BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS

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[1] Centro Legal de la Raza is greatly indebted to the National Immigrant Justice Center (NIJC) for allowing Centro Legal to modify NIJC's pro bono manual for use by Centro Legal's pro bono attorneys.

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Please Note: This manual is a brief guide to asylum practice and does not purport to discuss all aspects of immigration practice related to asylum proceedings. Additional sources should be consulted when more complex questions regarding current law and procedure arise. Many of these resources are referenced in this manual.

National Immigrant Justice Center
Updated and Modified by Centro Legal de la Raza
March 2016

ACRONYMS AND TERMS

* * *

AG	Attorney General
AO	Asylum Officer
BIA	Board of Immigration Appeals
ICE	Immigration and Customs Enforcement
CAT	Convention Against Torture
CIR	Comprehensive Immigration Reform
DACA	Deferred Action for Childhood Arrivals
DHS	Department of Homeland Security
EOIR	Executive Office for Immigration Review
FOIA	Freedom of Information Act
ICE	Immigration and Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
IJ	Immigration Judge
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
LPR	Lawful Permanent Resident
NOID	Notice of Intent to Deny
NTA	Notice to Appear
SSA	Social Security Administration
TA	Trial Attorney
TPS	Temporary Protected Status
TVPRA	Trafficking Victims Protection Reauthorization Act
UAC	Unaccompanied Alien Child
UNHCR	United Nations High Commissioner for Refugees
USC	United States Citizen
USCIS	United States Citizenship & Immigration Services
VAWA	Violence Against Women Act

INFORMATION ON THE *PRO BONO* PROGRAM

* * *

The National Immigrant Justice Center (NIJC)

Heartland Alliance's National Immigrant Justice Center (NIJC) is a Chicago-based nongovernmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum-seekers through a unique combination of direct services, policy reform, impact litigation and public education. NIJC's asylum *pro bono* project was founded in 1985 and provides legal representation to low-income non-citizens seeking asylum in the United States. The project is now one of the leading asylum representation programs in the country, handling hundreds of affirmative and defensive asylum cases every year before the Chicago Asylum Office, the Chicago Immigration Court, the Circuit Courts of Appeals, and the Supreme Court. Largely as a result of the efforts of its *pro bono* partners, NIJC has helped thousands of asylum-seekers from more than 60 nations begin new lives in the United States. NIJC's asylum project has become a national model for organizations providing immigration legal services. For more information visit www.immigrantjustice.org.

Centro Legal de la Raza (Centro Legal)

Founded in 1969, Centro Legal is a comprehensive legal service agency focused on strengthening low-income, immigrant, and Latino individuals and families by providing culturally competent legal representation, education, and advocacy. Centro Legal provides direct legal services in the areas of immigration, housing, and employment. Centro Legal's immigration practice is focused on serving the needs of the most vulnerable community members, including families living in poverty, asylum seekers, children, victims of violent crimes including domestic violence and detained individuals in removal proceedings. Centro Legal provides comprehensive, full-service direct representation, legal rights education, and client intake through various immigration clinics. Centro Legal and our *pro bono* partners have immediately responded to the 2014 humanitarian crisis of unaccompanied minors and families with young children seeking protection by representing hundreds of young asylum seekers throughout Northern California.

Centro Legal's Clients

Cento Legal's asylum clients are men, women and children who have fled civil wars, violence, and persecution around the globe. Many have survived state-sponsored torture and other persecution. Other clients have been subjected to severe human rights abuses by non-state agents such as guerilla groups and private citizens whom the government in the country of origin is unwilling or unable to control. Through Centro Legal's asylum project, *pro bono* attorneys have saved the lives of clients fearing political, racial, ethnic and religious persecution, gender-based violence, and abuse and discrimination based on sexual orientation. Centro Legal provides representation to asylum-seekers in affirmative and defensive proceedings. Many of Cento Legal's clients are already in removal proceedings at the immigration court - the last step before the United States government will deport them to their countries or origin. In these adversarial proceedings before an immigration judge, an individual who has an attorney has a significantly better chance of winning asylum than an individual who is *pro se*.

What *Pro Bono* Attorneys Can Expect From Centro Legal

Centro Legal understands the majority of its *pro bono* attorneys have limited immigration law experience. Centro Legal's *pro bono* partners report that asylum cases are the most interesting, challenging, and rewarding cases of their careers. Attorneys who accept a Cento Legal case for *pro bono* representation can expect that Centro Legal will provide the support and assistance necessary to capably represent Centro Legal clients.

Centro Legal provides *pro bono* attorneys with:

- basic asylum trainings offered about once every three months. Centro Legal offers advanced asylum trainings on emerging issues in asylum law several times a year. Centro Legal may also provide specialized training sessions upon request.

- information regarding immigration law, practice, and procedure; sample applications, motions, and pleadings; documentation; and other case resources.

- consultation with experienced Centro Legal practitioners regarding case-related questions, theories, and trial strategies. Centro Legal attorneys remain current on immigration law, policy, and practice, and frequently serve as faculty at local and national immigration law trainings.

- professional liability insurance. Centro Legal carries comprehensive professional liability insurance, which specifically covers its *pro bono* attorneys.

- involvement in ground-breaking legal issues and opportunity to interact with clients from different cultural, ethnic, religious, and socio-economic backgrounds.

- unique litigation experience, with opportunities to represent clients before a federal agency or the U.S. circuit courts of appeals.

- exceptional legal experience that will enhance a *pro bono* attorney's career development.

What Centro Legal Expects from *Pro Bono* Partners

Centro Legal clients' lives are quite literally at stake in asylum proceedings. For that reason, Centro Legal treats every case very seriously asks that *pro bono* partners to do the same.

Centro Legal asks that *pro bono* attorneys agree:

- to attend the next available Centro Legal training, if the attorney has not already attended a training.

- to provide representation on a case for its duration. This means through completion of the adjudication on the merits of the claim, and if necessary, at the appellate level before the Board of

Immigration Appeals (BIA). When federal court appeals become necessary, Centro Legal asks that the representing firm consider remaining involved.

- to transfer representation of the case to another attorney in the partner firm if the *pro bono* attorney is compelled to withdraw representation for any reason other than the emergence of a conflict of interest or a termination of representation due to client misconduct. Centro Legal is unable to absorb *pro bono* cases in-house, except in very limited circumstances.

- to inform Centro Legal of any transfer of representation within the firm or of the addition of attorneys to the legal team assigned to the case.

- to keep Centro Legal informed of the status of the case. Centro Legal maintains an agreement with every client referred for *pro bono* representation and remains "of counsel." Many federal asylee benefits are only available for a very short period of time after the asylum approval, so it is critical that *pro bono* partners inform Centro Legal of case adjudications immediately.

- to contact Centro Legal if the client appears eligible for another immigration benefit. *Pro bono* attorneys should understand that applying for other immigration benefits may impact the client's case.

- to contact Centro Legal if the client requests assistance regarding other legal matters. Centro Legal's involvement in the case is limited to asylum matters. Cento Legal is unable to provide technical support on other legal matters. If a client becomes eligible for another immigration benefit, Cento Legal may execute a supplementary retainer with the client to assist in seeking that benefit.

- to contact Centro Legal before speaking with the media or any members of Congress about the case. Centro Legal is actively involved in immigration policy and advocacy efforts at the state and national levels, and with local and national media. Coordinating with Centro Legal will ensure that any advocacy efforts achieve the best possible result for the client.

First Steps

Centro Legal recommends *pro bono* attorneys take the following steps upon receipt of a case:

Contact the client. Centro Legal advises contacting the client when her case has been assigned to a *pro bono* attorney. Often, clients have waited months for assignment to an attorney and are eager to hear from their new lawyers.

Review the file in full. When possible Centro Legal attempts to obtain relevant documentation from clients prior to case acceptance and will share these documents when assigning a case to a *pro bono* attorney. Upon review of the file, *pro bono* attorneys will likely identify additional documents that would be useful in supporting the asylum claim and should begin working with the client to obtain these documents.

Review the Notice to Appear. If the client's case is before the immigration court, the judge will require a response to the charging document known as the Notice to Appear (NTA) at the initial hearing. Carefully review the allegations and charges on the NTA with the client to ensure accuracy. Errors on the

NTA can be extremely detrimental and should be discussed with the government trial attorney and the judge at the hearing.

Review any pre-existing asylum applications. If the client applied affirmatively with the asylum office and was referred to the immigration court, be sure to review the existing application carefully with the client. Often, language barriers and the absence of counsel at the affirmative stage result in the inclusion of erroneous information in the first application. The immigration court record will contain any previously filed asylum application and errors in the application may generate problems in the court adjudication. Minor corrections can be made to the application in the form of written or oral amendments. If the original application contains significant errors, the *pro bono* attorney may wish to request leave from the court to file a superseding application. Bear in mind that any inconsistent information contained in a previous application will need to be explained to the court and may be included in the judge's credibility assessment.

Submit a FOIA request to obtain the client's full immigration file. If the client was referred to the court from the asylum office, was subject to a credible fear determination upon entry to the United States or has any time applied for any immigration benefits or given statements to immigration officials, the *pro bono* attorney should request a copy of the client's government immigration file through the Freedom of Information Act (FOIA). The response to a FOIA request may reveal documents in the government file that could be used for impeachment purposes during the client's trial. FOIA requests from clients in removal proceedings receive expedited treatment. For clients not in removal proceedings, a response may take a year or more. See the "Additional Information" section of this manual for FOIA instructions.

Review the Court Practice Manuals. If the client's case is before the immigration court, the Immigration Court Practice Manual, available at www.usdoj.gov/eoir, describes the procedures and requirements for immigration court practice. The Practice Manual is binding on all parties who appear before the immigration court, unless the immigration judge directs otherwise in a particular case. If a client's case is before the Board of Immigration Appeals, review the BIA Practice Manual, also available at www.usdoj.gov/eoir.

File an Appearance and Register with EOIR. If the client's case is before the immigration court, register with the Executive Office for Immigration Review (EOIR) and file an E-28 appearance form with the Court and the Immigration and Customs Enforcement (ICE) Office of the Chief Counsel as soon as possible. Since June 10, 2013, all attorneys practicing before EOIR (which includes the immigration courts and the Board of Immigration Appeals) must register with EOIR. Registration includes both an online and in-person component. Attorneys with cases currently pending before the Court who have not yet completed the registration process must do so immediately. To register with EOIR, please go to www.usdoj.gov/eoir.

THE BASICS OF ASYLUM LAW

* * *

Background

Federal law provides that any individuals who have suffered or fear persecution in their home countries based on their race, religion, nationality, political opinion or social group can apply for asylum in the United States. This right to seek protection is set forth in 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. U.S. Congress codified refugee and asylee protection in 1980 through the Refugee Act.

To qualify for asylum, the applicant must be physically present in the United States. Asylum may be granted to an applicant who establishes past persecution or a well-founded fear of future persecution in the country of origin on account of the applicant's race, religion, nationality, political opinion, or membership in a particular social group. The persecution must be inflicted by the government of the country of origin or an entity the government is unwilling or unable to control. Additional factors, such as the ability to relocate within the country of origin or firm resettlement in another country, may make asylum nonviable. Asylum is a discretionary benefit. In exercising discretion, the adjudicator can take into account negative factors, including violations of immigration law or criminal law.

A grant of asylum conveys significant benefits to the recipient. Unless an asylee commits a serious crime or otherwise violates her status, she cannot be removed from the United States unless the government can show that there has been a "fundamental change in circumstances [in the home country] relating to the original claim…" such that she may no longer be in danger upon return. 8 C.F.R. § 208.24. An asylee is authorized to work and may apply to adjust status and obtain lawful permanent residence (LPR) status one year after the grant of asylum. Further, an asylee is able to petition for and provide asylee status to her spouse and any unmarried children who were under the age of 21 at the time the asylum application was received by the government. These family petitions must be filed within two years of the grant of asylum.

The Department of Homeland Security (DHS), through U.S. Citizenship & Immigration Services (USCIS), adjudicates affirmative requests for asylum. The Department of Justice, through the Executive Office for Immigration Review (EOIR) holds jurisdiction over asylum applications pending in removal proceedings.

AGENCIES INVOLVED IN THE ASYLUM PROCESS

Department of Homeland Security (DHS)

- United States Citizenship and Immigration Services (USCIS) – which houses the Asylum Office (AO)
- Immigration and Customs Enforcement (ICE)
- Customs and Border Patrol (CBP)

Department of Justice (DOJ)

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

Jurisdiction Over Asylum Applications

Jurisdiction over an asylum application is determined by whether or not the applicant is in removal proceedings. An asylum-seeker who is not in removal proceedings applies for asylum *affirmatively* with the USCIS asylum office regardless of whether she entered the United States with permission or remains in lawful status. If USCIS declines to approve the asylum application and the applicant is not in some form of lawful immigration status, the application is referred to the immigration court and removal proceedings commence. At this point, jurisdiction over the asylum application shifts to the immigration court.

If an individual is arrested by the DHS or otherwise placed in removal proceedings (e.g. upon referral from USCIS), she must apply for asylum *defensively* with the immigration court. There the asylum application serves as a defense against removal and the court has exclusive jurisdiction.

Legal Test for Asylum/Refugee Protection

The Immigration and Nationality Act (INA) sets forth the legal test for asylum eligibility. If an asylum applicant meets the definition of a refugee, the application may be granted. 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). Accordingly, individuals may qualify for asylum if they can prove:

1. a well-founded fear
2. of persecution
3. perpetuated by the government or an entity the government cannot or will not control
4. on account of
5. one of the five protected grounds[2]

Legal Test For Well-Founded Fear

In order to establish a "well-founded fear" of persecution, an asylum applicant need only show a *reasonable possibility* that she will be persecuted. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). An applicant who establishes past persecution by the government (or an entity the government cannot or will not control) on account of one of the five protected grounds has met that test and established a rebuttable presumption that she has a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1).

An applicant can also established asylum eligibility by demonstrating an independent well-founded fear of future persecution, *i.e.*, a reasonable possibility that she *will be* persecuted by the government (or an

[2] Centro Legal recommends that attorneys structure their legal memoranda or briefs around these five elements.

entity the government cannot or will not control) on account of one of the five protected grounds. 8 C.F.R. § 208.13(b)(2); *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007).

The Supreme Court has stated that the following is sufficient to establish a well-founded fear:

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

Cardoza-Fonseca, 480 U.S. 421.

Definition of Persecution

Neither the INA nor accompanying regulations define persecution. Guidance concerning persecution is thus found exclusively in case law. The Ninth Circuit has stated that persecution is "… 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 omitted); see also *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313 (9th Cir. 2012); *Li v. Holder*, 559 F.3d 1096, 1107 (9th Cir. 2009). Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution. See *Chand v. INS*, 222 F.3d 1066, 1073-74 (9th Cir. 2000). Threats of serious harm, particularly when combined with confrontation or other mistreatment, may constitute persecution. See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120-21 (9th Cir. 2004). "Threats on one's life, within a context of political and social turmoil or violence, have long been held sufficient to satisfy a petitioner's burden of showing an objective basis for fear of persecution." *Kaiser v. Ashcroft*, 390 F.3d 653, 658 (9th Cir. 2004).

However, physical harm is not required for a finding of persecution. *Kovac v. INS*, 407 F.2d 102, 105-07 (9th Cir. 1969). "Persecution may be emotional or psychological, as well as physical." *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) ; see also *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004).

The cumulative effect of harms and abuses that might not individually rise to the level of persecution may support an asylum claim. See *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998). The court "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); *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007). As a result, various types of harm that do not amount to persecution in isolation may be considered persecution when taken in the aggregate. Such harms might include:

1. arbitrary interference with a person's privacy, family, home or correspondence;
2. enforced social or civil inactivity;
3. passport denial; and/or
4. constant surveillance.

Also important to consider is the applicant's age at the time of the persecution. "Age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution." Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1045 (9th Cir. 2007) (internal quotation marks and citation omitted). An infant or young child may have suffered persecution even if there is no memory of the events. Mendoza-Pablo v. Holder, 667 F.3d 1308, 1312-15 (9th Cir. 2012)

Government Actor

In order to qualify for asylum, an applicant must establish that the persecution she suffered or fears was or will be perpetrated by either the government, a quasi-official group or a group the government cannot or will not control. *Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000).Thus, an applicant can establish asylum eligibility by showing her persecution was inflicted by a group – or even society at large – that the government refuses to control because it condones or tolerates the groups' activities (such as women who perform female genital mutilation, abusive spouses, or paramilitary groups) or by a group that the government cannot control because the group is too powerful (such as gangs or guerilla groups). The Board of Immigration Appeals has found that an applicant established asylum eligibility based on persecution by a non-government entity even where she did not request governmental protection because the evidence demonstrated that if she had requested help, the authorities would have been unable or unwilling to control her persecutor and requesting protection would have placed the applicant at a greater risk of harm. *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000).

The Nexus

An applicant must show a nexus between the persecution and one of the protected grounds of asylum: race, religion, nationality, political opinion, or membership in a particular social group. In addition, the applicant must establish that the protected ground(s) "was or will be *at least one central reason* for persecuting the applicant." INA § 208(b)(1)(B)(i); *INS v. Elias-Zacarias*, 502 U.S. 478, 481-82 (1992); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010)[3]. To meet this "one central reason" requirement, applicants should demonstrate a clear nexus between the persecution and the protected ground and should take care to consider and highlight all direct and circumstantial evidence in the case which demonstrates nexus. Nexus can be established through either direct or circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

It is important to note that the nexus element is distinct from the protected grounds and the two elements require separate analyses. Thus, the question of whether an applicant holds a political opinion or belongs to a particular social group is completely separate from the question of whether the applicant was persecuted on account of her political opinion or membership in a particular social group.

The Five Protected Grounds for Asylum

The first three protected grounds of asylum (race, religion, and nationality) have 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.

[3] The REAL ID Act (P.L. 109-13) added the "one central reason" burden of proof to asylum claims. Therefore, this burden only applies to asylum applications filed on or after May 11, 2005.

2. RELIGION

Persecution on account of religion can include the prohibition of public or private worship, membership in a particular religious community, or religious instruction. UNHCR Handbook ¶ 72. Serious discrimination towards a person because of her membership in a particular religion or religious community may also constitute persecution on account of religion. *Id.*

3. NATIONALITY

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

4. POLITICAL OPINION

An applicant's *actual* political opinion may constitute a protected ground. Additionally, a political opinion *imputed* onto the applicant may be recognized to establish a protected ground. An "imputed opinion" is an opinion that the persecutor believes the applicant to hold.

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

5. SOCIAL GROUP

"Social group" is a broad and evolving concept. Generally, it is understood as a group of people who share or are defined by certain immutable characteristics such as age, geographic location, class background, ethnic background, family ties, gender, and sexual orientation.

The Board of Immigration Appeals has said that members of a particular social group must share a "*common immutable characteristic.*" *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). That characteristic should be something the group cannot or should not be required to change. *Id.* A "particular social group" is one "united by a voluntary association, including a former association, *or* by an 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*, 225 F.3d at 1092-93 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc).

The Board subsequently added the additional requirements of "social visibility" and "particularity" to the particular social group definition. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

In 2013, the Ninth Circuit issued a critical *en banc* decision regarding the particular social group definition in the case of *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc). The Ninth Circuit determined that social visibility did not mean literal, on-sight visibility, but instead, whether the group would be perceived as a group or recognized as a group. Construed in this way, the Court found that the social visibility test would not directly conflict with prior agency precedent. The Court then noted that even with this interpretation of the term "social visibility," it is still unclear whose perspective

is relevant. Although the Court left this question to the BIA to decide in the first instance, the Court noted that it believes the perception of the persecutors may matter the most

The Court did not address the question of exactly how an asylum applicant – particularly a pro se applicant – would be able to establish that society or her persecutors recognize her group as a group. Women who have not been circumcised in a country that practices female circumcision may be viewed as a distinct group by others in that country, but it's unclear exactly how an applicant can prove that fact without providing an affidavit from a country expert or sociologist.

As for the particularity test, the Court recognized that its precedent and the BIA's precedent has conflated the social visibility and particularity tests at times. The Court determined that the particularity test is still relevant for considering "whether a group's boundaries are so amorphous that in practice, the persecutor does not consider it a group," but particularity is "merely one factor as to whether a collection of individuals is considered to be a particular social group in practice." To the extent that the Court's prior precedent had held that witness-based social groups failed the particularity test because the groups were not sufficiently homogenous, *see Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009) and *Velasco-Cervantes v. Holder*, 593 F.3d 975 (9th Cir. 2010), they are overruled.

However in February 2014 in a pair of published decisions, the Board of Immigration Appeals ("BIA") held that a particular social group must be "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *see also Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). According to the Board, the particularity requirement means that a group must be discrete and have definable boundaries; it cannot be made up of broad and diverse members. *M-E-V-G-*, 26 I&N Dec. at 239. To meet the social distinction requirement, the group need not be literally visible, but it must be recognized as a group by society. *Id.* at 240.

As the sharp contrast between these decisions makes clear, particular social group case law has changed dramatically in recent years and continues to evolve. Because particular social group case law has grown more restrictive, asylum claims based on membership in a particular social group have become increasingly complex. **It is therefore crucial that attorneys representing Centro Legal clients with particular social group-based asylum claims contact Centro Legal to strategize the best social group definitions for their client.** The specific social group definition used in a case is often the main factor that determines whether or not an asylum claim will be successful.

Asylum Claims Involving Gender Violence

Women often experience human rights abuses that are particular to their gender. These include rape, molestation, domestic violence, female genital mutilation/circumcision, forced marriage, honor killing, sexual harassment and sexual slavery. Many of the serious harms faced by women occur in the private realm of the home and family. In addition, of the five protected grounds for asylum (race, religion, nationality, membership in a particular social group, and political opinion), women typically experience these forms of persecution because of their membership in a particular social group related to their gender. Many adjudicators reject gender-based social groups on policy grounds as being too broad or as creating floodgate concerns. Consequently, it remains a challenge for attorneys to convince many adjudicators to recognize applicants with these claims as falling within the definition of a refugee, even under the most compelling circumstances In *Matter of Acosta*, 19 I&N Dec. 211(BIA 1985), the seminal

case regarding membership in a particular social group, the Board defined the term "particular social group" as a group that shares a characteristic that members cannot change or should not be required to change. In *Acosta*, the Board explicitly listed gender as an example of an immutable characteristic that can form the basis of a particular social group. Therefore, under the *Acosta* test, gender alone should be sufficient to form a cognizable social group. Like the other protected grounds for asylum (race, religion, nationality, and political opinion), membership in a particular social group is determined by the shared trait and not limited by number.

Historically, advocates representing women with gender-based claims often created complex and elaborate social groups for their clients in an attempt to avoid the perception that the group is overly broad. Centro Legal encourages *pro bono* attorneys to avoid this practice and to instead make particular social group arguments based on *Acosta*, in which the only requirement for a cognizable social group is that the group be based on an immutable characteristic that the group's members cannot or should not be required to change. Centro Legal hopes that as more advocates create social groups based on a pure reading of *Acosta*, adjudicators will begin to accept them as viable and move away from the current scheme of overly narrow and often convoluted particular social group construction.

The Department of Homeland Security ("DHS") and the Board of Immigration Appeals ("BIA") have recognized that women who have been the victims of domestic violence and other forms of gendered violence (such as rape) are be eligible for asylum on account of their membership in a particular social group. In 2008, the Attorney General ordered that the case of *Matter of R-A-* be remanded back to the Board. *Matter of R-A-*, 24 I&N Dec. 629 (A.G. 2008). The Board in turn remanded the case to the IJ, and in December 2009 the respondent in that case – a Guatemalan woman whose claim was based on the domestic abuse she suffered at the hands of her partner – was finally granted asylum after fighting her case for 14 years.

DHS and the courts have also recognized that a Mexican woman in an abusive domestic relationship may qualify for protection based relief. DHS, in its April 2009 brief in *Matter of L.R.*, an asylum case involving a Mexican women who was abused by her domestic partner, states, "DHS accepts that in some cases, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership." See attached. Possible social group formulations proposed by DHS include: 1) Mexican women who are viewed as property by virtue of their positions within a domestic relationship; 2) Mexican women in domestic relationships who are unable to leave. The respondent in *Matter of L.R.* was granted asylum in August 2010.

In the DHS brief in *Matter of L-R-*, DHS provided a framework for analysis of domestic violence claims that outlines the two above particular social group formulations which address both the immutable or fundamental characteristic required for a showing of membership as well as the more recent requirements of particularity and social visibility. In addition, the brief sets forth a framework on *how* to establish social group membership in a domestic violence. The brief goes on to define certain contours of a successful claim as they relate to country conditions information; including social and legal norms which tolerate and accept violence against women, the inability or unwillingness on the part of the government to protect victims, and the absence of a place within the home country where the woman could move in order to escape her persecutor. These elements mirror to some extent existing asylum requirements but bring them into focus in the domestic violence context.
The Ninth Circuit found that Guatemalan women as a class could in fact be a cognizable social group formulation and remanded to the BIA for further proceedings consistent with its opinion. *Perdomo v. Holder*, 611 F.3d 662 (9th Cir 2010). The court found that the BIA had never decided in a precedential

decision whether gender alone could be the basis for a cognizable social group and that it had failed to follow its own case law in its analysis. *Id*. at 669. The court held that the BIA erred in dismissing the social group formulation as being overbroad and diverse. The court found the BIA had misread Ninth Circuit case law which does allow for broad and diffuse social groups so long as they share the required immutable or fundamental characteristic. The court allows for the possibility of a Guatemalan woman forming a social group based on gender and nationality alone, without other defining elements, given that in other cases broad and diverse groups have been recognized. *Id*. at 667.

The BIA recently found that married women in Guatemala who are unable to leave their relationship constitute a particular social group. Matter of A-R-C-G, 26 I & N Dec. 388 (BIA 2014).

Past Persecution

If an applicant establishes that she experienced past persecution on account of a protected ground by the government or an entity the government cannot or will not control, she is presumed to possess a well-founded fear of future persecution. 8 C.F.R. §208.13(b)(1); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). At that point, the burden shifts to the government to establish by a preponderance of the evidence that conditions in the country of origin have changed such that the applicant no longer has a well-founded fear, or that it would be reasonable for the applicant to move to another part of the country to avoid persecution. 8 C.F.R. §208.13(b)(1)(i).

If the government succeeds in establishing changed country conditions or the reasonableness and safety of internal relocation, the applicant may still be afforded so-called "humanitarian" asylum protection if she can demonstrate (a) compelling reasons for being unwilling or unable to return arising out of the severity of the past persecution or (b) a reasonable possibility of suffering other serious harm. *See* 8 C.F.R. § 208.13(b)(1)(iii); *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012); *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008); *Chen*, 20 I&N Dec. 16. The "other serious harm" must rise to the level of persecution, but it need not be based on one of the five enumerated grounds. *Id.; L-S-*, 25 I&N Dec. 705. This form of asylum is only available to asylum applicants who establish past persecution on account of a protected ground by the government or an entity the government cannot or will not control. It is not available for withholding of removal applicants.

Internal Relocation

If an applicant has a presumed well-founded fear of future persecution based on past persecution, the government may overcome the presumption by establishing by a preponderance of the evidence that the applicant could avoid future persecution by relocating to another part of the home country and that such relocation is reasonable. 8 C.F.R. §208.13(b)(2)(ii). If the applicant has not suffered past persecution, it is the applicant's burden to demonstrate she could not avoid persecution by relocating and/or that relocating would not be reasonable. 8 C.F.R. §208.13(b)(3)(i). However, if the feared persecutor is the government, relocation is presumed unreasonable unless the government can prove otherwise by a preponderance of the evidence. 8 C.F.R. §208.13(b)(3)(ii).

In determining whether the applicant could relocate, the adjudicator must first examine whether safe relocation is possible, and if so, whether it would be reasonable to expect the applicant to relocate. Kaiser v. Ashcroft, 390 F.3d 653, 659 (9th Cir. 2004) (quoting 8 C.F.R. § 1208.13(b)(2)(ii)). The reasonability of internal relocation should be examined in light of ongoing civil strife; government infrastructures; geographical limits; and social or cultural constraints. 8 C.F.R. §208.13(b)(3).

Future Fear Only Claims

If an applicant has not suffered past persecution or if her future fear of persecution has been rebutted, the applicant must establish an independent well-founded fear of future persecution. In a future-fear only claim, an applicant must demonstrate the same asylum elements as an applicant with a past persecution claim: persecution by the government or an entity the government cannot or will not control on account of a protected ground. However, because the asylum claim is only forward looking, the applicant must also demonstrate both a subjective and objective fear of persecution. *Cardoza-Fonseca*, 480 U.S. 421; *Halim v. Holder*, 590 F.3d 971, 976 (9th Cir. 2009).

To satisfy the subjective component in a future fear only claim, the applicant must show that she genuinely fears returning to her country of origin. The objective prong of a future fear-only claim can be established one of two ways. First, the applicant can establish that a reasonably possibility – or at least a 10 percent chance - exists that she will be "singled out individually for persecution" by the government or an entity the government cannot or will not control on account of a protected ground. 8 C.F.R. § 208.13(b)(2)(iii). Second, the applicant can establish that "there is a pattern or practice" in her home country "of persecution of a group of persons similarly situated to the applicant on account of" the protected grounds and the applicant establishes her "inclusion in, and identification with, such group of persons such that . . . her fear of persecution upon return is reasonable." 8 C.F.R. § 208.13(b)(2)(iii); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004).

As with an asylum claim based on past persecution, an applicant with an independent fear of future persecution is not eligible for asylum if she could avoid persecution by relocating to another part of her country of nationality, "if under all the circumstances it would be reasonable to expect the applicant to do so." 8 C.F.R. §208.13(b)(2)(ii). If the persecutor is a government or is "government-sponsored," it is presumed that internal relocation would not be reasonable. 8 C.F.R. § 208.13(b)(3)(ii).

ALTERNATIVES TO ASYLUM

* * *

Withholding of Removal

Another protection available to individuals fleeing persecution is withholding of removal. INA §241(b)(3). Withholding of removal is a non-discretionary form of relief from removal that is available to applicants who establish it is more likely that not they will face persecution in their country of removal by the government or an entity the government cannot or will not control on account of one of the protected grounds (i.e. race, religion, nationality, political opinion, membership in a particular social group). Withholding may be an appropriate alternative to asylum if: 1) is ineligible for asylum based on one of the bars listed below, including the one-year filing deadline; or 2) there are negative factors in the client's past such as a criminal history that are not felonious but which make discretionary grant of asylum questionable.

The application for withholding of removal is the same as the application for asylum (Form I-589). One automatically applies for both forms of relief concurrently when submitting the asylum application. Because withholding of removal means that an individual's removal has been withheld, withholding can only be granted *after* an immigration judge orders an individual removed. In a withholding case, the immigration judge will typically issue a decision ordering the client removed and then state that he is ordering that removal be withheld.

The benefits attendant to a grant of withholding of removal are limited. An individual who is granted withholding of removal cannot be removed from the United States to the country from which she was fleeing persecution, but can be removed to a safe third country if one is available. The individual can obtain work authorization – which is renewable annually. However, she may not petition to extend status to a spouse or children. Also, the individual is not permitted to adjust status to legal permanent residency, apply for citizenship, or travel outside the United States.

Legal Standard for Withholding of Removal

In order to satisfy the test for withholding of removal, an individual must show a clear probability of persecution by the government or a group the government cannot or will not control on account of one of the protected grounds. *INS v. Stevic*, 467 U.S. 407 (1984). This is a more difficult burden (P>50%) to meet than for asylum. As in asylum law, however, if an individual can show she suffered persecution in the past, she benefits from a rebuttable presumption of future persecution. Withholding of removal is mandatory if the individual meets the above clear probability test and establishes that she is not barred.

Convention Against Torture

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[4] prohibits the return of a person to a country where substantial grounds exist for

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

believing that she would be subjected to torture. *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. Additionally, unlike asylum and withholding of removal, an applicant for CAT relief is not required to establish her fear of torture is on account of race, religion, nationality, political opinion, or membership in a social group.

Regulations create two separate types of protection under CAT. *See* 8 C.F.R. §§ 208.16, 208.17. **Attorneys requesting CAT relief should be sure to request both types of CAT protection.** The first type of protection is withholding of removal under CAT. Withholding under CAT prohibits the return of an individual to her home country. It can only be terminated if the individual's case is reopened and DHS establishes the individual is no longer likely to be tortured in her home country. The same bars to withholding of removal exist for withholding of removal under CAT.

The second type of protection is called deferral of removal under CAT. There are no bars to deferral of removal under CAT. As a result, individuals will typically only receive deferral under CAT if they would likely be subject to torture, but are ineligible for asylum or withholding of removal due to the persecutor bar, the terrorism bar, or one of the crime-based bars. Deferral of removal under CAT is terminated more quickly and easily than withholding of removal. DHS may continue to detain an individual granted deferral of removal under CAT.

Like withholding of removal, CAT relief can only be granted after an immigration judge has ordered an individual removed. Also like withholding, the benefits of CAT are limited. An individual granted CAT relief cannot be removed from the United States to the country where she fears torture, but can be removed to a third country if one is available. The individual may not adjust her status to legal permanent residency or extend her status to family members. CAT holders can obtain work authorization.

Definition of Torture

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity. CAT, Art. 1., 8 C.F.R. § 208.18. The BIA has found that torture "is an extreme form of cruel and inhuman punishment and does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment." *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). The BIA has also found that indefinite detention, without further proof of torture does not constitute torture under this definition. *Id.*

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

CAT Standard of Proof

The standard of proof under the CAT is higher than the standard for asylum. The alien must prove that it is "more likely than not" she would be tortured if forced to return. *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002). The evidentiary proof required for CAT is very similar to the proof for asylum or withholding claims. All relevant considerations are to be taken into account, including, where applicable, the existence in the State concerned of a "consistent pattern of gross, flagrant or mass violations of human rights." *S-V-*, 22 I&N Dec. at 1313.

Procedure for Raising CAT Claims

Individuals seeking relief under the CAT must bring their claims before an immigration judge. The attorney requests relief under withholding of removal and CAT by checking the "CAT" box in the upper right-hand corner of the first page of the I-589 and by selecting CAT in response to the question regarding protected grounds. When applying for CAT relief, the attorney should be sure to provide evidence demonstrating that the client meets the definition of torture under 8 C.F.R. § 208.18. The attorney should also be sure to thoroughly brief the CAT elements in her brief because the elements are significantly different from the asylum elements.

In nearly every case, Centro Legal strongly recommends that an attorney request CAT relief as well. If a client has already filed for asylum, but did not request withholding of removal and CAT, the *pro bono* attorney should amend and supplement the application. Since CAT relief is not as beneficial as asylum, Centro Legal recommends that CAT be sought in the alternative, while concurrently seeking asylum. *Pro bono* attorneys with concerns about requesting CAT relief for their Centro Legal client should contact Centro Legal.

Voluntary Departure

Voluntary departure permits a removable individual to depart from the United States at her own expense within a designated amount of time in order to avoid a final order of removal. INA § 240B. Voluntary departure is not available in all cases. INA § 240B(c). Generally, Centro Legal does not recommend that individuals who maintain a fear of persecution or torture seek voluntary departure.

Voluntary departure may be appropriate in certain instances and may be preferable to a removal order. If an individual is issued a removal order she may be barred from reentering the United States for up to ten years and may be subject to civil and criminal penalties if she reenters without proper authorization. In addition, an individual with a removal order is barred for ten years from applying for cancellation of removal, adjustment of status, and other immigration benefits. If the individual receive voluntarily 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. However, if an individual receives a grant of voluntary departure and subsequently fails to timely depart, the legal repercussions are worse than those attendant to a removal order. INA §240B(d). If individual receives voluntary departure and subsequently moves to reopen her removal proceedings, the grant of voluntary departure is automatically revoked. 8 C.F.R. § 1240.26(e)(1).

An individual may apply for voluntary departure either prior to the master calendar hearing or at the conclusion of proceedings.

Master Calendar Hearing

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

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

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

Conclusion of the Merits Hearing

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

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

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

BARS TO ELIGIBILTY FOR ASYLUM, WITHHOLDING AND CAT

* * *

***Pro bono* attorneys who identify any of these conditions in their cases should contact CENTRO LEGAL.**	Bars Asylum?	Bars Withholding/ Withholding under CAT?	Bars Deferral under CAT?
One-Year Filing Deadline Bar: See explanatory section below. INA §208(a)(2)(B); 8 C.F.R. §§ 208.4, 208.34.	Yes	No	No
Persecutor Bar: Individuals who have persecutor another on account of one of the protected grounds. INA § 208(b)(2)(A)(i).	Yes	Yes	No
Terrorism Bar: See the explanatory section below. INA § 208(b)(2)(A)(v).	Yes	Yes	No
Particularly Serious Crime (PSC) Bar: Individuals convicted of a "particularly serious crime. For asylum purposes, any aggravated felony (as defined under immigration law, *see* INA § 101(a)(43)) constitutes a PSC. For withholding/withholding under CAT purposes, an aggravated felony constitutes a PSC if the aggregate term of imprisonment sentenced was at least five years. Immigration judges also have the authority to define non-aggravated felony crimes as PSCs. *See* CENTRO LEGAL's Detention Supplement for more information regarding the impact of a criminal history on applications for asylum and withholding of removal. INA §§ 208(b)(2)(A)(ii), 208(b)(2)(B), 241(b)(3)(B)(ii).	Yes	Yes	No
Serious Non-Political Crime Outside the U.S. Bar INA § 208(b)(2)(A)(iii).	Yes	Yes	No
"Danger to the Security of the United States" Bar INA § 208(b)(2)(A)(iv).	Yes	Yes	No
Firm Resettlement Bar: Individuals who are *firmly resettled* within the meaning of 8 C.F.R. §208.15. INA §208(b)(2)(A)(vi); *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012); *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).	Yes	No	No
Previous Asylum Denial Bar: Individuals who *previously filed for asylum* and were denied. INA §208(a)(2)(C)	Yes	No	No
Safe Third Country Bar: Individuals who *may be removed pursuant to a bilateral or multilateral agreement to a safe third country*, unless the Attorney General finds it in the national interest to grant asylum. INA §208(a)(2)(A). At present, the United States only has a safe third country agreement with Canada.	Yes	No	No

The One-Year Filing Deadline

All applicants must file their asylum applications within one year of their entry into the United States.[5] Applicants must prove by clear and convincing evidence that they have filed their asylum application within one year since their arrival in the United States or to the satisfaction of the Asylum Officer or immigration judge that they qualify for an exception to the deadline. *See* 8 C.F.R. § 208.4(2)(A). Regulations provide that the one-year deadline assessment should be made on a case by case basis by the immigration judge or the Asylum Officer. *See* 8 C.F.R. § 208.4(a)(2) and (a)(5); *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010). The one-year deadline is extremely harsh, but there are some exceptions, as follows:

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

    The burden is on the applicant to prove the changed circumstances. The applicant must file the application within a reasonable time after the applicant becomes aware of the change in circumstances.

2. If there are "extraordinary circumstances" that the applicant had no control over that kept the applicant from filing for asylum within a year of entry into the United States. For example:
    1. serious illness;
    2. a long period of mental or physical problems, including those due to violence against the applicant or persecution suffered;
    3. the applicant is under age 18 and living without parent or legal guardian; *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002)[6]
    4. ineffective assistance of counsel, i.e., the applicant had a lawyer but the lawyer did not provide notice of the one-year deadline;
    5. the applicant was in some other lawful status until a reasonable period before the asylum application was filed.
    6. the application was filed within one year of arriving, but was returned for some reason and soon filed again.

The burden is on the applicant to prove extraordinary circumstances. The circumstances must be directly related to the applicant's failure to file the application within one year. *See* 8 C.F.R. §208.4(a)(4). The applicant must also file the application within a "reasonable" time (generally interpreted to mean less than six months) after the she becomes aware of the change in circumstances.

[5] For asylum applicants who entered the United States prior to April 1, 1997, the deadline for applying was April 1, 1998.

[6] Pursuant to the TVPRA, unaccompanied alien children are not subject to the one-year filing deadline during the time that they are unaccompanied and under 18 years old.

CALCULATING THE ONE-YEAR DEADLINE

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

For defensive applications filed with the immigration court, the day the application is received by the court in open proceedings will be considered the filing date.[7]

To timely file an asylum application, USCIS or the immigration court must receive the application the day before the date of entry, in the following year. For example an applicant who enters on February 1, 2010 must make sure his application is received by January 31, 2011. Applications received on February 1 will not be considered timely.

Practice Tip:
If a client does not have proof of her date of entry, her pro bono attorney should file the I-589 within one year of a date before she entered the United States for which she does have proof. E.g., if the client has proof of a date she was in Mexico before she entered the United States; file the I-589 before that date.

The Terrorism Bars

Since 2001, Congress has enacted several pieces of legislation that purport to keep terrorists from gaining immigration status in the United States but, in practice, result in the denial of protection to many victims of terrorist activity. The USA PATRIOT Act of 2001 (Pub. L. No. 107-56, 115 Stat. 272 and the REAL ID Act of 2005 (Pub. L. No. 109-13, 119 Stat. 231) amended the INA to expand the definitions of classes of people subject to the terrorism related inadmissibility grounds. *See* INA §212(a)(3)(B).

TERRORIST ORGANIZATIONS AND ACTIVITY DEFINED

A collection of people may 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

[7] Generally, asylum applications submitted to the immigration court must be filed in open court at a Master Calendar hearing. However, if the client's one-year filing deadline will fall before the client's Master Calendar date, the client must still file her asylum application prior to the one-year deadline. To do so, the pro bono attorney should file a skeletal I-589 asylum application with the court clerk, along with a motion requesting leave to file the I-589 with the clerk. See the National Immigrant Justice Center's website for a sample motion.

activities. INA §212(a)(3)(B)(vi)(III). Terrorist activity includes any "threat, attempt, or conspiracy" to use "any…explosive, firearm, or other weapon or dangerous device (other than for mere personal or monetary gain), with intent to endanger…the safety of one or more individuals or to cause substantial damage to property." INA §212(a)(3)(B)(iii)(V). To be terrorist activity, the act must be "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).

The definition of engage in terrorist activity was also expanded to include material support to a terrorist organization (under the new, broad terrorist organization definition). As a result, people who support groups considered to be terrorist organizations are barred from asylum, withholding of removal, and withholding under CAT. Thus far, the Board has not recognized any defenses to this bar. Duress, infancy, self-defense and mental incapacity do not excuse material support. Being held hostage in one's home while members of a guerilla group lodge for the night could trigger the bar. Paying a ransom to avoid the assassination of a family member could trigger the bar. The statutory language, as one BIA Board member observed, is "breathtaking in its scope." *S-K* at 948. (Osuna, J., concurring).

IMPACT OF THE EXPANDED DEFINITIONS

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

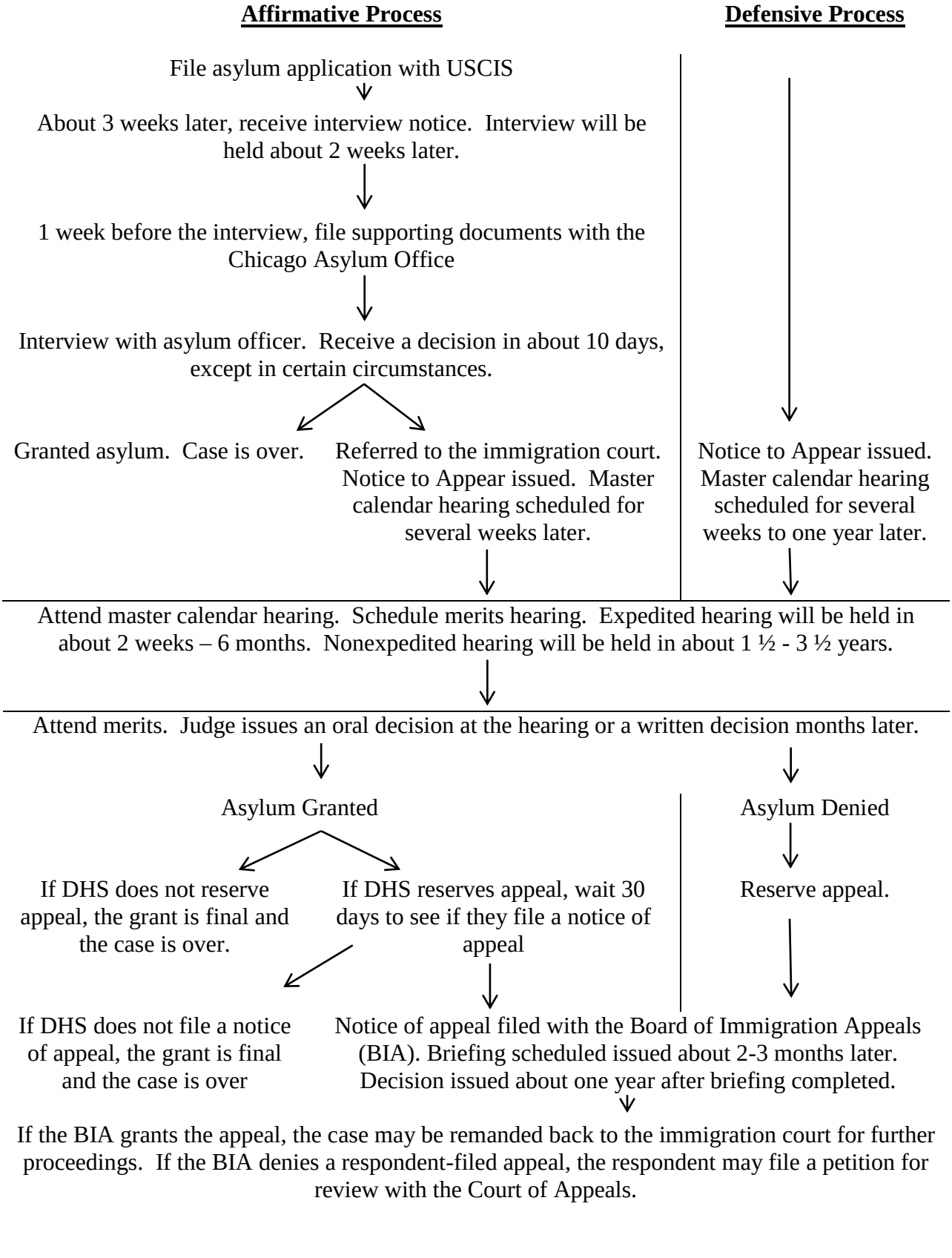
EXEMPTIONS

Although it is possible to obtain an exemption from the Department of Homeland Security for some activity under the terrorism related inadmissibility grounds, these exemptions are difficult to obtain and are granted at the unreviewable discretion of the DHS. A list of the exemptions currently available can be found on CENTRO LEGAL's website at http://immigrantjustice.org/terrorism-bar-exemptions.

HOW THESES ISSUES ARISE

Attorneys representing asylum-seekers must keep these expanded definitions of terrorist activity in mind. Facts that previously would have bolstered applicants' claims for asylum and demonstrated persecution can now make them ineligible for asylum. P*ro bono* attorney working with clients who presents facts that might trigger these bars should contact Centro Legal. More information about the terrorism bars can be found on the National Immigrant Justice Center's website at http://immigrantjustice.org/terrorism-bars-asylum.

FLOW CHART: STEPS IN THE ASYLUM PROCESS



THE ASYLUM PROCESS

* * *

There are two ways to apply for asylum: affirmatively and defensively[8]. A person who is physically present in the United States can affirmatively request asylum in the United States by filing an application with USCIS. An individual who has been served with a Notice to Appear (NTA), placing her in removal proceedings may file an asylum request defensively before the immigration court. Asylum applications filed in removal proceedings are called "defensive" applications because the application is a defense to removal. Even if the applicant first applied for asylum with USCIS, the application becomes defensive once the asylum applicant is in removal proceedings.

Documentary Requirements

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

Asylum Office (affirmative)
(file with the Nebraska Service Center)

- ❑ Appearance form: G-28
- ❑ Skeletal application for asylum (I-589) and 1 passport photo
- ❑ 2 copies, plus an additional copy for each derivative
- ❑ No filing fee!

Then one week before the interview, file:
(with the San Francisco Asylum Office)

- ❑ Legal memo
- ❑ A detailed client affidavit/declaration with a translator's certificate if necessary
- ❑ Annotated Index
- ❑ Supporting Documentation, including
  - Identity Documents, Expert Affidavits (possibly), and Other Corroboration
- ❑ Evidence of claimed relationship for all included family members

Immigration Court (defensive)

- ❑ Appearance form: E-28
- ❑ Skeletal application for Asylum (I-589) and 1 passport photo
- ❑ 1 copy of the I-589, plus another copy served on DHS
- ❑ No filing fee!

Then prior to merits hearing, file:

- ❑ Brief
- ❑ A detailed client affidavit/declaration with a translator's certificate if necessary
- ❑ Annotated Index
- ❑ Supporting Documentation, including
  - Identity Documents, Expert Affidavits (possibly), and Other Corroboration
- ❑ Evidence of claimed relationship for all included family members.
- ❑ Certificate of service on DHS

[8] Pursuant to the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the Asylum Office has initial jurisdiction over all asylum applications filed by unaccompanied alien children, even if the child is already in immigration proceedings. "Unaccompanied alien children" refers to children who do not have lawful immigration status in the United States, who have not attained 18 years of age, and who do not have a parent or legal guardian in the United States. 6 U.S.C. § 279(g)(2). The TVPRA went into effect on March 23, 2009. More information regarding the TVPRA can be found in Appendix Q of this manual. If a *pro bono* attorney thinks her client should be considered an unaccompanied alien child, the attorney should contact Centro Legal.

Practice Tip:
Whether a client has an affirmative or defensive case, the attorney should have her sign the USCIS appearance form (G-28) as soon as representation begins. That way, if the client is detained or the pro bono attorney needs to urgently contact USCIS about the case, the attorney will be able to do so immediately.

Preparing the Asylum Case

Asylum interviews and hearings are generally quite simple and straightforward compared to civil trials. The typical Centro Legal client asylum interview lasts two to three hours and involves the Asylum Officer questioning the client regarding her claim. A typical asylum hearing consists of the testimony of the client, additional testimony from an expert witness, and brief opening and closing statements. Additional witnesses are valuable if they can be obtained, but often there are simply none available. Despite the fact that the interviews and hearings are generally straightforward, asylum hearings do, in fact, require a great deal of preparation. Moreover, asylum law has grown increasingly complex in recent years and in most cases, attorneys should expect to conduct significant legal research to support their arguments regarding their client's eligibility for relief.

Centro Legal strongly recommend that *pro bono* attorneys begin case preparation by reading background material on the recent history of their client's country. Attorneys will save a lot of time and minimize the chances of confusion or error by having a basic understanding of the political and military conflicts in the client's country before beginning case preparation.

Step One: Interviewing The Client

Many *pro bono* attorneys underestimate how much time with the client is necessary to adequately prepare the client's affidavit and testimony. Interviewing the client, in the process of preparing the I-589 and affidavit and in preparation for hearing testimony, is the most difficult and critical part of handling an asylum case.

In interviewing asylum clients, *pro bono* attorneys may encounter problems they are not accustomed to in dealing with other sorts of cases. For example, clients in asylum cases rarely speak English and are sometimes uneducated or unsophisticated. Additionally, many clients suffer from Post-Traumatic Stress Disorder or other psychological and emotional problems that make it difficult for them to fully tell their story to anyone.

Pro bono attorneys should also be aware that they may need to use a different style of interviewing when interviewing clients in asylum cases. Lawyers in this country often have a style of interviewing that can be threatening to Centro Legal clients. An intense, rapid-fire approach, bearing down hard on minor inconsistencies, may be very frightening to clients seeking asylum. As a result, a more gentle approach may be required.

1. ESTABLISHING TRUST WITH THE CLIENT

Establishing trust with the client is essential in asylum cases. The majority of Centro Legal clients come from countries whose legal systems are corrupt and inept at best. As a result, they are generally unfamiliar and suspicious of the legal proceedings that they find themselves in. This suspicion makes it

difficult for asylum-seekers to trust their attorneys, let alone the judge rendering a decision in their case. Part of the *pro bono* attorney's job is attempting to overcome this built-in distrust.

Centro Legal recommends that at least in initial sessions, *pro bono* attorneys begin by helping the client relax and trust them. Attorneys should be as friendly as possible, explain things thoroughly, and urge the client to ask questions. *Pro bono* attorneys may find it helpful in establishing trust with their client to share something about themselves. Sometimes the best way to begin a relationship with an Centro client is to offer coffee or refreshments and simply sit and chat for a few minutes. Attorneys should remember that as human beings, they have many mutual interests in common with their clients – family, friends, etc. Seek these out and state them.

2. OVERCOMING CULTURAL BARRIERS

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

Another cultural barrier may be the client's natural reticence about answering questions fully and honestly. Often, a client's only experiences in dealing with well-dressed interrogators sitting behind desks in business offices have been unpleasant and threatening. They may withhold information at first or may modify their story, or concoct one completely, based on their assumptions about what their attorney wants or expects to hear. With patient interviewing and a careful building of trust, a different yet accurate and more credible story may emerge.

3. DEALING WITH PSYCHOLOGICAL BARRIERS

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

From the 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 go over the story again;

- The client may display inappropriate behavior or affect while talking about things that happened to her. The most obvious and best-known example is the tendency of many people to relate horrifying events in a flat, seemingly emotionless voice; or

- The client may be suffering from other problems, such as depression or substance abuse, related to or stemming from PTSD or other psychological condition.

4. INTERVIEWING THROUGH AN INTERPRETER[9]

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

Step Two: Preparing the I-589

After interviewing the client, the first thing *pro bono* attorneys should typically do is complete the Form I-589 asylum application. Although the form is fairly straight-forward, there are a number of important guidelines to keep in mind:

- Be sure to check the Convention Against Torture box on the first and fifth page of the I-589
- Include an answer to every question. If the question does not apply or the answer is unknown, write "n/a" or "unknown" rather than leaving the answer blank.
- If the client has a spouse or child who is not in the United States, be sure to check the "no" box in response to the question asking if the spouse or child should be included in the application.
- In response to the substantive questions beginning on page five, simply provide skeletal answers that summarize the response in two – three sentences and then state "affidavit will follow with more information." There is no benefit to providing a lengthy response to these questions rather than in the affidavit, and it is typically better for the client's case if the entire story is provided in the client's affidavit, rather than in piecemeal fashion in the I-589.

Step Three: Drafting the Affidavit

The affidavit is the most important part of an asylum case. Because the client's credible testimony can be sufficient to sustain her burden of proof, the affidavit is often the most significant piece of evidence in support of the case. *See* INA § 208(b)(1)(ii). To establish the client's credibility, it's important to include sufficient detail in the affidavit and to answer the who, what, where, when, why, and how of the client's claim. At the same time, it's also crucial not to include the kinds of details that the client may not remember at the time of the interview or hearing. For example, it's best to avoid include exact dates or numbers and to use words like "approximately," "around," and "about." This is because even small inconsistencies can seriously impact the client's case. An asylum officer or immigration judge may make a credibility determination based on the totality of the circumstances, and all relevant factors, including:

(1) Demeanor, candor or responsiveness of the applicant or witness
(2) Inherent plausibility of the applicant or witness's account

[9] See Appendix M for information regarding obtaining and working with an interpreter.

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

INA § 208(b)(1)(B)(iii). Because the affidavit is so important to the asylum case and drafting the affidavit often requires the client to discuss traumatic and sensitive information, the attorney should plan to spend at least four – five meetings with the client to prepare the affidavit.

Step Four: Obtaining Witnesses

If possible, *pro bono* attorneys should attempt to obtain additional witnesses besides the client (friends, family, cultural groups, churches). In affirmative (asylum office) cases, witnesses rarely testify at the interview itself. Instead, attorneys who have obtained witnesses will simply submit their declarations or affidavits with the rest of the asylum application package. In defensive (immigration court) cases, *pro bono* attorneys can choose to simply provide witness affidavits with their pre-hearing materials and have the witness available for testimony at the request of the judge or, if appropriate, they can choose to have their witnesses testify in court along with the client.[10]

1. MATERIAL WITNESSES

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

2. EXPERT WITNESSES

Expert witnesses, on the other hand, have been critical elements in many successful Centro Legal cases in the past and *pro bono* attorneys should make a strong effort to obtain such witnesses, particularly if their case is before the immigration court. It is not unusual for an immigration judge to expect that an asylum applicant have an expert witness to support her case.

[10] If a witness is not made available to testify in court, DHS may object to the admission of the witness's affidavit. Because the Federal Rules of Evidence do not apply in immigration court and the standard for the admission of evidence is so low, simply responding that the objection goes to the weight to be given the evidence and not its admission will suffice. The judge will likely give less weight to witness affidavits when the witness is not available to testify. However, there are often strategic reasons why an attorney will not want to make a witness available to testify, despite the diminished weight given to the affidavit.

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

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

If a *pro bono* attorney's client is suffering from Post-Traumatic Stress Disorder or other psychological problems that may affect the credibility of her testimony, the attorney should consider having a psychologist testify at the hearing, or at a minimum, submitting an affidavit from the psychologist describing the client's symptoms in detail. Similarly, it may be helpful to have a doctor or other qualified expert testify if the client has been tortured or beaten.

Step Five: Compiling Corroborative Evidence

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

The client is largely responsible for persuading the judge that she is credible and truthful. However, since the immigration courts increasingly demand corroborative evidence, *pro bono* attorneys should present such evidence in order to provide general objective support for the client's testimony and bolster her asylum claim.[11] The following are general types of corroborative evidence:

1. The client's personal documents, such as evidence of particular race, religion, nationality, political party, ethnic or social group, or evidence that reveals facts about applicant, such as citizenship, education and status in society;

2. official records, letters and affidavits which support the client's story, such as an arrest warrant, conviction document or other police records of arrest, documents showing detention or charges, affidavits from people with knowledge of persecution, medical records of injuries; and

[11] Items in section in paragraph #2 may be authenticated by a U.S. Embassy or by other means available. On occasion, the trial attorney will ask that the client submit any original foreign documents, such as police records, birth and death certificates, and medical records, to DHS for forensic analysis. In many cases, the judge will not set a date for the client's merits hearing until such documents have been submitted for forensic analysis. Please see page 57 for more information about the forensic analysis process.

3. documentation from newspapers or official reports of human rights organizations that speak to the client's particular situation.

Attorneys should remember that an immigration judge may grant asylum based on the testimony of the applicant alone, but only where the testimony is "credible, is persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[12] INA § 208(b)(1)(B)(ii); 8 USC § 1158(b)(1)(B)(ii). Furthermore, an immigration judge may require additional evidence to corroborate otherwise credible testimony "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[13] *Id.* When determining whether the applicant has met her burden of proof, the judge may weigh the credible testimony along with other evidence in the record. *Id.*

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

However, before filing any corroborating documents with the court or the DHS, establish the documents' origin, chain of custody, and the ability to authenticate the documents. The client should identify the document and explain how she obtained it. *Pro bono* attorneys who have any doubts about the reliability of a document should consult with Centro Legal prior to filing it with the court. Any document presented to court could be examined by the federal forensic document lab.

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

1. DOCUMENTS IN A FOREIGN LANGUAGE

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

2. ORIGINAL DOCUMENTS

[12] These requirements for corroborating evidence were codified pursuant to the REAL ID Act and therefore apply only to asylum applications filed on or after May 11, 2005. For asylum applications filed before May 11, 2005, attorneys should see *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998); *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

[13] An immigration judge finding regarding the availability of corroborating documents is a finding of fact. "No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in sections 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." INA § 242(b)(4); 8 USC § 1252(b)(4).

For affirmative proceedings, *pro bono* attorneys should not file original documents with USCIS. Instead, bring original documents such as birth certificates, travel documents and marriage certificates to the asylum interview. The asylum officer may wish to inspect them.

In defensive proceedings, the *pro bono* attorney should make all original documents that will be submitted in support of the asylum application available to the trial attorney, along with translations if the original documents are in a foreign language. DHS may wish to submit certain original documents, such as birth, marriage, and death certificates; school, police, and medical records; identity cards; and other government issued document to the federal forensics document lab for evaluation.[14] Immigration judges at the San Francisco Immigration Court may require that attorneys submit these kinds of original documents to the trial attorney before the judge will set the case for a merits hearing. Please see page 57 of this manual for additional important information regarding the forensic examination of documents.

Step Six: Preparing the Cover Letter or Pre-Hearing Brief

1. ASYLUM OFFICE COVER LETTER

Because the asylum office interview is a non-adversarial process, Centro Legal recommends that *pro bono* attorneys submit a legal memorandum in the form of a cover letter with the asylum package, rather than a lengthy trial memorandum or brief. The purpose of the cover letter is to summarize the client's claim and eligibility for asylum in a concise manner. Asylum officers report that the applicant's cover letter is most useful to them when it provides a clear overview of the claim because they can then use portions of the letter in their assessment report as to why the asylum office should approve the application. Accordingly, the cover letter should not be lengthy (less than 10 pages) and should primarily articulate the facts that establish the client's asylum eligibility. *Pro bono* attorneys may find case citations useful in their cover letters for complicated or novel legal arguments, but otherwise may generally omit them.

In addition to the cover letter, the asylum package should contain, at a minimum, an annotated index of supporting documents, the client's affidavit and other supporting documents. The index should set forth the case, highlighting the focus of the material that supports the legal argument. *Pro bono* attorneys may consider organizing the index according to subheadings that support the arguments in the case and highlighting key evidence in the index in yellow to be sure the asylum office reviews the key evidence.

2. PRE-HEARING BRIEF

In defensive cases, the *pro bono* attorney will submit a pre-hearing document package prior to the client's merits hearing before the immigration court. This package will contain, at a minimum, a pre-hearing brief, an annotated index of supporting documents, affidavits and other supporting documents, and a witness list. Pursuant to the Immigration Court Practice Manual, these documents must be filed no later than 15 days prior to the merits hearing, unless the judge has directed the attorney otherwise.

Under federal regulations, 8 C.F.R. §1003.21(b), and Immigration Court Practice Manual chapter 4.19, each party is directed to file a pre-hearing brief. The pre-hearing brief should include a statement of the facts, the applicable law, an analysis of the facts based on the law, and a conclusion, as well as copies of

[14] DHS will not submit original affidavits, letters, newspapers or similar documents to the forensic document lab, so it is not necessary to submit these documents to DHS prior to the merits hearing. In addition, as noted on page 57, *pro bono* attorneys should not submit the client's passport to DHS unless DHS specifically requests it because the client will not be able to get these original documents back from DHS until her case is completed.

any affidavits and supporting documents, and a list of proposed witnesses. An index of supporting documents is critical. Such an index should set forth the case, highlighting the focus of the material that supports the legal argument. *Pro bono* attorneys may consider organizing the index according to subheadings that support the arguments in the case and highlighting key evidence in the index in yellow, as this may be all that the judge reads.

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

Centro Legal is generally able to review pre-hearing briefs and asylum cover letters so long as the *pro bono* attorney provides the documents to Centro Legal staff no less than five business days before the attorney intends to file it with the court. Even if *pro bono* attorneys choose not to submit the brief to Centro Legal for review, Centro Legal encourages attorneys to discuss legal arguments with Centro Legal prior to filing the brief or cover letter where the legal argument or relevant case law is novel or complex, such as gender-based asylum cases and particular social group claims. Please provide Centro Legal with a final copy of the pre-trial brief or asylum office cover letter.

Filing the Application and Presenting the Case

The asylum filing process differs depending on whether the applicant has an affirmative or defensive case. Affirmative asylum applicants generally file a skeletal I-589 asylum application first and then submit all supporting documents several weeks later, prior to the asylum office interview. Defensive applicants generally file the I-589 application first and then file all the supporting documents prior to the merits hearing, often months or years later.

The Affirmative Process

1. FILING AN AFFIRMATIVE APPLICATION WITH USCIS

A *pro bono* attorney representing an affirmative asylum applicant will file the client's asylum package with the Nebraska Service Center. Mailing information for the USCIS Nebraska Service Center (including information for overnight/courier delivery) can be found on page 59 of the manual.

The affirmative application package must contain the original application with one passport-style photograph; two extra copies; and a copy of the entire original package for each derivative applicant, with a passport photograph of each derivative. For example, a principal applicant with two derivative children (in the United States) would need to file her original application, two copies, and then an additional copy for each child with the child's passport photo. Centro Legal recommends that attorneys simply file the I-589 application with the passport photograph, the requisite number of copies, and the attorney's G-28 appearance form with the Nebraska Service Center. Then, one week prior to the interview date, the attorney can file all supporting documents (including a legal memorandum, the client's affidavit, an annotated index, corroborating evidence, country condition reports, and any other supporting documentation) directly with the San Francisco Asylum Office. This helps to ensure that the San

Francisco Asylum Office receives the full asylum application package and that documents are not misplaced or improperly rearranged during the file transfer from Nebraska to San Francisco.

Two to three weeks after the Service Center receives an application, it will send the applicant (and the attorney, if a G-28 was included with the application) a receipt notice and a fingerprint appointment notice. Approximately two weeks after receiving the receipt notice, the applicant and attorney should receive a notice scheduling an interview with an asylum officer, who will approve or deny her case. The issuance of an interview notice means that the applicant's file is now at the San Francisco Asylum Office and the attorney can file the supporting document package there.

Practice Tip:
Centro Legal strongly recommends that *pro bono* attorneys not list their own mailing address as the client's mailing address on immigration forms. USCIS often sends correspondence to the client at the listed mailing address, months or years after representation has ended. Moreover, if the attorney has submitted a G-28 appearance form with the application, USCIS will serve a copy of all correspondence on the attorney.

2. FINGERPRINTS

If an asylum applicant is filing affirmatively, USCIS will send a fingerprint appointment notice to the applicant without any prompting from the applicant or the *pro bono* attorney. USCIS will mail the notice approximately two – three weeks after it receives the I-589 application and the notice will instruct the applicant to go to a specific Application Support Center (ASC) to take her fingerprints. Centro Legal recommends that *pro bono* attorneys advise their clients of this process and instruct the clients to contact the attorney when she receives a date for fingerprinting.

Most of Centro Legal's asylum clients have not resided in the United States long enough to have established a criminal record here. If a *pro bono* attorney believes that a client may have a criminal record, the attorney should contact Centro Legal. Centro Legal may recommend that the attorney and client send a separate request to the FBI, so that they will know what is in the record.

3. THE ASYLUM INTERVIEW

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

The asylum office interview is informal and usually occurs in an office. If the client is not fluent in English, the *pro bono* attorney must arrange for an interpreter to attend the interview. The asylum office will not provide an interpreter. The *pro bono* attorney may not serve as the interpreter. In addition, Centro Legal strongly recommends that a family member of the applicant not serve as the interpreter during the interview either.

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

the asylum officer begins the review process. If the application requires significant changes or updates, Centro Legal recommends that the attorney prepare a written list of the changes or updates and submit the list to the officer at the beginning of the interview.

The asylum officer will ask the client questions that most often will come directly from the client's affidavit regarding her experiences and the reasons she fears returning to her home country. Sometimes the questions are open-ended, i.e., "why are you afraid to return to Kenya?" Other times, the questions are specific, i.e., "what happened to you on October 6, 1999?" Most asylum interviews last anywhere from 1 ½ to 3 hours.

The role of the attorney during the asylum interview is very limited. The *pro bono* attorney may interrupt the interview if she feels that the applicant did not understand the question or if a question is inappropriate. The attorney should ask to stop the interview and speak to a supervisor if the interviewing officer's behavior is inappropriate. The attorney should also take detailed notes during the interview because this will be the only record of the interview the attorney will have if the applicant's case is referred to court. At the end of the interview, the attorney will be asked or can request to make a short closing statement on behalf of the applicant. During the closing statement, the attorney should explain to the asylum officer why the client is eligible for asylum and the enumerated grounds applicable to the client's claim. The attorney should also direct the asylum officer to any document that is particularly supportive of the applicant's case or that the attorney believes should be given particular attention.

In most cases, at the end of the interview, the asylum officer will request that the applicant return in approximately ten to fourteen days to pick up her decision, unless the asylum officer provides the applicant with a notice stating that the decision will be mailed. When the applicant and attorney go to the asylum office to pick up the decision, the applicant must bring a photo ID and the notice given to her by the asylum officer after her interview indicating the time and date the decision will be ready for pick up. At that time, the applicant and attorney will simply pick up the decision from the receptionist at the window. They will not meet with an asylum officer. Asylum applications that are not approved are referred to the immigration court for *de novo* review.

The Defensive Process

To practice before the immigration court, attorneys must first register with EOIR's E-Registry system. All attorneys currently practicing before EOIR must complete the E-Registry process immediately or risk suspension before EOIR until the registration process has been completed.

To register, attorneys must first complete an online profile and will then receive a unique EOIR ID number which they must use when completing the E-28 appearance form.[15] After completing the online registration, attorneys must appear in person at the immigration court to complete the identification verification process. For more information about the E-Registry system and the identification verification

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

process, including dates and times when attorneys can complete the identification process, please see http://www.justice.gov/eoir/engage/eRegistration.htm.

An attorney should complete the registration process as soon as possible after accepting a defensive asylum applicant for representation so that she can file her appearance with the Court and begin to receive any Court correspondence. All attorneys representing a client in court must file an E-28 appearance form with the Court electronically or in hard copy (on green paper) and serve a copy electronically or in hard copy on the trial attorney.

FILING CHECKLIST FOR COURT

- ✓ Follow any filing requirements from the immigration judge and review the EOIR Immigration Court Practice Manual.
- ✓ Translate and provide a certificate of translation for all foreign language documents
- ✓ Tab all documents using letters. Consecutively paginate all documents beginning with Tab A.
- ✓ Provide an annotated index
- ✓ Two-whole punch the top of all documents
- ✓ Do not secure the filing with any type of binding. Use a binder clip if necessary.
- ✓ Print on one side only.
- ✓ File original copy of all signed documents with the Court. Retain original photographs and identity documents unless instructed to produce them.

1. FILING A DEFENSIVE APPLICATION WITH THE COURT

If the asylum office referred a *pro bono* attorney's client to the immigration court, the judge should already have a copy of the I-589 application package from the asylum office in the court file. If, however, the client is in immigration court removal proceedings and has not yet filed for asylum, she must submit her I-589 asylum application with the court within one year of her arrival in the United States. Generally, defensive applications must be filed in open court at a Master Calendar (status) hearing. However, many of Centro Legal's clients are not scheduled for Master Calendar hearings until after their one-year filing deadline for asylum eligibility. Even if the client's first Master Calendar occurs before the client's one-year filing deadline, it still may not occur for many months, which delays the client's ability to seek employment authorization. In that situation, the *pro bono* attorney will need to take steps to both "lodge" the asylum application to start the client's asylum clock and file the I-589 prior to the client's one-year deadline.

"Lodging" an asylum application is a process by which the court will note the submission of an asylum application for purposes of starting an asylum applicant's asylum clock, which in turn determines an asylum applicant's eligibility for employment authorization. For more information about employment

authorization for asylum applicants, please contact Centro Legal. To lodge an asylum application, attorneys should follow the instructions provided by the Immigration Court Practice Manual, Chapter 4.15(l), which state that an attorney should:

1. Prepare the original form I-589 and a cover letter stating that the form is being submitted for the purposes of lodging. Take the original I-589 and cover letter to the window at the immigration court and "lodge" them in person.
2. The court clerk will stamp "lodged but not filed" and note in their database that the application has been lodged. The court will not keep a copy and will return the original stamped application to you, so it is important that you retain the stamped I-589 for your records.

If the client's next hearing will not occur until after the client's one-year filing deadline for asylum, an attorney must also take an addition step to demonstrate that she has attempted to meet the one-year deadline:

1. If there is significant time before the client's one-year deadline and the attorney is prepared to move forward with the client's case, the attorney should file a motion to advance the client's hearing to a date before the one-year filing deadline.[16]
2. If there is little time before the client's one-year deadline or if the judge has not responded to the motion to advance and the one-year deadline is approaching, the attorney should attempt to file the client's original I-589 and a "motion for leave to file form I-589 with the court clerk" at the court window.[17] The attorney should be sure to bring a copy of the motion and I-589 so that it can be date-stamped and kept with the client's records.
3. Most likely, the clerk will keep the motion, but will separate the I-589 and return it to the attorney (and stamp it as lodged, if the attorney did not previously lodge the application).[18]
4. Then serve a copy on ICE.

Remember, even if a client's Master Calendar hearing is scheduled for a date after the one-year deadline, the I-589 asylum application MUST still be filed prior to the one-year deadline or the client will be ineligible for asylum.

2. THE MASTER CALENDAR HEARING

The "Master Calendar" hearing is a preliminary hearing at which the non-citizen pleads to the charges on the Notice to Appear (NTA) and formally requests the type of relief sought. The Master Calendar hearing functions much like an arraignment in criminal proceedings. Unless there are complications in the case, the Master Calendar hearing is normally a routine proceeding that usually takes less than one hour to complete, although the attorney and client may have a significant wait before the hearing begins.

[16] A sample motion to advance can be found in CENTRO LEGAL's motions bank at https://www.immigrantjustice.org/attorney-resources-registered-users.
[17] A sample motion for leave to file form I-589 with the court clerk can be found in CENTRO LEGAL's motions bank at https://www.immigrantjustice.org/attorney-resources-registered-users.
[18] If the clerk separates the I-589 from the motion and returns it to the attorney, but the judge subsequently grants the motion, the attorney can then return to the clerk with the approved motion and attempt to refile the I-589 with the clerk.

a. Notice of the Hearing

The immigration court will send the client written notice of the date and time for the Master Calendar hearing. If the asylum office recently referred the client to the court, the Notice to Appear will also serve as the hearing notice and will list the hearing date and time. *Pro bono* attorneys sometimes have short notice of these hearings, but little or no preparation is required.

b. Where

Immigration Court hearings for non detained cases are held at the San Francisco Immigration Court, 100 Montgomery Street, Suite 800, San Francisco, CA 94104.[19]

c. Arriving at the Court

To appear for a Master Calendar hearing for a non-detained client, *pro bono* attorneys should bring or meet their client to the San Francisco Immigration Court at least a few minutes before the scheduled hearing time. A bulletin board in the waiting room will contain a list of the names and "Alien Numbers" of individuals with scheduled hearings. Although the court lists specific times for Master Calendar hearings on the hearing notices, the judges hear Master Calendar hearings based on the date of the original entrance of appearance and the A number of a client. Centro Legal recommends that *pro bono* attorneys and their clients arrive early to court to be among the first to sign up for the calendar call; this will help to minimize the waiting time in court.[20]

If the *pro bono* attorney has not already filed an appearance, the attorney should do so at the Master Calendar hearing, by bringing two, completed copies of form E-28 to court or obtaining two copies from the clerk's window, filling them out, and serving one on the trial attorney and one on the judge.

d. Attendance of the Client

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

e. The Immigration Judge

The judge who presides over the client's Master Calendar hearing will also be the judge who conducts the hearing on the merits and decides all motions. (In contrast, the trial attorney present at the client's Master

[19] See the National Immigrant Justice Center's Detention Supplement for information regarding the location of immigration hearings for detained individuals.

[20] Fortunately for Centro Legal *pro bono* attorneys, persons represented by counsel are called to appear before the court first; unrepresented people are heard afterwards.

Calendar hearing will most likely not be the same trial attorney for the client's merits hearing.) *Pro bono* attorneys should note that their hearing strategies and their client's chances of success depend in large part on which judge hears their case. In San Francisco, there are currently sixteen immigration judges, each with a different personality, attitude toward asylum seekers, and "track record." After appearing at a Master Calendar hearing, *pro bono* attorneys should confer with Centro Legal about the judge presiding over their case.

f. Interpreters

In San Francisco, the court has in house interpreters when the respondent's language is Spanish. For other languages or dialects, the court uses contract interpreters, whose quality and reliability is highly variable. At the merits hearing, the interpreter will be in person. However, the court does not provide an in-person interpreter for non-Spanish languages at the Master Calendar hearing because there is typically little, if any, communication with the client. If a non-Spanish interpreter is needed at the Master Calendar hearing, the judge will use a phone interpretation service. If interpretation is impossible in court for the Master Calendar hearing and necessary for the client, attorneys may request a continued hearing.

In addition, at the Master Calendar hearing, *pro bono* attorneys should state for the record whether they will require an interpreter at the merits hearing and specify whether a particular dialect is required. For languages like Arabic or Mam (an indigenous Guatemalan language) where the dialect can differ dramatically country-to-country, Centro Legal recommends that the attorney specify the country as well as the language (e.g. Mam Todos Santos or Mam San Marcos). If the *pro bono* attorney suspects at any time that the interpreter and client do not understand each other or that interpretation errors have occurred, the attorney should be sure to make the court aware of the problem and object where appropriate. If necessary, request a continuance so that the court can find a new interpreter.

3. THE MASTER CALENDAR HEARING PROCESS

a. The Beginning of the Hearing

When the attorney's case is called, the immigration judge is likely to talk with her off the record to determine the attorney's intentions and to straighten out any procedural problems. At that time, the attorney can advise the judge that she is a Centro Legal *pro bono* attorney. On the record, through an interpreter where necessary, the judge will state the nature of the proceedings and ask the client if she understands what is happening.

b. Determining Representation by Counsel

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

c. Establishing Receipt of the Notice to Appear

The judge will ask the attorney or the client if the client has received a copy of the NTA. If not, she should say so and ask for a copy. The judge will often grant continuances so that the attorney can go over

the NTA with the client to determine whether the charges are correct—and if there is any question, even remotely, about their accuracy, then the attorney should seek a continuance.

d. Admitting or Denying the Charges and Conceding Removability

If the attorney has the NTA, the judge will ask the client to either admit or deny the specific charges in the NTA—namely, that she entered without inspection on a certain date or overstayed her visa and is removable. The attorney will also be asked to either contest or concede removability as charged on the NTA. In order to be eligible to apply for asylum, the client, through the attorney, must admit removability under one of the grounds. However, if there is more than one charge of removability, discuss it with the client and with Centro Legal staff.[21]

e. Designating a Country of Removal

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

If the trial attorney or judge designates a country <u>other</u> than the one from which the client is seeking asylum, the attorney should register her opposition on the record and request leave to designate the country from which asylum is sought.

f. Stating the Client's Desire to Apply for Asylum

The attorney or the client will then state for the record that the client wishes to apply for asylum, withholding of removal and/or CAT.

g. Setting a Date for Submission of the Written Asylum Application

If the client has not yet filed an asylum application, the judge will usually set a date for submission of the completed written asylum application. The *pro bono* attorney should be sure that the date the judge sets for submission of the I-589 application is prior to the client's one-year filing deadline. Unless the judge specifically asks for additional documents, the attorney must only submit the I-589 asylum application at the specified date and not any supporting documentation. Moreover, Centro Legal recommends that attorneys not submit any additional supporting documentation unless specifically ordered by the judge so that the client is not tied to any statements or documentation before the attorney and client have had sufficient time to develop the case.

If the client previously filed for asylum with the asylum office and is now renewing her application before the immigration court, the judge will likely indicate that any amendments to the I-589 asylum application should be tendered to the court at the same time as other pre-trial submissions prior to the merits hearing. There is no need to submit a new I-589 application if the client has already filed one and the judges prefer

[21] Clients who have reasonable grounds to challenge removability are unlikely to become Centro Legal clients under the asylum project; rather, they would be referred to other projects within Centro Legal or other agencies. However, if in the course of interviewing the client some fact is revealed that may impact the client's removability, the *pro bono* attorney should consult with Centro Legal staff.

that attorneys do not submit new applications unless the initial application is illegible or was prepared without the client's knowledge of the information provided in the application.

h. Setting the Date and Amount of Time for the Merits Hearing

The date of the hearing on the merits of the claim will generally be several months to two years distant. The immigration judge may ask whether the *pro bono* attorney and client would like an expedited or non-expedited hearing date. Some asylum applicants have the right to request an expedited hearing because the law states that the court must adjudicate an asylum applicant's claim within 180 days from the date the asylum application is received by either USCIS or the immigration court (if applicant did not previously file with the USCIS). INA § 208(d)(5)(A)(iii).[22]

Please note that on the current expedited or "rocket docket" cases, different judges are interpreting differently whether merits hearing dates have to be expedited for rocket docket cases. It is therefore important for the attorney to speak to Centro Legal prior to the master calendar hearing to determine the judge's practice.

It is also crucial that the client understand the importance of being fully prepared for asylum hearings and that the attorney recommend to the client that she waive her right to an expedited hearing if the expedited date will not allow for enough preparation time. If the client waives her right to an expedited hearing, the judge will likely schedule the client for a hearing date one to three years into the future and the client may NOT be eligible for employment authorization during this time. As a result, the attorney MUST discuss these possibilities with the client BEFORE the hearing so that the client is prepared at the time of the Master Calendar hearing.

After the attorney asserts whether she wants an expedited or non-expedited hearing date, the judge usually asks how much time will be necessary to complete the hearing. *Pro bono* attorneys should ask for at least three or four hours, and should do not hesitate to ask for more time if they really think they will need it. *Pro bono* attorneys will find that three is the bare minimum for presenting a thorough case. Unfortunately, the judges are rather hesitant to schedule more than four hours for a hearing and typically will refuse to set a hearing for more than four hours. Once the hearing date is set, the Master Calendar is adjourned.

If the *pro bono* attorney is representing a detained client, the attorney and client will receive an expedited hearing date. Detained individuals typically have their final hearing date set for one or two months in advance.

4. PREPARING FOR THE MERITS HEARING

Merits hearings in asylum cases are formal, adversarial, evidentiary hearings on the record. Trial attorneys act as "prosecutors," attempting to disprove the applicant's eligibility for asylum. Witnesses are sworn, and

[22] Pursuant to an EOIR policy memorandum, applicants who first file for asylum with the asylum office are only eligible for an expedited hearing if there were less than 75 days on the applicant's asylum clock on the date of the referral. However, an applicant who is not eligible for an expedited hearing may still be eligible for employment authorization if she does not otherwise cause a delay in her case. *See* Appendix L, CENTRO LEGAL's Summary and Recommendations Regarding the November 2011 EOIR Asylum Clock Memorandum.

both sides have the opportunity for direct and cross-examination. Immigration judges are usually also very involved in questioning the client.

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

a. Preparing the Client to Testify

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

Additionally, *pro bono* attorneys should be aware that it is very common for witnesses to vary their testimony on the stand from what they have stated in their pre-hearing preparation interviews. They often fail to testify about certain things, sometimes key elements, and/or may suddenly state new facts that the attorney has never heard before. In addition, all witnesses, particularly asylum applicants, are generally very nervous and thus likely to forget certain things. For example, clients often forget dates or even years in which events happened. Though this is quite normal human behavior, both trial attorneys and immigration judges tend to think that if a client cannot remember in which year an important event occurred, then the client is not credible.[23] Remember, as explained *supra*, an immigration judge can make a credibility determination based on a wide range of factors. *See* INA § 208(b)(1)(B)(iii).

As a result of this credibility standard and the likelihood that the client's testimony may vary on the stand, *pro bono* attorneys must try to convince the client in advance of the importance of remembering the details of her case and testifying to them to the best of her recollection. Centro Legal recommend that *pro bono* attorneys run through at least one mock hearing with their client with both a direct and cross-examination. After building trust with the client, it is important that *pro bono* attorneys mentally prepare their client to face seemingly hostile questioning from the trial attorney and judge.

In addition to preparing the client to face questioning from the trial attorney and judge, there are several other things that *pro bono* attorneys can do to better prepare their client to meet the credibility standard:

(a) File a FOIA: if the client's case is in immigration court, the attorney should file a FOIA request to obtain a copy of the DHS immigration file on the client. It often takes two-three months to obtain the FOIA result, so the request should be filed as early as possible. Please see page 56 for instructions regarding the FOIA request.
(b) Review the court file: attorneys can request to review the immigration court's file and listen to any prior hearings. Note that the immigration court's file may be different from the DHS file, so it is wise to both review the court file and request a FOIA of the DHS file.
(c) Discuss and review prior asylum applications and affidavits: *pro bono* attorneys should review the accuracy of preexisting asylum applications and/or client affidavits, especially if the *pro bono* attorney began representation after the asylum office referred the client's case to court. Attorneys should inquire as to how past applications were prepared and whether the contents were reviewed with the client in her native language prior to submission. Attorneys should also discuss the use of and competency of any interpreters prior to representation.

[23] Where an immigration judge failed to make an explicit credibility finding, the respondent and any witnesses enjoy a rebuttable presumption of credibility. INA § 208(b)(1)(B)(iii).

(d) Know and prepare witnesses: the immigration judge can consider witness behavior when determining the client's credibility. Before putting anyone on the stand, attorneys should prepare the witness as she would her client.

b. Fingerprints

Unlike the affirmative process, in defensive asylum proceedings (before the immigration court), the applicant and her attorney are responsible for requesting a fingerprint appointment, unless the client is detained. If the client is detained, DHS is responsible for fingerprinting her. To request a fingerprint appointment, the *pro bono* attorney must send a copy of the instructions for providing biometric and biographic information with the first three pages of the I-589 and an E-28 to the Nebraska Service Center. This must be done no later than 180 days before the scheduled merits hearing. The Service Center will issue an appointment notice directing the applicant to appear to be fingerprinted at the Application Support Center (ASC) closest to her home address.

When the client goes to the ASC to get her fingerprints taken, the ASC will date stamp the client's fingerprint appointment notice as proof that it took her fingerprints. Centro Legal recommends that *pro bono* attorneys make a copy of this stamped notice and bring it to the merits hearing in case there are any questions as to whether the client attended her fingerprints appointment. After the ASC takes the client's fingerprints, DHS will then send the fingerprints to the FBI in order to obtain the applicant's record.

Fingerprints remain current for a period of 15 months, but do not need to be current at all times. Fingerprints need only be current on the date of the client's merits hearing. If a merits hearing has been scheduled for the client, the *pro bono* attorney must make sure that the client's fingerprints will be current as of the date of the hearing. If the attorney has not been able to obtain an appointment three months prior to the merits hearing, the attorney should contact Centro Legal immediately. **If the client's fingerprints are not current at the time of the merits hearing, the immigration judge cannot issue a decision. Furthermore, the judge can consider the application abandoned and deny the client asylum.**

Due to the extremely negative consequences of failing to obtain a fingerprint appointment, Centro Legal recommends that after accepting a Centro Legal asylum case, the attorney immediately calendar the date by which she must request a fingerprint appointment for her client to avoid missing this vital step in the asylum process.

c. Contacting the Trial Attorney Prior to the Merits Hearing

Centro Legal recommends that *pro bono* attorneys attempt to contact the trial attorney at 415-705-4604 one or two days in advance of the hearing to explore any pre-hearing agreements that might be reached. This conversation will be helpful in determining what the trial attorney sees as the weakness in the case.

On occasion, Cento Legal *pro bono* attorneys have been successful in obtaining stipulations from trial attorneys that clients are eligible for asylum or that past persecution occurred etc. (although the judges believe firmly they are not bound by agreement between the DHS and the respondent, and may not accept such stipulations). It is generally unlikely that the trial attorney will stipulate to anything in most cases because she will be principally concerned with the issue of credibility and probably will not stipulate to anything until she has observed the client's testimony and conducted some cross-examination. In that case, the *pro bono* attorney may find it useful to ask the trial attorney at the close of the hearing if she will stipulate to eligibility and not oppose asylum or, failing that, if she will waive appeal if the client wins, thus ending the case immediately.

5. MERITS HEARING PROCEDURE

a. Rules of Procedure

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

b. Rules of Evidence

In immigration court, the Federal Rules of Evidence do not apply; rather, the test is whether the evidence is "probative and its admission is fundamentally fair." *Gu v. Gonzales*, 454 F.3d 1014 (9th Cir. 2006). Formal presentation of evidence is generally not required. Judges will simply admit documents or physical evidence, sometimes permitting argument but rarely requiring formal authentication. Similarly, objections to evidence, particularly hearsay objections, are rarely made or upheld depending on the trial attorney and judge.

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

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

c. The Record

As with the Master Calendar hearings, the formal record of the case is made on digital recording system, controlled by the Judge, who may stop and start recording at will. Although it has not often been a problem in San Francisco, attorneys should be alert for instances of judges capriciously turning the recording off. If necessary, *pro bono* attorneys should be ready to restate objections on the record and clearly note that the judge turned off the recorder inappropriately. Remember that the digital recording system is the official record of what goes on in the courtroom. Attorneys are not permitted to bring their own stenographer or otherwise make their own record of the hearing.[24]

[24] Upon request, the court will make a cd copy of the hearing recording for attorneys. However, prior to 2010, the court used a tape recorder to record hearings. The court will also make copies of hearing tapes if the attorney provides the court with blank tapes, but due to problems with recording speeds, *pro bono* attorneys who wish to listen to hearings held prior to 2010 will likely need to listen to the hearing tapes on the court's tape recorder.

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

d. The Immigration Judge

Judges in asylum hearings play a very active role and almost always engage in extensive direct and cross-examination of the client. Each conducts hearings in her own particular style. Attorneys are strongly encouraged to attend a merits hearing held before the judge in their case, for purposes of gauging how she conducts proceedings. If it is not possible to attend a hearing before a particular judge, *pro bono* attorneys should, at a minimum, consult with Centro Legal.

e. The DHS Trial Attorney

DHS is represented by one of the trial attorneys from the local Office of the Chief Counsel. The DHS trial attorney represents the government and generally plays an adversarial role at the merits hearing. As previously indicated, Centro Legal recommends that *pro bono* attorneys contact the Chief Counsel's Office prior to the hearing to obtain the identity of the trial attorney assigned to their case and to discuss the merits of their case.

f. Interpreters

As previously noted, if a respondent speaks Spanish, an immigration court in house staff will act as the interpreter during the client's hearing. For other languages, the court uses contract interpreters of varying quality. For the merits hearing, *pro bono* attorneys may wish to have their own interpreter or someone familiar with the client's language present to signal errors in translation that can be corrected or objected to during the proceedings.

g. General Logistics of the Hearing

In most courtrooms, the respondent and her attorney sit at the table on the right side of the room (facing the judge's bench), while the trial attorney sits on the left. How testimony is conducted depends on the judge. Some require the witnesses to take the witness stand next to the bench, while others permit the client to remain seated next to the attorney. Some judges ask attorneys to conduct examinations from a podium, while others do not.

Removal hearings are open to the public, although there are almost never any spectators other than the persons connected with the case. However, asylum hearings can be closed to the public at the request of the respondent. Witnesses in either kind of proceeding are almost always excluded from the courtroom on the government's motion.

6. THE MERITS HEARING

a. Arriving at the Court

Asylum hearings usually begin promptly, *so pro* bono attorneys and their client should arrive at the San Francisco Immigration Court well in advance of the scheduled time. After arriving at the immigration court, the *pro bono* attorney should first report to the clerk at the window to acknowledge that the client is present and ready to go for a hearing before a particular judge. The clerk will ask the attorney and her client to wait until the courtroom is opened.

b. Off the Record Formalities

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

c. Correcting and Updating Information

At the beginning of the hearing on the record, the judge generally gives the respondent's attorney a chance to update or correct any information on the asylum application or other materials previously submitted. It is important to make certain that names, addresses, dates, A-numbers, etc. are up-to-date and correct. In addition, where the attorney knows there will be substantial or even minor inconsistencies between testimony and earlier submissions, such as statements given to a DHS officer or statements made during the credible fear interview, an attempt should be made at this point to correct inaccuracies and to state clearly the reasons for the inaccuracies.

If the asylum application or other previously filed materials contain substantial errors or incorrect information, or if the previous application needs substantial updates, Centro Legal recommends that attorneys submit a "notice of amendments" with their other pre-hearing submissions. This notice should list the errors, the correct information and possibly, an explanation as to why the errors occurred.

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

d. Identifying and Admitting Exhibits

Next, the judge will go through the process of admitting exhibits. Generally, the Notice to Appear and related materials have already been admitted as initial exhibits and the asylum application along with all attached materials will be identified and admitted as a group exhibit. The judge will simply identify all offered exhibits and ask if there are any objections. There are generally no objections to this, but if the trial attorney does object to a particular piece of evidence, the judge will usually permit brief arguments and rule quickly. Occasionally, specific items such as expert witness affidavits or *curriculum vitae*, or

pieces of direct evidence, such as letters or documents, will draw objections that the judge is not comfortable ruling on at that point. In that situation, the judge may instead reserve her ruling until the attorney presents the evidence during the hearing.

e. Opening Statements

Most of the judges at the San Francisco Immigration Court will not be permit opening statements as they do not think they are necessary. Opening statements, where permitted, can be helpful in reminding the judge of the issues in the case before testimony begins. *Pro bono* attorneys should be aware that opening statements in immigration court are extremely brief – no more than one or two minutes – and should simply summarize the client's case.

f. Direct Examination

Examination of witnesses in immigration court is largely the same as in other courts. The respondent's attorney offers her case first, conducting direct examination, then the trial attorney conducts a cross-examination, and then the respondent's attorney can redirect where necessary. Generally, witnesses must be present in court. However, if the expert witness is located in another part of the country or the world and the cost of obtaining the expert is prohibitive, most of the immigration judges allow telephonic testimony by expert witnesses.

Attorneys should be well prepared for direct examination and the client should be well rehearsed in how to conduct herself. The client should be advised to answer questions succinctly without engaging in long narratives, and should state clearly when she does not understand a question. Centro Legal recommends that attorneys practice direct examination with the client numerous times so that the client feels well-prepared during the hearing.

Since asylum hearings are brief, typically scheduled for three or four hour time slots, *pro bono* attorneys should prepare direct examination with an eye on the clock.[25] Attorneys should get preliminary information out as quickly as possible and eliminate duplicative information.

Trial attorneys will object to leading questions in the direct examination and the judge will generally sustain the objection. To avoid time-consuming arguments regarding leading questions, *pro bono* attorneys should simply prepare the client in advance on how to answer non-leading questions. It may be helpful to prepare a written question and answer sheet with the client, reviewing for accuracy. Check it against the written asylum application and the client's affidavit (as well as corroborated evidence.) However, do not have the client memorize a prepared direct examination because it can make the real direct examination sound scripted and the client seem less credible.

g. Cross-Examination

After direct examination, the trial attorney will conduct cross-examination, generally focusing on credibility. Again, though there are essentially no rules of procedure or evidence, *pro bono* attorneys

[25] Some judges are willing to schedule additional hearing time at a later date if it becomes clear that testimony will not be completed by the end of the allocated time period. Other judges, however, will absolutely not continue the hearing and will instead close the case and issue their decision regardless of how incomplete the evidence. Attorneys should consult with Centro Legal about the practices of individual judges.

should raise objections when the questioning is inappropriate. Generally, the trial attorney's cross-examination is minimal. Redirect is permissible and strongly recommended where cross-examination has raised damaging issues.

h. Examination by the Immigration Judge

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

Sometimes the judge's questions are not inappropriate or offensive, but may simply be confusing. Questions previously asked may elicit inconsistent, incoherent, or non-responsive answers. One remedy may be to respectfully suggest to the judge a different manner of wording the question or to simply suggest to the judge that the client is confused or may not have understood the translation of the question. Another remedy may be to request an opportunity to conduct a brief additional redirect after the judge has completed his questioning, in order to clarify any confusion or explain any inconsistencies or issues affecting the judge's estimate of the witness' credibility.

i. Closing Statements

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

7. THE DECISION OF THE IMMIGRATION JUDGE

Typically, the judge will issue her oral decision immediately at the close of the case. She may simply discuss what her decision would be and on what grounds she has decided, or she may recess the hearing for half an hour and return with a decision which will be read into the record. When the immigration judge issues her decision, whether favorable or unfavorable, the client receives only a minute order form filled out and signed by the judge.

Other times, the immigration judge may continue the case for a period of time in order to produce a written decision--generally, when a novel or highly debatable point of law is at issue. However, this is less common.

When the judge is orally rendering his decision, the attorney should pay careful attention and make note of the bases for the decision, and any areas where the judge misstates, misinterprets, or overlooks

evidence or matters of law. If the client loses, the pro *bono* attorney must fill out a Notice to Appeal, stating specific grounds justifying the appeal, not just a general statement of boilerplate language.

After the judge issues an oral decision, each side will be asked whether they choose to reserve appeal. If the client wins, the trial attorney will in most cases reserve appeal--and on many occasions, they actually do file a Notice of Appeal.

After the hearing on the merits, please notify Centro Legal of the outcome as soon as possible to ensure that the client is able to access certain asylee benefits. If the client receives a final grant of asylum, Centro Legal asks that the *pro bono* attorney email a copy of the client's affidavit, I-589 asylum application, pre-hearing brief or memorandum, and the asylum office or immigration judge's decision to Eleni Wolfe-Roubatis at eleni@centrolegal.org for Centro Legal's records.

The Appeal To The BIA

An unsuccessful asylum applicant may appeal to the Board of Immigration Appeals (BIA), an administrative body in Falls Church, Virginia. Centro Legal's policy is that if the judge has denied asylum and a reasonable and non-frivolous ground for appeal exists, appeal should be pursued.

The appeal requires a simple Notice of Appeal, articulating the grounds for appeal, that must be filed within 30 days of an oral decision or mailing of a written decision, and a $110 filing fee.[26] The Notice of Appeal – and all correspondence to the BIA – must include a certificate of service stating that service was made in the Office of the Chief Counsel.

Approximately two – four months after the filing of the Notice of Appeal, the BIA will send a transcript and briefing schedule to both parties. The *pro bono* attorney will file a written brief after receiving the transcript. The brief is normally due within 21 days of receipt of the transcript. An extension of 21 days may be requested prior to the expiration of this due date.

When drafting a BIA appeal brief, *pro bono* attorneys should be aware that the BIA frequently denies asylum appeals and it is likely that the client will have to pursue a petition for review before the Court of Appeals. As a result, the BIA appeal brief must fully exhaust all appealable issues and **it is extremely important that all BIA appeal briefs are reviewed by Centro Legal prior to filing.** *Pro bono* attorneys should provide Centro Legal with a draft of the brief **at least five business days** before they intend to file. Centro Legal also asks that attorneys provide a copy of the final product that they filed. Once the appeal to the BIA is decided, please notify and provide Centro Legal with a copy of the opinion so that next steps can be determined.

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

[26] If an applicant was denied asylum, but granted voluntary departure, and files an appeal of the asylum denial, she must provide the BIA proof that she has posted her voluntary departure bond within 30 days of filing her notice of appeal. If the applicant does not provide the BIA with timely proof that she posted bond, the BIA will not reinstate her voluntary departure period in its final order. 8 C.F.R. § 1240.26(c)(3)(ii).

Federal Court Review

If the BIA decides against the client, she may be entitled to file a petition for review before the Court of Appeals in the circuit in which the case was originally tried, i.e. the Ninth Circuit for cases tried before the San Francisco Immigration Court. If the BIA denies the client's appeal, Cento Legal will work with the *pro bono* attorneys to determine if filing a petition for review is a viable option for the client. Petitions for review of BIA decisions must be filed within 30 days of the issuance of the BIA decision. However, there may be earlier deadlines related to the client's removability that could necessitate filing the petition prior to the 30 day deadline. Moreover, in some cases, the *pro bono* attorneys may need to file a motion for a stay of the client's removal if DHS is attempting to remove the client. Given the numerous issues that can arise following the BIA's denial of a client's appeal, it is crucial that *pro bono* attorneys work closely with Centro Legal at this stage. There is no obligation for *pro bono* attorneys to represent the client before the federal court of appeals but there is an obligation to advise Centro Legal of a BIA decision so that Centro Legal can work with the client to determine any next possible steps.

ADVISING THE CLIENT AFTER ASYLUM IS GRANTED

* * *

When asylum is granted, it means that the asylee can live and work legally in the United States and will eventually have the opportunity to apply for lawful permanent resident (LPR) status and citizenship. However, DHS can, at any time, reopen the case and attempt to terminate asylum and seek the removal of the asylee if it is determined that any one of a number of conditions are met: that country conditions have fundamentally changed such that that the asylee no longer need fear persecution; that the asylee participated in the persecution of others; that the asylee committed a particularly serious crime and constitutes a danger to the community; that the asylee committed a serious non-political crime outside of the United States; that the asylee poses a threat to the security of the United States; that the asylee was firmly resettled outside the United States prior to her arrival; that the asylee may be removed pursuant to a bi-lateral agreement to a safe third country that will provide protections; that the asylee has voluntarily returned to her home country; or, that the asylee has acquired a new nationality.[27]

Practically speaking, attempts to revoke asylum are rare without new evidence that the asylee has committed a serious crime in the United States or fraudulently obtained asylum. It is important to note, however, that asylum *is not* a permanent, guaranteed status for life in the United States. For that reason, it is essential to encourage all asylees to begin the process of applying for lawful permanent residence <u>one year</u> from the date on which they were granted asylum.[28] Please see below for more information regarding this process.

[27] 8 C.F.R. §208.24
[28] *See* INA §209, 8 U.S.C. §1159 and 8 C.F.R. §§209.1, 209.2.

Derivative Asylum for Spouse and Children

In affirmative cases, "immediate family members" present in the United States and "included" in the original asylum application automatically receive asylum when the asylum office grants asylum to the principal applicant. In defensive cases, "immediate family members" present in the United States who are in removal proceedings with the principal applicant (*i.e.*, have received an NTA) and are" included" in the application automatically receive asylum when the judge grants asylum to the principal applicant. "Immediate family members" include the asylee's legal spouse and unmarried children under 21 years of age. If the client and her spouse have a common-law marriage, which is very common in many countries, the *pro bono* attorney should strongly encourage them to legally marry in the United States prior to the date on which the asylum office or judge adjudicates the client's claim. Only those formal relationships that exist on the date on which asylum is granted entitle spouses and children to derivative benefits.

The Child Status Protection Act

In 2002, Congress enacted the Child Status Protection Act (CSPA), which provides limited protections to persons who "age-out" of immigration benefits, that is, attain the age of 21 while awaiting the processing of an immigration application for which their eligibility is contingent upon being *under* 21. Under the CSPA, a number of protections are afforded specifically to children of asylum applicants. Children who are under 21 at the time an asylum application is filed by their parent are entitled to asylum status if they turn 21 before the application is adjudicated. *Pro bono* attorneys should take into account the age of an asylum applicant's children when preparing to file an application, and consult Centro Legal staff for advice.

If immediate family members are present in the United States, but were not "included" in the asylum application (or in a defensive case, if they were not in removal proceedings), an asylee can file an I-730 Refugee/Asylee Relative Petition with USCIS to obtain asylee derivative status for the family member.

If the client's immediate family members are outside the United States, the client must also file an I-730 form with USCIS. These petitions currently take about one year to adjudicate before being forwarded to the consulate. The U.S. Consulate then processes the application and issues visas for qualifying relatives. The length of time consumed by this part of the process varies from consulate to consulate throughout the world. The spouse and/or children will be admitted into the United States as asylees with benefits and rights similar to those of the principal asylee, often including the right to apply for legal permanent residence and eventually, citizenship.

The asylee <u>must</u> petition for immediate relatives within a two-year period after being granted asylum. Once the two-year period has passed, asylees can no longer petition for their immediate family members. As a procedural matter, Centro Legal asks that *pro bono* attorneys refer clients back to Centro Legal prior to the filing of I-730 family petitions. This ensures that Centro Legal is able to screen clients for this benefit since there are frequently legal complications that make these applications challenging. For example, USCIS may require DNA testing for the asylee petitioner and her derivative children or discover unexpected issues related to the family members that can make them ineligible for asylee derivative status.

Centro Legal currently serves clients seeking to file I-730 petitions in-house. Centro Legal's capacity to provide technical support on I-730 cases is limited to these clinics. *Pro bono* attorneys should be aware that Centro Legal does not maintain retainer agreements with former asylum clients once asylum has been granted. As a result, Centro Legal is unable to assist *pro bono* attorneys who choose to file I-730 petitions themselves.

Eligibility for Employment and a Social Security Number

Asylees are automatically eligible to work in the United States and DO NOT need an Employment Authorization Document (EAD). An asylee is eligible for an *unrestricted* social security card that, along with proof of identity, is sufficient to establish that she is eligible to work in the United States. An asylee can obtain an unrestricted social security card by bringing proof of the asylum grant to the Social Security Administration (SSA), along with proof of identity, and applying for the card.

Individuals who obtained asylum through the asylum office can show the original asylum office decision and/or their new I-94 (which is issued with the asylum office decision) as proof of their asylum status. For individuals who obtain asylum in court, the SSA typically will not accept the court order as proof of their asylum status. These asylees will need to first obtain a new I-94 card from USCIS that lists their status as asylees. Please see Appendix N for more information about requesting an asylee I-94 card.

Asylees can only obtain the unrestricted social security card following a final grant of asylum, so if the judge grants asylum, but DHS reserves appeal, the client is not eligible for an unrestricted social security card. Asylees with final grants should wait approximately ten days to two weeks following the grant to request an unrestricted card, and they will receive the cards in the mail roughly two weeks after they have applied. SSA will provide a letter detailing this process upon application, and this letter will be sufficient for applying for public benefits as an asylee.

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

Clients who obtain asylum from the asylum office will automatically receive an EAD in the mail following the grant of asylum. Clients who obtain asylum through an immigration judge and wish to have an EAD will need to file an I-765 application to obtain the EAD.

Pro bono attorneys should inform their clients that if they obtain an EAD after receiving asylum, the clients should not use the EAD as a substitute for an unrestricted social security card and a state-issued ID card. The latter two documents should be used, as soon as they are available, as proof of eligibility to accept employment in the United States when completing an I-9 form with a potential employer.

Some potential employers *illegally* require that asylees present an EAD as proof of employment eligibility. Such a demand is document abuse, and should be reported to the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Public Benefits

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

receive benefits for periods of three months to a year, depending on the programs. Other programs may be available continuously.

Once a Centro Legal client receives a final grant of asylum, Centro Legal will refer clients to the next asylee orientation at the San Francisco asylum office that will assist the client with the benefits process. To be eligible for benefits, the client must have an intake interview with the resettlement agency **within 30 days** of the asylum grant, so **it is crucial that attorneys notify CENTRO LEGAL as soon as their clients receive asylum**. Clients with cases on appeal or who possess a conditional approval or a recommended approval are not eligible for benefits until the appeal is complete or a final approval is granted.

In addition to administering benefits programs and providing general public benefits counseling, these agencies often provide English classes, employment training and placement programs, mental health programs, youth and elderly services, and referrals to other social service agencies as necessary.

Taxes

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

Right To Travel

An asylee is eligible to travel outside the United States. Before leaving the United States, however, asylees must obtain advance permission to re-enter the country. An asylee can receive such authorization by applying for a Refugee Travel Document. Asylees who wish to apply for a Refugee Travel Document should make an appointment with Centro Legal's Immigrant Legal Defense Project for assistance.

Even with a Refugee Travel Document, it is essential that the asylee not return to her home country until she has become a lawful permanent resident and preferably, until she is a U.S. citizen. If the asylee does return to her home country, DHS could refuse to allow her to reenter the United States on the grounds that she implicitly no longer fears persecution. Moreover, other factors could make an asylee ineligible to reenter the United States even with a Refugee Travel Document.[29] Asylees should always consult with an attorney before traveling outside of the United States. Centro Legal discourages foreign travel of any kind until asylees become LPRs.

Lawful Permanent Residence Status

One year from the date of the asylum grant, the asylee is eligible to submit an application for adjustment of status to become a lawful permanent resident. It typically takes approximately one year for asylees to gain LPR status after they file their applications.

[29] An asylee who accrued one year or more of unlawful presence before applying for asylum could trigger a 10-year bar to reentry if she leaves the United States before obtaining permanent residency.

The grant of LPR status is discretionary and USCIS can deny adjustment of status for asylees for a number of reasons, particularly if USCIS believes that the asylee no longer meets the definition of a "refugee." This could occur in a case where conditions in the asylee's home country have improved to such an extent that she no longer fears persecution. In practice, this provision is rarely invoked; for most asylees, adjustment is virtually automatic.

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

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

As with I-730 petitions, Centro Legal asks that *pro bono* attorneys refer clients back to Centro Legal prior to the filing of asylee adjustment applications and not file them on their own. This ensures that Centro Legal is able to screen clients to make sure that they are still eligible to adjust their status.

Centro Legal also serves asylees seeking to adjust their status in-house. Centro Legal's capacity to provide technical support on asylee adjustment cases is limited to these clinics. *Pro bono* attorneys should be aware that Centro Legal does not maintain retainer agreements with former asylum clients once asylum has been granted. As a result, Centro Legal is unable to assist *pro bono* attorneys who choose to file asylee adjustment applications themselves.

Citizenship

Five years after an asylee receives permanent residence ("green card" status), she may apply to become a U.S. citizen. This status will afford the full protections under the law, and permanent, virtually irrevocable status in the United States. Centro Legal strongly recommends that individuals seek legal representation when applying to become a U.S. citizen. Individuals who would like assistance with the naturalization process can make a consultation appointment with Centro Legal.

Selective Service Registration

All males in the United States between 18 and 26 years of age are required to register for the draft. Asylees and asylum-seekers are not exempt. Failure to register may have implications for the client when he applies to become a U.S. citizen. Information about the Selective Service can be found at http://www.sss.gov.

ADDITIONAL INFORMATION

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Obtaining Employment Authorization

Although employment authorization is not an asylum applicant's automatic right, an asylum applicant may be authorized to work. *See* INA §208(d)(2). An asylum applicant's ability to obtain employment authorization depends upon her "asylum clock." The asylum clock is an electronic tracking system managed by the asylum office and the Executive Office for Immigration Review (EOIR), which tracks how many days have elapsed since an asylum applicant filed a complete asylum application (form I-589) with the asylum office or the immigration court. It can be stopped and started depending on what happens in the course of the application period. An asylum applicant becomes eligible to file for an Employment Authorization Document (EAD) 150 days after filing a "complete" asylum application and can receive an EAD 180 days after filing a "complete" asylum application.

The asylum clock starts at the time the asylum application is "filed." An application is considered "filed" on the date it is received by USCIS (if the applicant is filing for asylum affirmatively) or on the date is received in open court by an immigration judge (if the applicant is filing for asylum defensively). In addition, due to a recent class action law suit regarding the asylum clock, asylum applicants can now start their asylum clock by "lodging" their asylum application with an immigration court clerk (rather than filing in open court) if they did not previously file for asylum with the asylum office or the immigration court. However, the asylum clock stops any time that the applicant causes a delay in the adjudication of her case and may not be restarted, making the applicant ineligible for employment authorization.

Pro bono attorneys should know that if they or their client ask for a continuance at any time or for any reason, the "clock" will likely stop. If the client did not accrue 180 days on the clock before it stopped the client may not be eligible for employment authorization because the 180 days required will not be reached. Attorneys should also be aware that declining an expedited hearing date offered by the immigration judge at a Master Calendar hearing is considered a case delay caused by the applicant and stops the asylum clock.

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

The following represents the law to be applied to individuals who have applied for asylum on or after January 4, 1995. Attorneys with additional questions regarding the asylum clock may find it useful to review the December 2013 EOIR memoranda regarding the clock.[30]

Eligibility

[30] This memorandum can be found on NIJC's website at http://immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers and at www.usdoj.gov/eoir.

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

1. That she has NOT been convicted of an "aggravated felony." *See* 8 C.F.R. § 208.7(a)(1).

2. That she has NOT failed to appear for an asylum interview or a hearing before an immigration judge (unless the applicant demonstrates exceptional circumstances for having failed to appear). *See* 8 C.F.R. § 208.7(a)(4).

3. That she has NOT had her asylum application denied by an asylum officer or by an immigration judge within 150 days after applying for asylum. *See* 8 C.F.R. § 208.7(a)(1).

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

When To File

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

What To File

1. APPLICATION

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

2. PROOF OF PENDING ASYLUM APPLICATION

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

3. FEE AND FEE WAIVER

There is no fee required for the applicant's first application for employment authorization. After the first application and for renewing employment authorization, the filing fee is $380.00. If the applicant can demonstrate an "inability to pay" the filing fee, then she may file a fee waiver request. *See* 8 C.F.R. §103.7(c). To request a fee waiver, the attorney should submit form I-912. The attorney may also want

to include an affidavit from the applicant with additional details regarding her inability to pay the filing fee.

4. PHOTOS

The applicant must also submit two, color passport style photographs. The applicant's name and "A" number should be lightly printed on the back of both photos in pencil. In addition, the photographs should be inserted into a sealed envelope and paper-clipped to the I-765 application.

Attorneys who choose to file their client's I-765 application electronically are not required to submit standard photographs, but must make an appointment at a local Application Support Center for the electronic capture of the client's photograph, fingerprints and signature. For more information, visit http://uscis.gov/graphics/formsfee/forms/e-photo.htm.

Please note that USCIS may change the filing requirements for I-765 applications, so attorneys should be sure to check USCIS's webpage before filing to ensure that they have the most up-to-date instructions.

Timeline for Adjudication

It usually takes 60-90 days for an applicant to get an employment authorization card issued. The applicant will first receive a Notice of Receipt of the I-765 application. Once her I-765 application is approved, then the applicant will receive a Notice of Approval.

Renewals

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

To renew, *pro bono* attorneys must file an I-765 form with the $380.00 filing fee (unless she is filing a fee waiver request) along with proof that the applicant continues to pursue her asylum application. Such proof depends upon the stage of the applicant's asylum application. A copy of the following may be appropriate proof:

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

When Employment Authorization Terminates

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

1. AFTER DENIAL BY AN ASYLUM OFFICER

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

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

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

Freedom of Information Act Requests

If a client is seeking asylum defensively before the immigration judge, Centro Legal recommends that the *pro bono* attorney file a Freedom of Information Act (FOIA) request with the DHS to obtain copies of the client's file because DHS may have documents that the client does not have or that the client has forgotten. For example, if DHS stopped the client at the border, DHS may have documents regarding statements the client made at that time, which contradict statements she makes during the hearing. The client may also have previously filed for some other immigration benefit, but neglected to tell her attorney or Centro Legal. Without the FOIA request, *pro bono* attorneys will not know about these documents until the trial attorney uses them for impeachment purposes during the merits hearing.

Clients in immigration court removal proceedings are eligible for expedited or "Track Three" processing of the FOIA request. It generally takes DHS a few months to respond to a Track Three FOIA request and DHS generally responds more quickly to a faxed request. Depending on the time frame of the case, *pro bono* attorneys may need to file the request as soon as they accept the case. Centro Legal generally recommends that *pro bono* attorneys with clients who are applying for asylum before the asylum office not file a FOIA request because they will not receive a response quickly enough to be helpful in the case. It typically takes DHS one year or more to respond to non-expedited (not in removal proceedings) FOIA requests.

All FOIA Requests should be sent to:

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

The fax number for Track Three requests is 816-350-5785 and the email address is uscis.foia@uscis.dhs.gov.

Forensic Examination of Original Documents

If the client is in removal proceedings, the *pro bono* attorney should make the trial attorney aware of all original documents that will be submitted in support of the asylum application.

DHS may wish to submit these documents to the FBI Forensics Document Lab for evaluation**.** Immigration judges at the San Francisco Immigration Court may require that attorneys submit all original documents to the trial attorney before the immigration judge will set the case for a merits hearing**.** Centro Legal recommends that *pro bono* attorneys bring all original documents, with translations and in filing format, plus two copies of the original document package, to their client's first Master Calendar hearing if the client has all the original documents by that time. If the judge or DHS requests the documents, then the *pro bono* attorney should submit the original package and one copy to DHS and serve another copy on the judge. If the judge or DHS do not request the documents, Centro Legal recommends that the *pro bono* attorney not submit these documents to the judge or DHS, but instead keep them until the merits hearing.

If the *pro bono* attorney does not submit the original documents to DHS at the Master Calendar hearing, the attorney should note the existence of original documents in the pre-hearing document index and make the documents available during the merits hearing for the judge's inspection. Sometimes, the trial attorney may not ask for original documents until the merits hearing, but then may ask the judge for a continuance in order to obtain the results of the forensic analysis. If the continuance is unreasonable or if the *pro bono* attorney feels the judge has continued the case for an excessive period of time to obtain the forensic results, Centro Legal suggests that the *pro bono* attorney oppose the continuance as inappropriate or as creating a significant hardship for the client.

Centro Legal strongly recommends that *pro bono* attorneys not submit a client's passport to DHS as an original document unless the judge or trial attorney has specifically requested the passport. Often, the passport is a client's only form of identification and once DHS obtains the client's passport, DHS will not return it to the client until proceedings have ended.

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

Practice Tip:
For the purpose of forensic analysis in immigration court, the term "original documents" generally includes birth, marriage and death certificates; school, police, and medical records; identity cards; and other government-issued documents. The term does not generally include affidavits, letters from witnesses, newspaper articles or other similar documents. *Pro bono* attorneys should contact Centro Legal if they have questions as to whether a particular document constitutes an "original document."

CONTACT INFORMATION

* * *

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IMPORTANT PHONE NUMBERS AND ADDRESSES

* * *

San Francisco Office of Asylum
Phillip Burton Federal Building
450 Golden Gate Avenue, 4th Floor West
San Francisco, CA 94102
415-575-1300
415-575-1393

DHS-ICE Chief Counsel
100 Montgomery Street, Ste. 200
San Francisco, CA 94104
Phone: 415-705-4604

Executive Office for Immigration Review
Chicago Immigration Court
100 Montgomery Street, Ste. 800
San Francisco, CA 94104
Phone: 415-705-4415

Nebraska Service Center
For Court Cases:
USCIS Nebraska Service Center
Defensive Asylum Application with Immigration Court
P.O. Box 87589
Lincoln, NE 68501-7589

For Non-Court or UAC Cases:
USCIS Nebraska Service Center
P.O. Box 87589
Lincoln, NE 68501-7589

Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 20530-0001
Phone: 703-605-1007

Important Websites

- Online applications: www.uscis.gov
- Executive Office for Immigration Review: www.usdoj.gov/eoir
- Centro Legal: www.centrolegal.org
- NIJC: www.immigrantjustice.org

EOIR Automated Information Line
1-800-898-7180
(For information regarding the client's hearing and her employment authorization clock)

LEGAL RESOURCE MATERIALS

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Sources For Case Preparation

AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law & Procedure, written by Regina Germain, published by AILA (American Immigration Lawyers' Association)

EOIR Virtual Law Library: http://www.justice.gov/eoir/vll/libindex.html

Immigration Court Practice Manual: www.usdoj.gov/eoir

Law of Asylum in the United States, written by Deborah Anker, published by Thomson West

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), available at http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf

UNHCR Guidelines on International Protection:

- Gender-Related Persecution: http://www.unhcr.org/3d58ddef4.html
- Membership in a Particular Social Group: http://www.unhcr.org/3d58de2da.html
- Religious-Based Refugee Claims: http://www.unhcr.org/40d8427a4.html
- Internal Flight or Relocation Alternative: http://www.unhcr.org/3f28d5cd4.html

Sources For Documentation

Amnesty International: http://www.amnesty.org/

Amnesty International USA: http://www.amnestyusa.org/

Human Rights Watch, www.hrw.org

United Nations High Commissioner for Refugees: www.unhcr.org/refworld

United States Department of State: http://www.state.gov/g/drl/rls/hrrpt/

World Organization Against Torture: http://www.omct.org/

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Please contact Centro Legal directly at eleni@centrolegal.org to request and also see NIJCs website www.immigrantjustice.org for additional asylum-related materials, including recorded trainings, sample briefs, and immigration legal updates.

GLOSSARY OF IMMIGRATION TERMS

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A

"A" Number: An eight digit number (or nine digits, if the first number is a zero) beginning with the letter "A" that the DHS gives to some non-citizens. (Please note that EOIR now requires all A Numbers to be submitted as nine digit numbers. If the 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-864) filed by a U.S. citizen or lawful permanent resident for a non-citizen seeking lawful permanent residence.

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

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

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

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

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

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

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

B

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

C

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

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

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

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

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

Conviction: Formal judgment of guilt entered by a court or, if adjudication of guilt was withheld, if a judge or jury has found the person guilty or the person

has entered a plea of guilty or *nolo contendere* and has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty or restraint.

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

D

Deferred Action for Childhood Arrivals (DACA): A form of temporary relief from deportation announced by the Obama Administration in July 2012 for certain young immigrants who were brought to the United States as children and educated here.

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

Deportation: The ejection of a non-citizen from the United States. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), non-citizens were ejected from the United States through deportation proceedings. Now known as removal proceedings.

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

E

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

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

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

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

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

I

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

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

L

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

N

Native: A person born in a specific country.

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

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

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

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

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

Notice to Appear (NTA): Document issued to commence removal proceedings, effective April1, 1997.

O

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

P

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

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

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

R

Refugee: A person who is granted permission 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 of the United States and enters the United States with refugee status.

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

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

Rescission: Cancellation of prior adjustment to permanent resident status.

Residence: The principal and actual place of dwelling.

Respondent: The term used for the 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.

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).

Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008: A law which, among other things, changed the process by which "unaccompanied alien children" apply for asylum. Pursuant to the TVPRA, USCIS (the Asylum Office) has initial jurisdiction over all asylum applications filed by unaccompanied alien children, even if the child is already in immigration proceedings. The TVPRA went into effect on March 23, 2009.

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. 6 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 immigrate without the assistance of the LPR or USC spouse or parent, provided that they meet certain conditions.

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

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

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

W

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

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