

OUR PRACTICE

Refugees and Asylees

Three types of relief exist for foreign nationals who fear persecution in their home countries on the grounds of race, religion, national origin, political opinion or membership in a particular social group:

- **Refugees** – persons brought in from outside the U.S. under quotas set by the President for certain regions. Results in permanent residence.
- **Asylees** – persons who have already physically come to the U.S. Usually results in permanent residence.
- **Withholding of Removal** – persons in the U.S. who don't qualify for asylum. Results in uncertain, indefinite arrangement.

In addition, the Convention Against Torture prevents removal of persons who would probably be tortured in their home country, and not necessarily on account of one of the five grounds required for refugees, etc., above.

Statistics from the immigration service (USCIS) have reflected clearly that persons represented by a lawyer are far more likely to be granted asylum than those who are not represented. We can help prepare and present the evidence to pursue any of these claims to relief.

The Nature of Fear Required

For refugee, asylum or withholding, there are three main requirements in common about the fear of harm:

- **Persecution** is what the alien fears – not just mild misfortune, justified punishment or required military service. Persecution can include confinement, torture, severe economic hardship, relegation to substandard dwellings, exclusion from institutions of higher learning, enforced social and civil inactivity, passport denial, constant surveillance, pressure to become an informer, mental abuse or threats and coercive population control measures. The persecutor must be the government or persons or organizations the government is unable or unwilling to control.
- The fear is **well-founded**. For asylum, the alien must show a "reasonable possibility" of being persecuted for one of the five reasons, which may mean as low as ten percent probability. For withholding, the persecution must be "probable," which means more than 50 percent probability. Usually this involves showing either a pattern of persecution of others similarly situated or their own past persecution. The threat of persecution must cover all parts of the home country where the person could be allowed to go.
- The persecution feared is **on account of** one of the five grounds, at least in part. The alien must show that the motivation of the persecutor is based, at least in part, on the victims' race, religion, national origin, political opinion or membership in a particular social group. Natural disasters, economic decline and even cruel treatment that is not based on one of the five grounds will not count. A persecutor's mistaken imputation of political opinion on the victim can qualify. "Membership in a particular social group" means persons who share a common, immutable characteristic," such as sex, color, kinship or in some cases shared past experiences, such as land ownership or military service. "Immutable" for this purpose means a characteristic that cannot be changed or should not be required to be changed, which has been held to include homosexuality.

Someone, who themselves have persecuted others on one of the five grounds, cannot be eligible. The opportunity to have "firmly resettled" in another country along the way to the U.S. may prevent approval. While most criminal and national security grounds of inadmissibility apply, many other inadmissibility grounds do not apply at all and others can be waived specially.

Evidence

It is hard to prove what someone might do far away, how likely it is they might do it and why they might do it. The most important evidence is the detailed application form and a credible, consistent statement by the applicant at the interview or hearing. It is very important to have as much corroborating information as possible about the applicant's past treatment or about the country conditions relating to the type of persecution, such as statements from other people, expert analysis and news reports. The USCIS or Immigration Judge rely heavily on the State Department's "Country Reports" on the human rights practices of each country. Various other reports available through the State Department's Bureau of Democracy, Human Rights and Labor can also be persuasive, since they are authored by the U.S. government. Other groups collect news reports and even create their own reports about various countries' human rights practices and such resources include:

- The USCIS Resource Information Center: reports prepared for asylum officers concerning various countries' conditions, plus other resources linked on a separate page for each country.
- HURISEARCH: huge searchable collection of more than 600 NGO sources/collections in 58 languages.
- UNHCR Newswire: search current news from several worldwide media sources.
- Amnesty International: innumerable reports and advocacy programs.
- Human Rights Watch: same.
- Asylumlaw.org: allows search of 15 human rights databases at once, plus innumerable other resources.

Refugee Program

Each year, the President makes an allotment for refugee admissions for different regions or countries of the world. The USCIS website describes the process for application and selection of individual refugees, which is influenced by selection priorities, such as relationship to someone already settled in the U.S. This selection takes place outside the U.S. and usually outside the applicant's home country (except Cuba, Vietnam and the Soviet Union), which makes personal appearance on behalf of a client difficult, but immigration attorneys can still be helpful in eliciting a prospective applicant's story; selecting the most important information; and preparing a package of papers for presentation to the USCIS or one of the agencies (particularly UNHCR and U.S. consulates) who help select applicants for USCIS consideration. The spouse and unmarried minor children under the age of 21 may derive status with the refugee or follow to join after the refugee files Form I-730.

Once a refugee is admitted to the U.S., they normally enjoy financial and other resettlement assistance through one of the many voluntary agencies who receive government funding for that purpose. The I-94 card they receive upon entry can serve as evidence of employment authorization for I-9 purposes for 90 days, but they should immediately file Form I-765 for an employment authorization card. They may also apply for a refugee travel document.

After accumulating one year physically in the U.S. after admission, the refugee may apply for adjustment of status to permanent residence under special procedures. The refugee becomes eligible for naturalization five years after initial admission as a refugee.

Asylum

Asylum can be claimed by someone who has made it at least to a U.S. border or airport or has already physically entered the U.S. The application is always made through Form I-589. Someone who is maintaining lawful status in the U.S. can make an "affirmative" claim to the USCIS that is reviewed by an Asylum Officer, whose decision can be appealed to the Board of Immigration Appeals (BIA). If the applicant is not in lawful status at the time of making the application to USCIS and the Asylum Officer does not approve the claim, the applicant is placed directly into removal proceedings, where the claim can be renewed before the Immigration Judge and, if denied, appealed to the BIA. Still other aliens who are placed into removal proceedings for some other reason may file a "defensive" asylum application in the Immigration Court. Someone facing expedited removal at the border or in connection with a prior removal order must still be allowed to request a "credible fear" hearing to see if any basis for asylum exists.

Until 1995, many people who had fallen out of status applied for asylum even with weak claims, because they would be allowed work authorization while an Asylum Officer piled their cases into the monstrous backlog of hundreds of thousands of cases awaiting decision. Some of those backlogged cases are still backlogged and the applicants continue to receive annual work authorization cards. Reforms enacted in 1995 required expedited consideration of new applications. This eliminated most chances for interim work authorization and required "referral" of unapproved claims to Immigration Court, thereby making a weak asylum application the fastest path to removal. With the stakes this high, advice and assistance from an immigration attorney is critical in evaluating all options and, if asylum is among those chosen, crafting the application papers and presenting testimony. In considering chances of success, one can view USCIS's statistical information on asylum adjudications, recognizing that the published data is not absolutely current and may reflect conditions that have since changed.

A 1996 law required that asylum applications be made within one year of entering the U.S., but there are exceptions for changed circumstances (in the conditions giving rise to fear and in the characteristics of the alien that might make them a target of persecution) and a host of other situations, including maintenance of lawful nonimmigrant status in the meantime, that might have prevented a timely filing. Someone with a good asylum claim should not fail to pursue it based on the one year filing rule without advice from an immigration lawyer concerning a possible exception.

The USCIS website provides a helpful overview of asylum, application procedures and obtaining asylum status for spouse and children. Asylum is a "discretionary" remedy, so that, even if all other eligibility rules are met, the decision maker can weigh more general factors and deny asylum. This underscores the importance of a well-documented case.

Once asylum is granted, the asylee can obtain interim work authorization and a refugee travel document. One year after asylum approval, the asylee may apply for adjustment of status to permanent residence under special procedures. Only 10,000 such adjustments may be granted per year, which is less than the number of asylum approvals granted per year. Thus, there is a lengthy backlog, but USCIS does not publish any information about the system by which the backlog is administered. An asylee becomes eligible for citizenship four years (instead of five) after adjustment of status was approved.

Withholding of Deportation

If someone is likely to be persecuted on one of the five grounds, but otherwise fails to qualify for asylum (such as an inadmissibility ground or an unfavorable exercise of discretion) and faces removal before an Immigration Court, they may be granted "withholding of removal." This provides nothing but a begrudging interim restraint from actual removal to the particular country of feared persecution, without permanent residence. The asylum application itself automatically doubles as an application for withholding. Family members cannot benefit from an approval.

Convention Against Torture

If the harm someone fears is not based on one of the five grounds, but is bad enough to be called "torture" intentionally inflicted by or with the consent of an official of the home country government, they may be considered for a slightly different kind of withholding of removal with similarly tenuous effect. If they are subject to certain criminal grounds, they may instead receive "deferral" of removal including detention.

Avoiding Persecution – Escape from Chaos

Numerous provisions of U.S. law, some carrying out international agreements, allow temporary, indefinite and/or permanent residence for persons whose countries of origin are places of chaos, special designation or possible persecution. We have separated these provisions into several groups for comparative discussion. Links to the discussions are imbedded in the paths mentioned below:

- Avoiding Persecution
 - Refugees – persons brought in from outside the U.S. based on feared persecution on certain grounds
 - Asylees – persons who have entered the U.S. claiming, or subsequently claiming, fear of persecution on certain grounds
 - Withholding of Removal – persons in the U.S. who are likely to face persecution on certain grounds and do not qualify for asylum
 - Convention Against Torture – persons who have entered the U.S. and who fear torture or who have suffered from "torture" which is defined as harm intentionally inflicted by or with the consent of an official of the home country government
- Temporary Protected Status
- Miscellaneous
 - Adjustment for Polish & Hungarian Refugees
 - Cuban, Nicaraguan and Haitian Adjustment Acts
 - Suspension for Salvadorans, Guatemalans and for Soviets
 - Lautenberg Amendment for Soviets, Vietnamese, Laotians and Cambodians
 - Humanitarian Parole

Frankly, these provisions, along with removal grounds and proceedings, are the most complex and confusing in immigration law. Unfortunately, they often arise in context of removal proceedings, compounding the complication and the consequences at stake. In addition, the unfortunate reality is that these complications often face people who, because of the fear and chaos they have escaped so far, are least capable of paying for expensive representation needed to press their positions. We salute the many non-profit agencies and private attorneys who provide pro bono representation in these cases to the extent they can.

Temporary Protected Status

Until 1990, U.S. immigration law provided significant opportunities to people who had fled certain types of persecution, but there wasn't much to protect someone from a country where general chaos had erupted. Then Congress enacted Temporary Protected Status, most often referred to as "TPS."

TPS was conceived as temporary relief with no inherent prospect for permanent status. It is only available for people from certain countries designated from time to time by the Attorney General, whose designations expire after 6 to 18 months, unless extended, and some designations have not been extended. Others have been extended arguably far longer than the immediate impact of the events that gave rise to designation. To benefit, someone from a designated country must have entered the U.S. by a certain date, must apply initially by a deadline (although there can be exceptions) and must keep filing applications to benefit from each subsequent

extension of the country's designation. Approval results in a valid work card and at least temporary protection from being removed.

The USCIS website describes the eligibility rules and application procedures of the TPS program and lists countries currently designated for TPS, although the list sometimes falls out of date.

It is important to remember that, although being in TPS keeps someone from being "unlawfully present," TPS is not a nonimmigrant status. Thus, if you can continue to maintain a nonimmigrant status, such as B-2 or F-1, even while you obtain and enjoy the unrestricted work authorization that comes with TPS, you will have the option to extend or change your nonimmigrant status after your TPS designation may end. If you let the nonimmigrant status lapse, you may have fewer meaningful options if and when TPS ends.

The DHS Secretary has tried to resist the temptation to make country extension designations at the last minute before the current designation expires and USCIS has tried to make systems changes to increase the efficiency of its application processing. The goal is for affected foreign nationals to have time to file for their EAD extension applications, and for USCIS to have time to fully process and approve eligible EAD applications, before the designated country's existing TPS work cards would expire. That way, employers could rely on the face of the cards and systems like E-Verify could function more smoothly.

However, especially with countries having large groups of TPS beneficiaries, such as El Salvador and Honduras, this turns out to be impossible and USCIS announces in the Federal Register that the cards will be extended automatically for about six months to allow time for the applications to be filed and processed. This can be confusing for employers who would expect to rely on the validity date printed on an employment card.

Miscellaneous

This following covers some other miscellaneous U.S. immigration options available to people coming from personally or nationally chaotic situations or fleeing persecution. Humanitarian parole is available on an individualized basis to people from all countries. Over the years, Congress has enacted special, limited laws that do not fit the rest of the immigration scheme, some of which benefit certain people from specific countries or sets of countries. For instance, Congress has in effect granted permanent residence eligibility to people from any country who were covered by class action lawsuits against USCIS for closing them out of a 1986 amnesty scheme. Countries covered by specific laws include Cuba, Nicaragua, Haiti, the former Soviet Union, Vietnam, Laos, Cambodia, Poland, Hungary, Guatemala and El Salvador. Note that Temporary Protected Status is also country specific. We can help with all of these options.

Humanitarian Parole. When no visa classification fits the situation or when the alien is subject to some inadmissibility ground for which they have not been able to obtain a waiver, they may seek "humanitarian parole" through the USCIS Parole and Humanitarian Assistance Branch. Parole is given on a case-by-case basis for urgent humanitarian reasons or significant public benefit. Usually it requires something very serious, such as dire need for medical treatment unavailable elsewhere, and it is not given often. It can only be requested from abroad. Parole results in a lawful entry and, while it is valid, prevents "unlawful presence," but it is not a nonimmigrant status from which one can change to another nonimmigrant status. Nevertheless, someone paroled into the U.S. may, if otherwise qualified, adjust status to permanent residence. The USCIS website contains useful information on applying for humanitarian parole.

Amnesty Holdovers. In 1986, Congress enacted an amnesty (or legalization) for aliens who had been unlawfully present in the U.S. from 1982 to 1986 or who had worked as agricultural workers for several seasons during that period. The deadline for applications for that amnesty is long past, but there were three class action lawsuits in which the classes of plaintiffs argued that they were incorrectly denied legalization or were discouraged or prevented by the immigration service (USCIS) from applying. In 2000, Congress passed

the LIFE Act putting an end to those class actions by giving participants in those lawsuits eligibility to apply for permanent residence. The USCIS website describes rules of the program.

Lautenberg Amendment. A special law, known as the "Lautenberg Amendment," enacted in 1989 temporarily, but extended since then, provides a more generous treatment for refugee status (not asylum) for certain nationals of the former Soviet Union (particularly Jews, Evangelical Christians, Ukrainian Catholics and Ukrainian Orthodox), Vietnam, Laos and Cambodia. That law, implemented in USCIS regulations, also allows adjustment of status to permanent residence for nationals from those countries who were paroled into the U.S. between 1988 and 1994. Former Soviets can also benefit from NACARA suspension.

Polish and Hungarian Refugees. Certain nationals of Poland and Hungary who were paroled into the U.S. between 1989 and 1991 may adjust to permanent residence. USCIS regulations provide details.

Cuban Arrangements. Several special arrangements apply to Cuban nationals. First, there has been a special Cuban lottery in past years, although the next lottery has not been set. Second, certain Cubans seem to receive special consideration in refugee cases. Third, the Cuban Adjustment Act allows special adjustment to permanent residence of Cubans who have been admitted or paroled (and those found in the U.S. undocumented often are then paroled) and physically present in the U.S. for one year. Fourth, the "NACARA" law discussed below applies to Cubans.

NACARA/HRIFA Adjustments for Cubans, Nicaraguans and Haitians. Two special laws for nationals of certain countries, called NACARA and HRIFA, allowed certain Haitians, Cubans and Nicaraguans who had been present in the U.S. since 1995 to adjust specially to permanent residence. The deadline for those adjustment applications has passed except for those who were previously denied NACARA adjustment because they had re-entered the U.S. illegally.

NACARA Special Suspension of Deportation for Guatemalans, Salvadorans and Former Soviets. The law allows special "suspension of deportation" to permanent residence under relaxed former standards and a unique procedure for certain nationals of El Salvador, Guatemala and countries of the former Soviet Union and Warsaw pact who entered the U.S. by certain dates in 1990 and either filed asylum applications and/or registered for certain benefits by certain dates before the end of 1991. This benefits many people whose asylum applications have been stuck in monstrous backlogs for more than a decade, who have been extending their work authorization cards annually all these years and who probably, ultimately, could not win an asylum claim. The complex eligibility and procedural rules for this benefit are set forth in substantial detail in the instructions to the application form, I-881.