



# Asylum: Legal Foundations

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JFON is a ministry of  
hospitality that  
welcomes immigrants

by providing affordable,  
high-quality immigration  
legal services,

engaging in advocacy for  
immigrants' rights

and offering education to  
communities of faith and the  
public.

## Justice For Our Neighbors' Mission

Clinic Case Types:  
Humanitarian case  
examples



*Special Immigrant  
Juvenile Status*



*Asylum*



*U-Visa*

# Sources of Immigration Law and Regulations

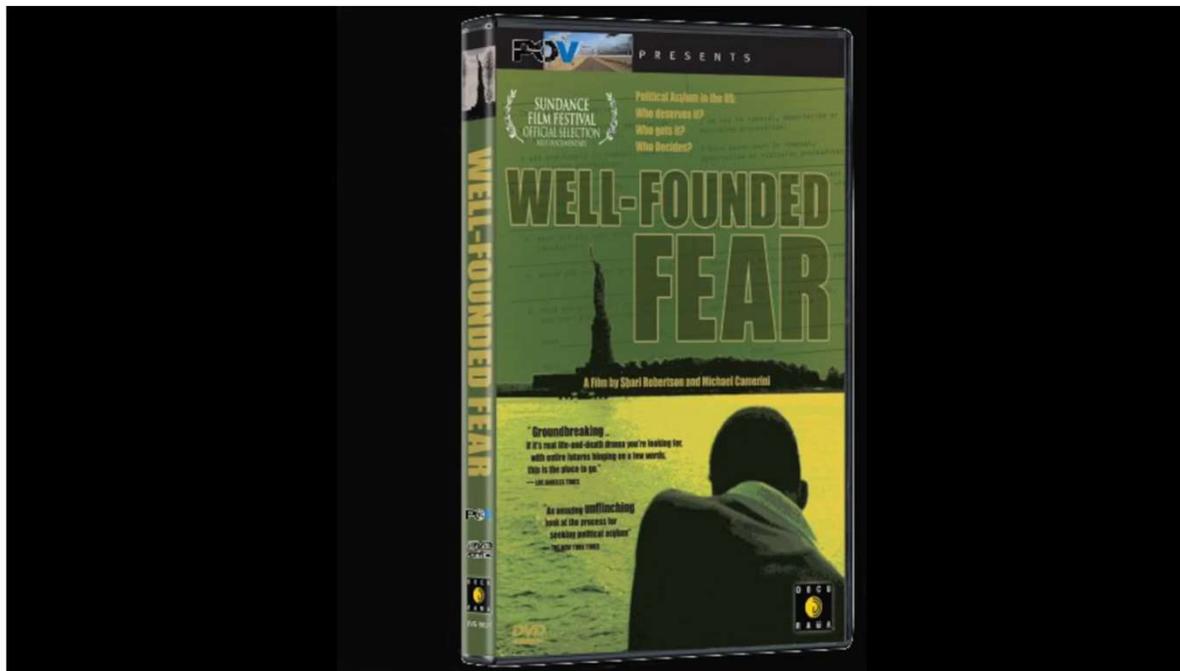
- ♦ The Immigration and Nationality Act
  - ♦ U.S.C. (U.S. Code) 1101 - 1537
  - ♦ INA (Immigration and Nationality Act) 101-507 (INA 208 - Asylum)
- ♦ Regulations: 8 CFR (Code of Federal Regulations) - 8 CFR Part 208 - Asylum Procedures
- ♦ Case law:
  - ♦ U.S. Supreme Court
  - ♦ 6<sup>th</sup> Circuit Federal Court of Appeals
  - ♦ Board of Immigration Appeals (Administrative Court)
  - ♦ State law (criminal and family law)
- ♦ American Immigration Lawyer's Association website ([www.aila.org](http://www.aila.org))
- ♦ Government websites (U.S.CIS and EOIR) - see especially, Immigration Court Practice Manual on the EOIR website (<https://www.justice.gov/eoir/page/file/1084851/download>)
- ♦ Excellent source of videos and materials on asylum: National Immigrant Justice Center's website (<https://www.immigrantjustice.org/>)

# Legal Realities....



# One Asylum Seeker's Experience...

access video online at: <https://www.youtube.com/watch?v=agNVXzvT1CA>



# What are some special challenges with representing asylum clients?

- ▶ Establishing trust with the client
- ▶ Cultural differences
- ▶ Psychological trauma
- ▶ Use of Interpreters (interviews, affidavit preparation, I-589 preparation)
- ▶ Identifying witnesses
- ▶ Corroborative evidence: which official records can help to tell the client's story? (arrest warrants; police records; newspaper documentation; medical records; statements from individuals that can attest to harm suffered by client)
- ▶ Documents in foreign languages...
- ▶ Writing the affidavit



## Check-in: Terminology (Asylee vs Refugee)

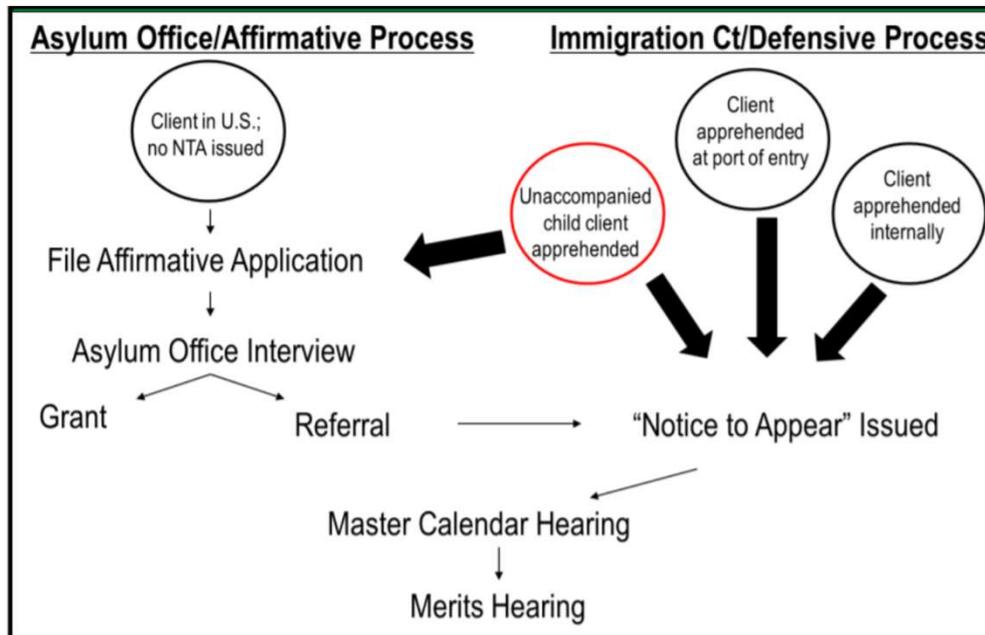
- ▶ Under U.S. law, a “refugee” is a person who is unable or unwilling to return to his or her home country because of a “well-founded fear of persecution” due to race, membership in a particular social group, political opinion, religion, or national origin.
- ▶ This definition is based on the United Nations 1951 Convention and 1967 Protocols relating to the Status of Refugees, which the United States became a party to in 1968.
- ▶ Congress passed the Refugee Act of 1980, which incorporated the Convention’s definition into U.S. law and provides the legal basis for today’s U.S. Refugee Admissions Program (USRAP) and Asylum Procedures.

# Check-in: Terminology (Asylee vs. Refugee)

- ▶ Who is an Asylee?
  - ▶ A person who has sought protection from persecution on a protected ground from inside the United States or at the border. They must meet the definition of a “refugee.” In the US asylum seekers apply for protection from inside the country or at a port of entry.
- ▶ **What is the difference between an Asylee and a Refugee? A refugee seeks/applies for protection from outside the United States.**

# Pathways: Affirmative vs. Defensive Asylum

(image source: National Immigrant Justice Center)



# Federal Agencies Involved in the Asylum Process

- ▶ **INS (Immigration and Naturalization Service) no longer exists, in 2003 Department of Homeland Security was created, restructuring our immigration agencies**
- ▶ **Department of Homeland Security (DHS)**
  - ▶ USCIS: Adjudicates applications (Asylum Office/Jurisdiction over Affirmative asylum Applications)
  - ▶ ICE: Enforcement/deportation (Notice to Appear issuance/Detention/Office of Chief Counsel)
  - ▶ CBP: Customs and Border Protection (Apprehension at border/within 100 miles of border)
- ▶ **Department of Justice (DOJ)**
  - ▶ Immigration court systems/EOIR (jurisdiction when asylum is raised as a defense to removal (“defensive asylum”)/Immigration Judges/BIA)

# Immigrants and Legal Representation

- ▶ A Supreme Court case called Gideon v Wainright requires that no one be deprived of their liberty without access to legal counsel, but that case only applies to criminal matters, not civil.
- ▶ Because most immigration law is civil law, immigrants are not entitled to legal representation if they cannot afford it - this includes LPRs, detained immigrants, and immigrants with cases in removal proceedings in Immigration Court.

# Elements of Asylum Claims

1. “Well-Founded Fear”
2. ...of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
5. - Race - Religion - Nationality - Political Opinion - Membership in a Particular Social Group

*A “nexus” must be established between persecution and a protected ground.*

# Elements of Asylum Claims

1. “Well-Founded Fear” (“reasonable possibility” of persecution - see *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)/one in ten chance of persecution; established by past persecution or reasonable possibility that asylum elements will be met/occur in the future).
2. ...of “Persecution” (see 6<sup>th</sup> Circuit definitions)
3. Perpetrated by the government or an entity the government cannot/will not control (see table)
4. “On account of” (Nexus/”One Central Ground for persecution” standard; may be established by direct or circumstantial evidence...) *A “nexus” must be established between persecution and a protected ground*
5. - Race - Religion - Nationality - Political Opinion - Membership in a Particular Social Group (see separate slide for range of interpretation of each ground)

# Definition of Persecution by the 6th Circuit

The term “persecution” - despite its centrality to determining who is eligible for asylum - is *not* defined in the Immigration and Nationality Act, but has been defined [and (re)defined] through courts over time in different federal circuits...Michigan is in the 6th Circuit.

## Examples:

- ▶ “the infliction of harm or suffering by the government, or persons the government is unwilling or unable to control, to overcome a characteristic of the victim.” *Al-Ghorbani v. Holder*, 585 F.3d 980, 997 (6th Cir.2009)
- ▶ “...’persecution’ within the meaning of 8 U.S.C. Section 1101(a)(42)(A) requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.” *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998) and *Gilaj v Gonzalez*, 408 F.3d 275, 284 (6th Cir. 2005).

<https://caselaw.findlaw.com/us-6th-circuit/1528094.html>

# Elements of Asylum Claims

**Race:** - Broad meaning (can include groups that are commonly referred to as a “race” within a cultural context)

**Religion** - (Christian, Atheist)

**Nationality:** - Not just citizenship; can include ethnic or linguistic group. May overlap with racial group identities

**Political Opinion:** - Actual or Imputed

**Membership in a Particular Social Group:** - One of the most common and most complex bases for asylum; historically has included LGBTQ groups, gender-based persecution claims. (core issue in recent challenges to asylum procedures, in “Matter of A-B-”)

## Particular Social Group (PSGs)

- ▶ A Particular Social Group (PSG) is a group based on a “common immutable characteristic” that members of that group cannot change nor should be required to change. See *Matter of Acosta*, 19 I&N Dec. 211,222 (BIA 1985).
- ▶ Has historically included: family relationships, gender, LGBTQ groups/identity, involvement in political parties and past activities, other group memberships
- ▶ Additional BIA decisions in 2014 - is the group “socially distinct”?

# Reality Check(s)

- ▶ What does the Asylum Process look like? (INA Section 208 and 8 CFR Part 208)
- ▶ If at port of entry, determined no credible fear of return, ordered for expedited removal from the US (no right to immigration hearing). Now, many individuals are not permitted to enter the United States while they wait for their hearings (e.g. “Remain in Mexico” policy)
- ▶ How long does the asylum process take? [6 months to 4+ years/affirmative v. defensive filing]
- ▶ Are asylum seekers entitled to attorneys? No. 5X higher rate of success if have an attorney.
- ▶ Asylum is a discretionary benefit...
- ▶ How many people are granted asylum? Granted in FY 2016: 20,500 out of 73,081 cases (28%). In FY 2016, 22% China, ELS (10.5%), Guatemala (9.5%), Honduras (7.5%), and Mexico (4.5%). No limit to the number that may be granted in any given year.
- ▶ Benefits to asylum? Pathway to Legal Permanent Residency Status..

# Evidentiary Support: The I-589 Form & Supporting Documentation

Inbox (44) x | Venezuel... x | Presenta... x | Justice for... x | My Drive x | Justice for... x | I-589, Ap... x | I-589, Ap... x | how to di... x | +

File | C:/Users/kpurn/Downloads/i-589%20(1).pdf

Department of Homeland Security  
U.S. Citizenship and Immigration Services  
U.S. Department of Justice  
Executive Office for Immigration Review

OMB No. 1615-0067; Expires 05/31/2019  
**I-589, Application for Asylum  
and for Withholding of Removal**

**START HERE - Type or print in black ink. See the instructions for information about eligibility and how to complete and file this application. There is no filing fee for this application.**  
**NOTE:**  Check this box if you also want to apply for withholding of removal under the Convention Against Torture.

**Part A.1. Information About You**

1. Alien Registration Number(s) (A-Number) (if any)	2. U.S. Social Security Number (if any)	3. USCIS Online Account Number (if any)
4. Complete Last Name	5. First Name	6. Middle Name
7. What other names have you used (include maiden name and aliases)?		
8. Residence in the U.S. (where you physically reside)		
Street Number and Name		Apt. Number
City	State	Zip Code
Telephone Number ( )		
9. Mailing Address in the U.S. (if different than the address in Item Number 8)		
In Care Of (if applicable):		Telephone Number ( )
Street Number and Name		Apt. Number
City	State	Zip Code
10. Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female	11. Marital Status: <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed	
12. Date of Birth (mm/dd/yyyy)	13. City and Country of Birth	
14. Present Nationality (Citizenship)	15. Nationality at Birth	16. Race, Ethnic, or Tribal Group
17. Religion		
18. Check the box, a through c, that applies: a. <input type="checkbox"/> I have never been in Immigration Court proceedings. b. <input type="checkbox"/> I am now in Immigration Court proceedings. c. <input type="checkbox"/> I am not now in Immigration Court proceedings, but I have been in the past.		
19. Complete 19 a through c.		
a. When did you last leave your country? (mm/dd/yyyy)		b. What is your current I-94 Number, if any?
c. List each entry into the U.S. beginning with your most recent entry. List date (mm/dd/yyyy), place, and your status for each entry. (Attach additional sheets as needed.)		
Date	Place	Status
Date	Place	Status
Date	Place	Status
		Date Status Expires

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# Generally, an Asylum Applicant Must Establish the following:

Possess one of the following characteristics, a combination of protected characteristics, or imputed protected characteristics which are: race, religion, nationality, membership in a particular social group (PSG), or political opinion

Have suffered past persecution or have a well-founded fear of future persecution

Persecution must be by the government, or by private actors the government is unable or unwilling to control

Persecution must be "on account of" the protected characteristic, or, have a "nexus" to the protected characteristic

Application must be filed within one year of the applicant's last arrival in the U.S. or the applicant must qualify for an exception to the OYFD

Applicant must not be otherwise ineligible due to criminal, security, or persecutor bars

# Evidentiary Support: Credibility and Corroboration

- ▶ **Credibility** is everything...
- ▶ **Client claims:** Physical evidence; Witness affidavit; police reports; pictures; other documentation to directly support dates and other events that occurred
- ▶ **Country conditions:** State Department Reports; Human rights reports/NGOs; News sources - domestic and foreign
- ▶ **Claims of past persecution:** Forensic medical exams; mental health exams; photos and other documentary evidence
- ▶ **Claims of fear of future persecution:** Expert testimony; country conditions; affidavits from similarly situated persons

# Evidentiary Burdens: Some Additional Considerations

- ▶ Past persecution: If established by applicant, presumption that applicant has a well-founded fear of future persecution. 8 CFR Section 208.13(b)(1). Burden shifts to government preponderance of the evidence to show that internal relocation reasonable or country conditions have changed.
- ▶ If no past persecution suffered by applicant, then applicant has burden to show that internal relocation is not reasonable. But if persecutor is the government, internal relocation is presumed unreasonable, unless government can show otherwise by a preponderance of the evidence.
- ▶ If no past persecution has been established, the applicant must establish a well-founded fear of future persecution. Must prove both that genuine fear of return to country of origin and that there is either 1) a reasonable possibility (10% chance) that s/he will be singled out for persecution or 2) that there is a pattern or practice of persecution of a group of persons similarly situated to the applicant. See 8 CFR Section 208.13(b)(2)(iii).

# Removal Proceedings

- ♦ “Removal” = Deportation
- ♦ Removal Proceedings are a judicial process in which the immigrant appears in Immigration Court in front of an Immigration Judge (an administrative law judge).

# Merits Hearing Procedure: Some Additional Considerations

- ▶ General Federal Rules of Evidence do not apply. General standard to consider - is the evidence probative and its admission fair? Many standard objections to evidence are not normally made or upheld, but varies by judge
- ▶ Benefits to client and fairness of process...
- ▶ Role of the Immigration Judge
- ▶ Corrections/amendments to the original record
- ▶ Opening Statements
- ▶ Decisions of the Immigration Judge
- ▶ Appeals to BIA, then may file petition for review to the Court of Appeals in the appropriate Federal Circuit

# Reality Check(s): For Due Process Concerns

- ▶ What can we learn from some of the recent legal controversies and attempts to change asylum procedures in the United States?
  - ▶ Matter of -A -B
  - ▶ Grace v Whitaker
  - ▶ “The Asylum Ban”
  - ▶ Migrant Protection Protocols
  - ▶ Safe Third Countries?
  - ▶ “Firm Resettlement” and asylum in US law...

## True or False? Which of the following have gone into effect since 2018?

- ▶ All Central American asylum seekers inside the U.S. or at the U.S. border must apply for asylum in Mexico before applying for asylum in the United States. (True or False?)
- ▶ Asylum seekers at the southern US border must wait in Mexico for while their asylum case is pending (True or False?)
- ▶ Asylum claims based on gender-based violence are no longer approved in the United States (True or False?)
- ▶ Applicants for asylum that have passed through a third country en route to the United States may not apply for asylum... (True or False?)
- ▶ Asylum applicants may be sent to Guatemala from the United States (regardless of their country of origin) because it is a safe third country... (True or False)

# Don't forget asylum alternatives!

- ▶ Withholding of Removal
  - ▶ Convention Against Torture
- 
- ▶ Special Thanks to N-JFON, JFON-Iowa and National Immigrant Justice Center (Chicago, Illinois) resources which assisted in the preparation of this presentation!!

Questions?

