

Human Rights First

Discrimination, Detention, and Deportation: Immigration & Refugees

<https://www.humanrightsfirst.org/resource/parole-vs-bond-asylum-system>

Policy Issue Resources

Work With Asylum Seekers

If you are seeking asylum, we can help

Areas of Focus

Current Initiatives

To be granted asylum, a person must demonstrate that he or she is a refugee, that he or she is not barred from asylum for any of the reasons listed in our immigration laws, and that the decision-maker should grant asylum as a matter of discretion.

A refugee is any person who is outside his or her country of nationality (or, if stateless, outside the country of last habitual residence) and is unable or unwilling to return to that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.

This definition is based on international law, specifically the 1951 UN Convention Relating to the Status of Refugees. The U.S. is not a signatory to this Convention, but did sign on to its 1967 Protocol, which incorporates the Convention by reference. The Refugee Convention requires state parties to protect people living within their borders and prohibits them from sending people to other countries where they would be harmed based on their race, religion, nationality, membership in a particular social group, or political opinion. With the Refugee Act of 1980, the U.S. brought the refugee definition into our domestic law. The refugee definition is found at section 101(a)(42) of the Immigration and Nationality Act (INA).

A person who meets the refugee definition may be granted asylum in the United States if he or she is not barred from asylum for any of the reasons listed in section 208 of that Act and if the adjudicator decides that he or she should be granted asylum as a matter of discretion.

The bars to asylum include the one-year filing deadline, which states that a person who needs asylum should file the application within one year of the last arrival in the United States. Otherwise, the asylum-seeker must show that he or she qualifies for an exception to the filing deadline and that he or she filed within a reasonable time given that exception. The bars to asylum also include the so-called material support bar.

Some people who need asylum will have their cases decided at the Asylum Office and others will have their cases decided at the Immigration Court. The standard for asylum is the same in both places, and Human Rights First works on cases at all levels of the system.

People apply for asylum with Form I-589. That application for asylum can also include a request for two related alternative forms of relief, which offer fewer benefits: withholding of removal under section 241(b)(3) of the INA and protection under the UN Convention Against Torture.

To be granted withholding of removal under section 241(b)(3) of the INA, a person must demonstrate that if returned to the country of origin he or she is more likely than not to be persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group. Some of the bars to asylum, including the one-year filing deadline, do not apply to claims for withholding of removal. There is no discretionary element. This means that if a person is more likely than not to be harmed for one of the reasons listed above, he or she must be granted withholding of removal.

To be granted withholding of removal under the U.N. Convention Against Torture, a person must demonstrate that if returned to the country of origin he or she is more likely than not to be tortured. There is no discretionary element. Most of the bars to asylum do not apply to requests for protection under the U.N. Convention Against Torture. The government of the United States has promised that it will not send anyone back to a country where he or she is likely to be tortured and so an immigration judge will consider eligibility for protection under the Torture Convention even if the asylum-seeker does not specifically request it.

The asylum system has two parts: the U.S. Department of Homeland Security (which includes the Asylum Office) and the U.S. Department of Justice (which includes the Immigration Courts). Cases that are not granted at either of those levels might go to the Board of Immigration Appeals, the U.S. Courts of Appeal, or even to the U.S. Supreme Court. Human Rights First works with asylum-seekers at all levels of the system. A person who meets the definition of a refugee can apply for asylum in various ways, depending on that person's immigration status at the time they decide to apply.

When a person has entered the United States, whether or not they were inspected at the border, and our government is not taking any active steps to remove them from the U.S., they can make what is known as an affirmative application for asylum. This means that the person will file an I-589 application by mail with the U.S. Department of Homeland Security. Later they will be interviewed by an officer at the local Asylum Office. If the officer grants the application, then the person has asylum. He or she can then petition for their spouse and children to join them in the United States. They are also then on the path toward a green card and eventual U.S. citizenship. If the officer denies the asylum application, and the person has no other immigration status, then they are referred to the Immigration Court, where a judge will consider the asylum case.

When a person has been placed in Immigration Court proceedings before they apply for asylum, the I-589 application should be filed directly with the immigration judge. This is known as a defensive application for asylum because the person is requesting asylum as a defense to the government's charge that they should be removed from the United States. Whether the case starts in the Asylum Office or in the Immigration Court, the judge considers the case from the beginning. If the immigration judge grants the application, then the person has asylum. He or she is then eligible for the same family-reunification and other benefits that a person would be eligible for if granted at the Asylum Office level. If the immigration judge grants only withholding of removal or protection under the U.N. Convention Against Torture, then the person may not petition for relatives but will be permitted to remain in the U.S. and to work to support himself or herself.

Asylum applications filed by unaccompanied children (those who are under age 18) are heard at the Asylum Office, even if the child is otherwise in proceedings in the Immigration Court. This is the result of the Trafficking Victims Protection Reauthorization Act (TVPRA) that went into effect March 23, 2009 and it applies to asylum applications filed on or after that date.

Cases which are denied in the Immigration Court may be appealed to the Board of Immigration Appeals. If the case is not granted at that level, the asylum-seeker may file a petition for review which brings it to the U.S. Court of Appeals in the circuit where the immigration judge denied the case. When asylum cases of genuine refugees are granted at the lower levels, the system works most effectively. Judges at the appellate courts are then available to spend their time on the many other types of cases that they have to decide. Pro bono representation of asylum-seekers can help to ensure that cases are well-prepared and properly decided in the first instance.

The process for seeking asylum is the same for people who are in the Immigration Court whether or not they are detained. The I-589 (asylum application) will be filed with the immigration judge and there will be an opportunity to testify and present evidence in support of the asylum case. However, it is much more difficult to prepare an asylum case from inside an immigration detention center because of limited access to supporting witnesses and documentation, and because detained cases move more quickly. *Pro bono* legal assistance can make a tremendous difference in these cases. In addition to helping with the asylum case, a *pro bono* lawyer can help a detained asylum-seeker to request release from detention on bond or parole.

For cases at the Asylum Office level, the filing of the I-589 will prompt the U.S. Department of Homeland Security (DHS) to send a biometrics appointment notice to the asylum-seeker, who will then go to have his or her fingerprints and photograph taken. This will make it possible for DHS to run a background check. The asylum-seeker will be fingerprinted again on the morning of the interview at the Asylum Office.

For cases at the Immigration Court level, the asylum-seeker must send a copy of the first three pages of the completed I-589 (asylum application) with a copy of the instruction sheet to the Nebraska Service Center. This will prompt DHS to send a biometrics appointment notice to the asylum-seeker, who will then go to have his or her fingerprints and photograph taken. These steps must be completed before the immigration judge can grant asylum. See 70 FR 19, 4743-4754. Once the biometrics have been processed, they remain valid for 15 months. Asylum-seekers in proceedings with merits hearings that are scheduled more than 15 months from the biometrics appointment may need to ask DHS to run the fingerprints through their system again to make sure that the biometrics are up-to-date at the time of the merits hearing. This is the responsibility of the asylum-seeker and his or her attorney. Please contact someone in the Refugee Representation program at Human Rights First if you need further guidance on how to ensure that the biometrics are updated before the merits hearing in your case or in the case of an asylum-seeker who you represent.

The U.S. government may designate a foreign country for Temporary Protected Status (TPS) due to conditions in that country which temporarily prevent its citizens from returning safely, or when the country is unable to handle the return of its citizens. A person from a TPS-designated country who is in the United States may apply for this temporary form of protection by filing a Form I-821. Countries may be designated for TPS due to various short-term conditions, including ongoing armed conflict (civil war), environmental disaster (such as earthquake or hurricane), or an epidemic. A person who is granted TPS may not be detained or removed from the United States, can work legally in this country, and may be granted a travel document to leave the U.S. and return. TPS is a temporary benefit and does not lead to lawful permanent residence or any kind of permanent immigration status. However, a person who is granted TPS may also apply for asylum or any other form of more lasting immigration status if eligible for those forms of relief.

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