents at the next court hearing, you return to court at the next scheduled hearing **with your client** and file the documents. The IJ will go on the record and you will ask if you are ready to submit documents. You then ask to approach the judge to hand him/her the documents. If you are filing an I-589, you give the original and a complete copy to the IJ, and you provide one copy to the ICE attorney. For other filings, you give the original to the IJ and one copy to the ICE attorney. (These rules are subject to change at any time, so you should always consult the Immigration Court Practice Manual for filing procedures.) You may raise any questions or issues you have about your case at a court filing/master calendar hearing. If the IJ is setting a date for a merits hearing, the IJ may ask you to estimate how long the merits hearing will take or how many witnesses you will have. Most merits hearings last for one morning, or one afternoon (three hours), but some last much longer if there are a lot of witnesses or very complex facts. At the filing hearing, IJ will give you a date for a merits hearing if the IJ had not done so previously.

Keep in mind that the government at any time may also cause delays by seeking additional time to send your client's documents to a forensics office for investigation, or for any number of reasons. A delay caused by the government should not stop the asylum clock. If for any reason you are not clear on what is required for the next hearing, you should ask for clarification from the IJ.

If the IJ has authorized a filing of documents at the immigration court clerk's filing window, the client's next appearance will usually be the merits hearing and you will be

instructed to file supplemental exhibits at the window on the 15th floor of the court building. Again, you should make sure that whatever you file at the window strictly complies with the Immigration Court Practice Manual. We encourage attorneys not to rely on an attorney filing service in immigration court as most attorney services are not familiar with immigration court procedures. It is helpful for the attorney of record to do the filing in the event that problems arise at the filing window.

E. Negotiating with ICE Counsel; Witness List; Pre-Hearing Conference; Pre-Hearing Statement

Once the IJ has set a merits hearing, you should review the Immigration Court Practice Manual's rules regarding merits hearings. Section 3.3(g) requires the filing of a witness list at least 15 days prior to the merits hearing, but we recommend filing the list 30 days prior to the hearing if possible. A sample witness list can be found at Appendix 3E. Sections 4.18 and 4.19 of the Practice Manual discuss pre-hearing statements and briefs. These items are encouraged but not required unless ordered by the IJ.

You should consider calling the trial attorney at least one month before your scheduled merits hearing with the hope of narrowing down issues. Even if the trial attorney is unwilling to discuss the merits of the case, you at least have established communication with opposing counsel. You can also confirm that the government is ready to proceed with the case. Too often, ICE is not ready to proceed because background checks are not complete, the file is lost, or an overseas investigation is not yet complete. The trial attorney may or may not be willing to review the case to advise you of the status, but there is no harm in asking. If you do not know which ICE counsel is assigned to your case, you can find out by contacting the Team Leader on the UP Chart, which is found at Appendix 9B. The Team Leader is the attorney listed under your assigned IJ who has an asterisk next to his or her name. The general telephone number for the ICE Office of Chief Counsel is (213) 894-2804.

You may want to move the court to hold a pre-trial conference if you believe certain issues could be resolved in this manner. To date, the courts have been reluctant to schedule pre-trial conferences, but we advise lawyers to advocate for such a procedure to make the adjudication more efficient for all parties. The Practice Manual, at 4.18(a), specifically states that pre-hearing conferences are held "to narrow issues, obtain stipulations between the parties, exchange information voluntarily and otherwise simplify and organize the proceeding." A party's request for a pre-hearing conference may be made orally or by written motion.

Finally, the Practice Manual encourages parties to file a pre-hearing statement which includes the statement of facts to which both parties have stipulated together with a statement that the parties have communicated in good faith to stipulate to the fullest extent possible. For other requirements, refer to 4.18(b)(ii) of the Practice Manual. It is exceedingly rare that the government will stipulate to any facts prior to hearing testimony from an asylum applicant, but even absent a stipulation, it may be beneficial to provide a pre-hearing statement to demonstrate your good faith efforts to the IJ.

F. Special Filing Procedures for Asylum Claims Involving Unaccompanied Children in Removal Proceedings

An Unaccompanied Alien Child (UAC) is a legal term referring to a child who has no lawful immigration status in the United States, has not attained 18 years of age, and has no parent or legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody. If your client falls within the UAC definition and intends to file an asylum application, notify the immigration judge and the ICE trial attorney at the next court hearing. Upon informing the court, the ICE counsel will provide you with the UAC Cover Sheet. See Appendix 10C for the DHS UAC Asylum Filing Instructions. The asylum application packet will be filed with and adjudicated by USCIS, not the immigration court. This provides for unaccompanied children's cases to be heard in a non-adversarial setting. The immigration judge will typically continue the case to allow adjudication by the asylum office though some cases may be administratively closed or terminated.

The UAC asylum application packet is filed with the USCIS Nebraska Service Center at USCIS NSC, UAC I-589, P.O. Box 87589, Lincoln, NE 68501. The packet should include cover letter, Form G-28, Form I-589 with supporting documents, documentation on the client's UAC status, and the DHS UAC Asylum Filing Instructions. Submit two additional copies of the entire packet with the original one. Make sure to clearly mark the child's A number on the cover letter. The cover letter should also include information on the child's next court hearing (i.e. date of the hearing and what the hearing is for) to assist the Asylum Office with scheduling the interview. In addition, indicate if the child has any other name or date of birth used by the EOIR. If you are seeking other immigration relief before CIS, specify the type and the order in which you want relief applications adjudicated. Upon receipt, NSC will issue a receipt notice and subsequently a biometrics appointment notice. File a copy of the receipt notice with the immigration court and ICE as proof of filing of the asylum application. The asylum interview will be scheduled at the Los Angeles Asylum Office in Anaheim. Note that all UAC cases have to go for special review at Asylum Headquarters in D.C. before the asylum office issues the final decision. If the AO approves the case, you can seek termination of the removal proceedings. If the case is not approved, it will be sent back to immigration court with a referral notice and your client can reassert his asylum claim before the court. A new Notice to Appear will be issued only if the case was previously terminated. For more information on asylum cases involving children please see §2.3(G) and §3.3(E)(2), *supra*, and Appendices 10C, 10D, and 10E.

§ 4.7 Merits Hearing

A merits hearing, like any trial, is full of surprises. It is impossible to predict whether it will last 30 minutes or 30 hours. In rare cases, the ICE trial attorney will agree not to oppose a grant of relief after discussion and sometimes minimal testimony from an applicant. In other cases, the trial attorney will oppose everything. Similarly, one IJ may see no issue from a set of facts, and another IJ may look at the same facts and identify numerous issues that you have never

considered. The best way to prepare is to observe your IJ conduct a merits hearing and to do a “moot court” with your client. To observe a merits hearing, you can call the Court Administrator at (213) 894-0645. You should tell the Administrator that you are a Public Counsel *pro bono* attorney wanting to know which day your assigned judge schedules merits hearings. If you do go to court to observe, the IJ may ask who you are. You should explain that you are *pro bono* counsel wanting to observe a case. Asylum applicants can request a closed hearing, but frequently no one will object to your presence in the court room.

Once you have observed a case, you will be better prepared to hold a “mock” hearing with your client. It is often helpful to recruit a colleague who does not know your client to play the role of the ICE attorney. Your client will be much more equipped to deal with an aggressive ICE counsel if the client has practiced responding to difficult questions in your office. It is critical that your client understand what will happen in the court, and how to respond appropriately to questions. Because the merits hearing is an administrative law proceeding, the IJ may take a much more active role than a judge in a state or federal court trial. Some IJs will interrupt an attorney’s direct examination and take over the questioning. Again, the more time you spend practicing for the final hearing and the more information that an applicant has regarding what to expect at a merits hearing, the better equipped your client will be to present a strong case.

The merits hearing starts by the IJ asking the parties if they are ready to proceed. Note that an IJ will not proceed with a merits hearing if biometrics checks are not completed. Make sure you bring proof (the date-stamped appointment notice) that your client appeared at a biometrics appointment within the last 15 months. If your client has complied with the biometrics requirement, it is ICE’s job to be prepared by having the results of the background checks. Assuming the parties are ready, most IJs begin by marking exhibits into the record. Listen carefully as the IJ marks the exhibits to ensure that all the evidence which you have filed has been identified. (It is not unusual for filed documents to be missing from either the court’s file or the ICE trial attorney’s file. You may want to bring extra copies of all filings in case documents are missing.)

After marking the exhibits, most judges then ask the parties to state their objections. Generally, the government does not object to country condition documents. The government often objects to any declaration if the declarant is not in court to be cross-examined. Most IJs will admit such declarations but give lesser weight to them. Declarations are often sent from abroad, and it would be impossible for declarants residing abroad to travel to the U.S. to testify. Sometimes, an IJ will admit evidence only if the applicant through counsel lays a foundation. Occasionally this is done before moving to the merits of the case, but more often you can lay the foundation in your direct examination. The government may also object to the admission of any official record that has not been properly authenticated pursuant to 8 C.F.R. §287.6. (Arguments to refute this objection are discussed at §4.3(G), *supra*.) You should be prepared to respond to all objections. It is particularly important to establish in the record why witnesses who reside in the Los Angeles area are unavailable to testify, if that is the case.

The government often files no evidence. When the government does have evidence, it is often the results of a forensic examination. If the government surprises you with evidence which the government seeks to admit the day of the merits hearing, you should object on due process grounds and seek a continuance so that you have an opportunity to review the evidence and file objections if warranted. You should also of course note that the offered evidence was not timely filed as required by the Practice Manual.

There are usually no opening statements at a merits hearing, because the IJs do not favor them. The first witness is almost always the asylum applicant. In rare cases you may want someone else to testify first. For example, in the case of an extremely traumatized client, testimony from an expert therapist can “set the stage” for the applicant. The direct exam is followed by government’s attorney cross- examination and then redirect. Then any additional witnesses are called. Witnesses are usually sequestered during the applicant’s testimony. Attorneys should seek the IJ’s permission to make a short closing argument summarizing the claim and addressing any legal issues that came up during the hearing. The IJ will sometimes render an oral decision at the end of the hearing, and other times schedule a subsequent hearing for a decision or advise the parties that a written decision will be mailed to the parties. If the IJ does make a decision on the day of the hearing, the parties will be asked whether appeal is waived or reserved. If your client is granted relief and the government waives appeal, you obviously should waive appeal as well. (This allows the IJ to grant relief without making a lengthy decision.) If the government reserves appeal, you should also reserve appeal if you were denied any relief – for instance, if your client was denied asylum but granted withholding of removal, and the government reserves appeal, you should reserve appeal as well in the event you want to challenge the denial of asylum. It is very helpful to bring someone to court to take notes of the hearing in the event of an appeal. If you do appeal to the BIA, you will not receive a transcript of the proceedings for many months.

A. Common Objections at the Merits Hearing

As discussed above, the Federal Rules of Evidence do not apply to removal proceedings but can provide guidance. Objections to evidence, where appropriate, should be made to create a record for appeal. Most common objections made by respondent’s attorneys are on the grounds of relevance, due process, that the question has been asked and answered, that the question misstates the testimony, and on insufficient authentication of documentary evidence. An attorney should always object to the introduction of written statements by a witness if the attorney has not previously received a copy of the statement, and if the witness is unavailable to be cross-examined. If served with evidence prior to a merits hearing (such as a report from the government’s forensics laboratory), you may want to file written objections to the introduction of the evidence if there are grounds for doing so. The government’s attorneys often object to leading questions, questions that call for speculation, and the admissibility of documents on authentication grounds. They likewise may object to written statements where the author is not in court to be cross-examined, but the law favors admissibility in such a case (at least when the written testimony is offered by the applicant).

B. Direct Examination, Cross-Examination and Redirect

It is important that your client understand what will happen at a merits hearing. You should explain the role of the IJ and the ICE attorney, the difference between direct, cross, and redirect examination, and the meaning of objections from attorneys. Instruct your client to listen to questions carefully and to answer exactly what is being asked. Most IJs become very impatient with respondents who do not respond directly to the question asked. Tell your client not to elaborate on direct examination, especially on yes or no questions. Advise your client never to guess at an answer, but to answer “I don’t know” if that is the true answer. Advise your client that after the cross examination, you will be able to ask her additional questions on redirect to set the record straight if any inaccuracies arose during cross-examination. Remind your client to speak clearly and only in the client’s native language, if the client is using an interpreter. Finally, remind your client to let you know immediately if there are any problems understanding the court translator.

§4.8 Decision and Post-Decision Issues

A. Appeal

At the end of the hearing, the IJ will ask you if you would like to reserve or waive appeal. The failure to reserve the right to appeal will prevent the client from appealing the decision and that reserving the right to appeal does not require you or the client to submit an appeal. Provided appeal has been reserved, there is a 30 day deadline to file a notice to appeal to the BIA. Your client should be aware of this deadline and you should discuss with her whether the IJ’s decision warrants an appeal. Remember that the ICE attorney may also appeal the IJ’s decision. If no appeal is filed within 30 days of the IJ’s decision, the decision becomes a final order.

As noted above, if your client is not detained and is denied relief, the client will not be detained during the pendency of an appeal before the BIA (unless the client commits a crime mandating detention). Appeals take between one and three years on non-detained cases. For detained clients, appeals are usually resolved within 6-12 months. After filing a Notice of Appeal, the parties are served with a transcript and a briefing schedule. There is no oral argument on appeal, except in very rare cases. Appeals are filed at the BIA in Falls Church, Virginia. A sample Notice of Appeal is at Appendix 5. If the BIA denies your client’s appeal, a Petition for Review must be filed within the Ninth Circuit Court of Appeals within 30 days of the BIA order. For more information about review by the Ninth Circuit, contact Public Counsel’s IRP and refer to the Ninth Circuit’s Immigration Outline.

B. Final Order Granting Asylum and Rights of Asylees

If the IJ grants your client asylum and the order is final (because the government waives appeal or because the government does not file an appeal within 30 days), your client is then an “asylee.” For proof of asylee status, the client should make an InfoPass appointment which can be done only on the CIS website: www.uscis.gov. The appointment should be made no earlier

than 3 weeks from the date of the final order, to insure that the client's file is transferred by ICE to the CIS Office at 300 N. Los Angeles Street in downtown Los Angeles. The client should bring to the InfoPass appointment the original IJ order granting asylum along with identification. At this appointment, CIS should issue the client an I-94, which is a white card that indicates the client's asylee status. Once the client has the I-94, the client can obtain an unrestricted social security card by visiting a social security office.

Right to Work

An asylee is immediately eligible to work in the U.S. and does not need an Employment Authorization Document (EAD). As noted above, an asylee obtains an unrestricted social security card with proof of the asylum grant (the I-94 and identification). Employers must accept the unrestricted social security card as proof of employment authorization. As a practical matter, many asylees choose to obtain an EAD, because employers recognize that document and it is a convenient form of identification. An initial EAD issued to an asylee does not require a fee, but there is a fee to renew the EAD after a year. Remind your clients that the EAD is not required, and asylees should produce the unrestricted social security card when completing an I-9 form for a potential employer. A handout explaining that asylees are not required to have work permits is at Appendix 8F. Asylees should be encouraged to provide a copy of this handout to any potential employers who have questions about the work permit issue.

Right to Obtain Asylee Status for Spouse and Children

An asylee must file an I-730 petition to obtain asylee status for the asylee's spouse and children. The children must have been under 21 on the date the asylum application was initially filed, and the marriage must have been a legal marriage on the date of filing. This form must be filed within two years of the final grant of asylum, regardless of whether family members are residing inside or outside of the United States.

Right to Benefits; Right to Travel

Finally, asylees are eligible for many government benefits unavailable to other immigrants. The lawful receipt of benefits will not prejudice in any way an asylee's right to adjust status to permanent residency and then naturalize. However, for certain benefit programs, an asylee must consult with a benefits expert within 30 days of the grant of asylum. For this reason, when your client is granted asylum you should immediately refer the client to either International Rescue Committee or Catholic Charities and explain the 30 day deadline. Appendix 8E has contact information for both agencies.

Asylees can apply for a Refugee Travel Document to travel abroad to countries other than the country of persecution. However, any travel abroad with a Refugee Travel Document abroad can have serious repercussions, depending on the immigration history of an asylee. While asylees are routinely granted permanent residency, complex issues can arise at the adjustment

stage depending again on an asylee's specific history. Your client should seek legal advice before any travel abroad.

Permanent Residency and Citizenship

An asylee can apply for adjustment of status to lawful permanent residency one year from the date of the asylum grant. A permanent resident will be eligible to seek citizenship five years from the date of the permanent residency grant, or three years if married to a U.S. citizen. The grant of permanent residence is discretionary and the government can deny adjustment of status to asylees for any number of reasons. In practice, adjustment is only denied in rare cases.

Legal Assistance after the Asylum Grant

In short, all of the steps described above require legal expertise. Public Counsel is one of the very few legal service organizations in Los Angeles that can represent asylum seekers. Federally funded legal service agencies cannot represent undocumented immigrants, including applicants for asylum, except under very specific circumstances. Public Counsel thus focuses on representing asylum seekers. Once a client becomes an asylee, we refer the client to other agencies with expertise representing asylees and recommend that you do the same. Legal Aid Foundation of Los Angeles (LAFLA) will assist asylees who were victims of state sponsored torture. LAFLA's intake line is 213 640-3913. For clients who do not qualify for LAFLA's services there are other organizations that will assist, such as Immigration Center for Women and Children (ICWC) and Central American Resource Center (CARECEN). ICWC's contact information is 213 614-1165 and info@icwclaw.org. CARECEN can be contacted at 213 385-7800.¹⁶

Appendix 8D is a closing letter which contains essential referral information. We encourage you to model your own closing letter on our letter. Please note that the sample letter was drafted for affirmative cases. If your client was granted asylum in immigration court include information from Appendix 8C on how to obtain the I-94 card and the initial employment authorization document from CIS. While some volunteer attorneys choose to continue representation in matters arising after the asylum grant, we advise referring out clients for the legal services that are required after a final grant. If you do close a case and provide referral information, make sure your client has a complete copy of her entire asylum application (including supporting evidence), and advise the client to bring this copy to meetings with future legal service providers.

¹⁶ CARECEN offers assistance with post-asylum immigration relief to any asylee, regardless of country of origin. However, clients who will need documents translated from languages other than Spanish, French and Portuguese, must obtain those translations on their own. Prospective clients are asked to come in during walk-in hours on Mondays between 9am and 4pm and on Wednesdays and Fridays between 9am and 12pm. Consultation fee is \$30. CARECEN is located at 2845 West 7th Street, Los Angeles, CA 90005.

C. Final Order of Withholding of Removal (INA §241)b)(3)) or CAT Relief

If your client is granted withholding of removal, or withholding or deferral under CAT, your client can obtain an EAD.

Individuals granted withholding or CAT relief cannot obtain legal status for their spouse and/or children, cannot travel abroad, cannot adjust to permanent residency, and are ineligible for most public benefits. In short, they are granted the right to remain and work in the United States but that is the extent of benefits. If you have questions about these forms of relief, please contact an IRP attorney.

D. Change of Address Form

Regardless of whether your client has been granted relief, all non-citizens must file an AR-11 change of address form whenever they move. Before closing a case, make sure you advise your client of the AR-11 requirement and provide AR-11 forms, which can be downloaded from the CIS website. If your client has a claim pending before the immigration court or the BIA, the client must file an additional EOIR Change of Address form within 5 days of moving.

E. Selective Service

All male residents of the United States, regardless of immigration status, who are between the ages of 18 and 26, must register for selective services. If your male client is within this age range, be sure to instruct the client on this requirement and assist them with registration. Go to <http://www.sss.gov/FSregist.htm> for instructions on how to register.

***Thank you for volunteering with Public Counsel and
protecting the rights of immigrants.***

ACRONYMS AND TERMS

AEDPA	Antiterrorism and Effective Death Penalty Act
AG	Attorney General
AO	Asylum Office(r)
AOS	Adjustment of Status
APSO	Asylum Pre-Screening Officer
BIA	Board of Immigration Appeals
ICE	Immigration and Customs Enforcement
CAT	U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBP	Customs and Border Protection
CFR	Code of Federal Regulation
CIS	Citizenship and Immigration Services
CSPA	Child Status Protection Act
CSC	California Service Center
DED	Deferred Enforced Departure
DHS	Department of Homeland Security
DOE	Date of Entry
DOJ	Department of Justice
DOS	Department of State
D/S	Duration of Status
DV	Domestic Violence
EAD	Employment Authorization Document
EOIR	Executive Office for Immigration Review
EWI	Entry without Inspection
FGM	Female Genital Mutilation
FOIA	Freedom of Information Act
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
IJ	Immigration Judge
INA	Immigration and Nationality Act
INFOPASS	USCIS Online Appointment Scheduling System
INS	Immigration and Naturalization Service
LGBT	Lesbian, Gay, Bisexual and Transgender
LPR	Lawful Permanent Resident
NACARA	Nicaraguan Adjustment and Central American Relief Act
NOID	Notice of Intent to Deny
NSC	Nebraska Service Center
NTA	Notice to Appear
OIL	Office of Immigration Litigation
O/S	Out of Status or Overstay

POE	Port of Entry
PTSD	Post-Traumatic Stress Disorder
Real ID	Real ID Act
SAO	Supervisory Adjudication Officer
SIJS	Special Immigrant Juvenile Status
SSA	Social Security Administration
TA	Trial Attorney
TPS	Temporary Protected Status
TSC	Texas Service Center
TVPRA	Trafficking Victims Protection Reauthorization Act
UNHCR	United Nations High Commissioner for Refugees
USC	United States Citizen
VAWA	Violence against Women Act
VD	Volunteer Departure
VSC	Vermont Service Center
VTVPA	Victims of Trafficking and Violence Protection Act

AGENCIES INVOLVED IN THE ASYLUM PROCESS

Department of Homeland Security (DHS)

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

Executive Office for Immigration Review (EOIR)

- Immigration Court
- Board of Immigration Appeals (BIA)

Office of Immigration Litigation (OIL)

- Represents government in immigration appeals before federal courts

GLOSSARY OF IMMIGRATION TERMS

A

“A” Number: An eight digit number (or nine digits, if the first number is a zero) beginning with the letter "A" that DHS gives to most non-citizens. Note that EOIR now requires all A Numbers to be submitted as nine digit numbers. If your client’s A Number only has eight digits, add a “0” to the beginning of the number.

Adjustment of Status: A process by which a non-citizen in the United States becomes a lawful permanent resident without having to leave the U.S.

Admission: The decision of the DHS to allow a non-citizen at the United States border or international airport or seaport to enter the United States.

Admissible: A non-citizen who may enter the U.S. because he/she is not among the classes of aliens who are ineligible for admission or has a waiver of inadmissibility.

Affidavit of Support: A form (I-134) filed by a U.S. citizen or lawful permanent resident for a non-citizen seeking lawful permanent residence.

Aggravated Felon: One convicted of numerous crimes set forth at INA §101(a)(43). An aggravated felony includes many crimes, but the most common are: (1) drug trafficking--any crime involving distribution, importation or sale of drugs, no matter the amount or the sentence; (2) the crime of theft, robbery or burglary with one year sentence whether imposed or suspended; and (3) the crime of violence with a one year sentence whether imposed or suspended.

Alien: A person who is not a citizen or national of the United States.

Alien Registration Receipt Card: The technical name for a "green card," which identifies an immigrant as having permanent resident status.

Aliens Previously Removed: Ground of inadmissibility, for persons previously removed for anywhere from five years to twenty years depending on prior circumstances.

Aliens Unlawfully Present: Ground of inadmissibility for three years for an individual unlawfully present in the U.S. for more than 180 days but less than one year commencing April 1, 1997 or for ten years if unlawfully present for one year or more.

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

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

Authorized Stay: Non-citizens are generally authorized to stay in the United States until the date on their Form I-94, given to them by a U.S. immigration officer when they entered the United States. If non-citizens wish to stay longer than this date, they may be eligible to file to extend their stay by filing a petition with USCIS. If they overstay the end date of their authorized stay, as provided by the CBP officer at a port-of-entry or USCIS, their visa will generally be automatically be voided or cancelled.

B

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

C

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

Child: “Child” in immigration law 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; or (6) a child who is an orphan. There is a significant amount of case law interpreting these categories. *See* INA §101(b)(1).

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

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

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

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

Credible Fear Interview: The credible fear interview takes place if an alien arrives in the U.S. with false or no documents, and is therefore subject to expedited removal, expresses a fear of persecution or a desire to seek asylum. Applicants who state they are seeking asylum or fear persecution or torture and can establish a “credible fear” of persecution will not be subject to expedited removal. The purpose of the interview is to determine if the alien can show that there is a significant possibility that he or she can satisfy the requirements for asylum. If the applicant establishes a credible fear to an asylum officer, the case is referred for an asylum, withholding of removal, and/or Convention against Torture hearing before the IJ.

D

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

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

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

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

E

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

Entry without Inspection (EWI): Entering the U.S. without being inspected by the DHS, such as a person who crosses the border between the U.S. and Mexico or Canada on foot at a place other than a designated port of entry.

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

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

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

Executive Office for Immigration Review (EOIR): Agency consisting of the immigration courts, the Board of Immigration Appeals, and the Office of the Chief Administrative Hearing Officer within 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.

I

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

Illegal Alien: See "Undocumented."

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

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

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

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

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

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

Immigration Judge (IJ): Presides over removal proceedings.

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

L

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

N

Native: A person born in a specific country.

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

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

Nicaraguan Adjustment and Central American Relief Act (NACARA): Legislation passed by Congress in 1997 to restore the opportunity for certain individuals present in the U.S. to adjust to permanent resident status. The legislation covers Cubans and Nicaraguans, Guatemalans, Salvadorans, and certain East Europeans of former Soviet Bloc Countries. Under the legislation, different requirements apply to each group.

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

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

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

Notice to Appear (NTA): Document issued to commence removal proceedings, effective April 1, 1997.

O

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

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

P

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

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

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

R

Refugee: A person who is granted permission while outside the U.S. to enter the U.S. legally because of harm or feared harm due to his/her race, religion, nationality, political opinion or membership in a particular social group. Unlike an asylum applicant, a refugee must meet this definition while outside the U.S. and enters the U.S. with refugee status.

Relief: Term used for a variety of grounds to avoid deportation or exclusion from the United States.

Removal: Proceedings to enforce departure of persons seeking admission to the U.S. who are inadmissible or persons who have been admitted but are removable. After IRIRA (1996), aliens are placed into removal proceedings instead of deportation or exclusion proceedings.

Rescission: Cancellation of prior adjustment to permanent resident status.

Residence: The principal and actual place of dwelling.

Reasonable Fear Interview: A person subject to expedited removal or reinstatement of removal who expresses a fear of returning to his country of removal will be given a “reasonable fear” interview by an asylum officer. The asylum officer determines whether there is a reasonable possibility that the person would be persecuted on account of his/her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he/she would be tortured in the country of removal. If the applicant is determined to have a reasonable fear, he/she will be referred to an IJ for consideration of withholding of removal or relief under Convention against Torture.

Respondent: The term used for the person in removal proceedings.

S

Service Centers: Offices of the DHS that decide most visa petitions. There are four regional Service Centers for the entire U.S.: the Vermont Service Center (VSC); the Nebraska Service Center (NSC); the Texas Service Center (TSC); and the California Service Center (CSC).

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

Suspension of Deportation: Commonly referred to as "Suspension," this is a way for a non-citizen to become a lawful permanent resident. Historically, suspension was only available to a person in deportation proceedings. A 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 the applicant or the applicant's U.S. citizen or LPR immediate relative will suffer extreme hardship if the applicant is deported. In the Violence Against Women Act, Congress created a new "suspension of deportation" for spouses and children of U.S. citizens or LPRs who can show that they have been victims of domestic violence or sexual abuse. These persons need only prove three years of continuous residence in the U.S.

T

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

U

Unaccompanied Alien Child (UAC): An unaccompanied alien child means a child who (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody. U.S.C. §729(g)(2).

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

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

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

V

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

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

Visa Petition: A form (or series of forms) filed with the DHS by a petitioner, so that the DHS can determine a non-citizen's eligibility to enter the U.S. as an immigrant or nonimmigrant.

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

W

Waiver: The excusing of a ground of inadmissibility by the DHS or the immigration court.

Work Permit: There is no single document in U.S. immigration law that is a "work permit." Citizens, nationals, and lawful permanent residents are authorized to be employed in the U.S. Certain nonimmigrant visa categories include employment in the U.S. Other aliens in the U.S. may have the right to apply for an Employment Authorization Document (EAD).

APPENDICES

Introduction

The samples below have been developed by the staff of Public Counsel's Immigrants' Rights Project for your use as a *pro bono* attorney. Please use the samples to aid you in representing your asylum client. Any sample forms provided here are only current as of October, 2011. You must always check for updated court forms and changes in immigration court procedures by referring to the current version of court forms and the Immigration Court Practice Manual which can be downloaded at www.justice.gov/eoir. In regard to sample briefs, please note that the law is constantly changing and the sample briefs are no substitute for your own research. These briefs will not be persuasive unless made your own, reflecting your client's facts, current law and your unique writing style!