

THE **ASYLUMIST**

How to Seek Asylum in the United States
and Keep Your Sanity

Jason A. Dzubow



Praise for The Asylumist

Jason Dzubow is a leader in the new due process army and part of the “gold standard” for practicing asylum aficionados. For over ten years, his blog “The Asylumist” has been providing “practice tips” and sage advice for asylum seekers, attorneys, and even Immigration Judges. Now, in his new book, Jason collects “The Asylumist’s Greatest Hits”—his best and most useful blog posts—and updates them to reflect the current state (or dystopia) of the law. Understanding the process is essential for protecting your rights! *The Asylumist: How to Seek Asylum in the United States and Keep Your Sanity* provides clear, accessible, practical, useful guidance, with a touch of humor, to help you navigate the asylum system. It’s an essential “problem-solving tool” for asylum applicants, attorneys, policy makers, and anyone interested in ensuring that asylum seekers obtain the protection that they need and deserve and in restoring due process and best practices to our now sadly and badly broken, dysfunctional, and intentionally unfair asylum system. Due Process Forever!

—Paul Wickham Schmidt, Former Chair, Board of Immigration Appeals, and blogger at ImmigrationCourtside.com

Jason Dzubow is a thoughtful and balanced voice in the often highly charged world of immigration. He cares deeply about the law and the people it impacts, from those seeking refuge to those tasked with administering the processes for delivering both relief and justice. In his new book, *The Asylumist: How to Seek Asylum and Keep Your Sanity*, he offers pragmatic advice and valuable insights on asylum and many other issues in the immigration arena.

—MaryBeth Keller, Former Chief Immigration Judge of the United States

The U.S. asylum system is complicated and confusing. Jason Dzubow’s new book, *The Asylumist: How to Seek Asylum in the United States and Keep Your Sanity*, offers practical advice for understanding that system and presenting the best possible asylum case. This is an invaluable resource for asylum seekers and their families.

—Mohsen Sazegara, Iranian Journalist and Democracy Activist

In his new book, *The Asylumist: How to Seek Asylum in the United States and Keep Your Sanity*, Attorney Jason Dzubow has accomplished a translational triumph. He has managed to make the labyrinth of US asylum law clear and approachable with procedural insights and case anecdotes that make the reader feel not just enlightened but represented. It takes the ultimate expert to translate the obscure into the manageable and, as with his blog *The Asylumist*, his gifts in this regard are on full display here. The plain speaking in this manual is both accessible and inspirational, with uplifting reminders about why we open our arms and hearts to those seeking protection from persecution in other lands.

—Judith G. Edersheim, JD, MD, Founding Co-Director, The MGH center for Law, Brain and Behavior, Assistant Professor of Psychiatry, Harvard Medical School

I cannot find the right words to appreciate the contribution of *The Asylumist* blog to the lives of torture survivors and other asylum seekers in the USA. This is one among the very few tools available to people fleeing violence, government oppression, and other inhumane treatment, who are looking for safety and the protection of the United States as required by international treaties. I have seen many of my clients and many of my friends use this blog when they had no one else to ask. This is how important this blog has been. Providing life-saving information to asylum seekers and preventing them from getting lost in the complex asylum system is as important as getting asylum itself. Accessible and easy to digest, *The Asylumist* has been a lifeline to many.

—Léonce Byimana, Executive Director, Torture Abolition and Survivors Support Coalition (TASSC) International

I have been reading Jason Dzubow’s blog *The Asylumist* for years now, and I was thrilled to hear that he was turning his blogs into a book. Jason’s clear, practical, and often-times-entertaining approach to explaining the U.S. asylum application process is both helpful and refreshing during a time of chaos and dysfunction for those seeking protection in the United States. I highly recommend *The Asylumist: How to Seek Asylum in the United States and Keep Your Sanity* to asylum practitioners, asylum-seekers, and anyone interested in a straight-forward approach to discussing this complex and broken system.

—Dree K. Collopy, Author of AILA’s Asylum Primer, partner at Benach Collopy LLP, and Adjunct Professor at American University Washington College of Law

Written by one of the nation’s foremost experts on asylum law, Jason Dzubow’s *The Asylumist: How to Seek Asylum in the United States and Keep Your Sanity* provides clear, straightforward advice on how to navigate all aspects of the asylum process in ways that maximize the possibility of success. Given that we often learn as much, if not more, from our failures than from our successes, Jason generously shares real life examples of cases both won and lost. This book, which also contains helpful tips for

clients on how to best support their cases, is a must-have for any attorney with an asylum practice.

—Kathy Doan, Executive Director, Capital Area Immigrants' Rights Coalition

In *The Asylumist: How to Seek Asylum in the United States and Keep Your Sanity*, one of the country's top experts in asylum law shares his knowledge in a readable and easy-to-understand format. Lawyers and non-lawyers alike will benefit from this book.

—Ahmad Sear Zia, Anchor and Editor, Voice of America

For over a decade, Jason Dzubow's blog *The Asylumist* has been a go-to resource for attorneys and asylum practitioners seeking updates on changes in asylum law and in-depth analysis of issues affecting the asylum community. I have been a beneficiary of his professional guidance for years. His book is a welcome and valuable resource, not only for the intending asylum applicant, but also for the practitioner. Having been both a Supervisory Asylum Officer and an Immigration Judge, I can attest that he touches on the most crucial issues for anyone navigating our government's asylum process. This book should be on the shelf of any immigration lawyer interacting with the asylum office or immigration courts.

—Judge Paul Grussendorf (Retired), Author of *My Trials: Inside America's Deportation Factories*

When we are born, we don't know what life has in store for us. For me, it was a 13-year journey to obtain asylum in the United States. If life throws a hurdle like asylum at you, you don't want to be without this book. I heartily recommend it.

—Kani Xulam, American Kurdish Information Network

Jason Dzubow is a nationally recognized expert in U.S. asylum law who has represented hundreds of asylum applicants from all over the world. For over a decade, Jason has shared his wisdom and experience on his blog, *The Asylumist*. Now, in his new book, *The Asylumist: How to Seek Asylum in the United States and Keep Your Sanity*, Jason brings together his most useful blog posts in an updated and accessible format. This book contains helpful practical advice that will benefit asylum seekers, attorneys, and law students. I recommend Jason's book and his blog to anyone interested in learning more about the U.S. asylum system.

—Stephen Yale-Loehr, Professor of Immigration Law Practice at Cornell Law School and Co-Director of the Cornell Law School Asylum and Convention Against Torture Appellate Clinic

For asylum seekers and immigration practitioners alike, *The Asylumist* has long served as an accessible resource to make immigration law more understandable. In book form, *The Asylumist* synthesizes a wealth of information and perspectives from Jason Dzubow's many years of work as a recognized advocate for asylum seekers. It is sure to become a valuable, go-to resource.

—Katharine Clark, Managing Attorney for Immigration, Ayuda-Maryland

The Asylumist

How to Seek Asylum in the United States and Keep Your Sanity

Jason A. Dzubow

Palmyra Books

Disclaimer:

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For Hana and Asher

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The Asylumist

Introduction

The United States has a long commitment to human rights. Our asylum system is one manifestation of that commitment. Since the end of World War II, our government's dedication to human rights in general, and asylum seekers in particular, has waxed and waned, but the core principle—our fealty to protect people fleeing persecution on account of race, religion, nationality, political opinion, and particular social group—has remained constant. That is the law as set forth in the Refugee Convention of 1951 and the Protocol Relating to the Status of Refugees of 1967, and formally codified in U.S. law as the Refugee Act of 1980.

Putting our humanitarian ideals into practice has proved to be a messy business. Our laws and regulations related to asylum reflect our schizophrenic view of non-citizens. On the one hand, we seek to protect those who fear harm and we take rightful pride in our country's record as a champion of human rights. On the other hand, we constantly fret that "aliens" are taking advantage of our generosity, or worse, that criminals and terrorists are infiltrating our nation through a porous immigration system.

What does all this mean in practical terms for asylum seekers navigating the fraught path to safety and stability—to resettlement—in the United States? That is the question which has animated my blog, *The Asylumist*, for over a decade and my career as an asylum attorney for many more years than that. It is also the reason for this book. After more than ten years writing a blog, I felt I had a lot of useful material for asylum seekers and advocates, but it wasn't organized or easily accessible. In this book, I've selected the most helpful and popular blog posts, updated them, and sorted them by topic.

This book isn't meant to be read cover to cover. Rather, it is divided by chapter to help asylum seekers and advocates find the information that is most useful to them, and to answer questions about the various parts of the process. Hopefully, this arrangement will be useful for asylum seekers and for others interested in the U.S. asylum system.

Of course, this book is not a substitute for obtaining advice from an attorney or an accredited representative. The rules related to asylum are in constant flux. What is true today may not be true tomorrow, and what worked for your friend may not work for you. There are many subtleties and pitfalls in the asylum process, and no book (or blog) can substitute for having an expert review the specifics of your case.

Also, this is not a traditional "how to" book, in the sense that it does not offer step-by-step instructions about how to seek asylum in the United States. Such a book would be difficult to write for an audience of non-lawyers (or even for an audience of lawyers), since there are so many variables. Each case has its own peculiarities and the law changes frequently.

Instead, this book is meant to serve as a companion for asylum seekers and their advocates. It is designed to support you as you navigate the asylum bureaucracy. It answers a number of common questions and aspires to help asylum seekers better understand the process. Further, and not least of all, this book aims to provide some comfort to those working their way through a difficult, confusing, demoralizing, and often unjust system. Perhaps by learning more about the process, asylum seekers will feel more empowered and more hopeful. Beyond any of that, I hope this book helps you see that you are not alone in your journey, and that there are many Americans waiting for you with open arms. We are glad you are here and excited that you have decided to make America your new home.

Chapter 1: Relief from Removal

What Happens When Asylum Is Granted?

I like the idea of starting on a positive note, and there is nothing more positive than a grant of asylum. Every asylum win is not only a victory for the individual, but also a victory for our country, as our nation is defined in large part by how we treat those coming to us for refuge. So if you have been granted asylum in the U.S., thank you for still believing in the American Dream —it helps the rest of us to keep believing as well.

Here we'll discuss what happens when an asylum case is granted. There are two ways to win asylum: *affirmatively* at the Asylum Offices and *defensively* in Immigration Court. There are some differences between an affirmative and a defensive grant, and we'll talk about those first.

If an applicant wins at the Asylum Office, she receives a letter indicating that asylum was granted. The date on the letter and the date of the asylum grant are not always the same. To find the date that asylum was granted, look in the body of the letter on the first page. It will indicate that, "as of X date, you have been granted asylum." This is the date that matters for purposes of applying for a Green Card and obtaining certain government benefits.

If asylum is granted in court, the Immigration Judge will issue an order stating that asylum is granted. If the Department of Homeland Security attorney (the prosecutor) appeals, the case is not over, and will have to be adjudicated by the Board of Immigration Appeals. But if DHS does not appeal (or if the BIA has already indicated that asylum must be granted), then the case is over and the applicant has asylum. There is [one more step](#) that the applicant must take in order to complete the process. The person must bring his approval order and photo ID to U.S. Citizenship and Immigration Services (USCIS), which will issue an I-94 indicating that the person has asylum and will also create a new Employment Authorization Document (EAD).

As soon as asylum is granted, you are [eligible to work](#) in the United States, even if you do not have an EAD. You can also get an unrestricted Social Security Number by contacting the [Social Security office](#).

A person who wins asylum can file an [I-730 petition](#) for her spouse and children. For a spouse to qualify for an I-730, the marriage must have existed prior to the date that asylum was granted. For a [child to benefit from an I-730](#), the child must have been under 21 and unmarried at the time the asylum application was filed. If the child turned 21 before the asylum case was granted, he is still eligible to benefit from the I-730. However, if the child married after the asylum case was filed, he is [not eligible to benefit](#) from the I-730 process.

One year after asylum is granted, the asylee may file for [lawful permanent residency](#) (LPR – her Green Card) using form I-485. We used to advise people that they could file for the Green Card 30 days prior to their one-year asylum anniversary, and that used to work. But then we filed a Green Card application early, and USCIS rejected it. Since then, we have advised our clients to wait one full year before filing for their residency. Principal asylum applicants usually do not receive a Green Card interview, but dependents usually do. When you receive the LPR card, it will be backdated by one year (so if you get the card on May 21, 2021, it will indicate that you have been an LPR since May 21, [2020](#)). You can apply for [U.S. citizenship](#) five years after the earlier date listed on the card.

A person who wins asylum can obtain a Refugee Travel Document (RTD) using [form I-131](#).

This document is valid for one year and is used in lieu of a passport, but there are [some limitations](#). For example, returning to the country of feared persecution can result in termination of asylum status or lawful permanent residency (see Chapter 7). Also, not every country will accept the RTD as a travel document, so you have to check with the country's embassy before traveling.

People granted asylum may also be eligible for certain government benefits, including referrals for short-term cash and medical assistance, job development, trauma counseling, and English as a Second Language services. The Office of Refugee Resettlement has a [state-by-state collection of agencies](#) that can help with these and other services. Also, HIAS, a national non-profit, provides [information about benefits for asylees](#). For those granted asylum affirmatively, the Asylum Office sometimes holds meetings to explain the benefits available to asylum seekers. You would have to ask your [local Asylum Office](#) about that. Be aware that after the case is granted, you have only a few months to access many services, and so the sooner you reach out to provider organizations, the better.

Asylees are eligible to attend university. (Asylum applicants who have an EAD are also eligible to attend most universities.) In many cases, universities offer in-state tuition to people with asylum. There may also be scholarships available. You would have to reach out directly to the university to learn more about tuition discounts and scholarship money.

Asylees also have certain legal obligations. If you are a male asylee (or a dependent) between the ages of 18 and 26, you must register for [Selective Service](#). LPRs and citizens are also required to register. Also, like everyone else, asylees have to pay taxes and follow the law.

Finally, asylees and LPRs must inform USCIS whenever they move to a new address. You are required to do this within ten days of the move. You can notify USCIS of your new address by mailing them [form AR-11](#) or filing it electronically. Either way, keep evidence that you filed the change-of-address form.

For many people, a grant of asylum marks the end of a long and difficult journey. Other challenges may still lie ahead—bringing family members to the U.S., obtaining a Green Card and citizenship, adjusting to a new life, recovering from past harm—but it is important to recognize the moment for what it is: An opportunity to live in safety and freedom and to become a part of the American story. On behalf of all those who are rooting for your success, let me say, Welcome to the USA!

The I-730 Process: Bringing Family Members Together

One of the great benefits of receiving asylum in the United States is that you can file for certain family members to either come to the United States or—if they are already here but do not have status—obtain their lawful status in our country. The process of filing for a family member can be complicated, but a new resource can help: The [I-730 Refugee/Asylee Family Reunification Practice Manual](#).

The first thing to know about this Manual is that it is designed for attorneys and accredited representatives; it is not designed for lay people. In other words, it's not really designed to assist asylees and refugees themselves. It's important to understand this, as the Manual includes some legal jargon and lots of legal references, which are more easily understood by people with legal training. However, overall, the Manual is clear and well written, and it might also be of use to people who are not represented by attorneys. (I fear that the authors of the Manual might cringe if they read this, but these days, low-cost legal help is not easy to find, and for those who cannot

secure assistance, the Manual could be a real life-saver.)

The second thing to know about this Manual is that it covers all the basics and provides ideas to assist in many problem situations. It also doesn't hurt that it is available for free. So kudos to authors Rebecca R. Schaeffer and Katherine Reynolds, and to the organizations that helped make the Manual possible: CLINIC, Church World Service, Elon University, and UNHCR.

Here, I want to give an overview of the I-730 process for asylees (as opposed to refugees) and to talk about what to expect when you file an [I-730 Asylee Relative Petition](#) for a family member.

First, only spouses and children can benefit from an I-730 petition. For spouses, the marriage must have existed prior to the approval of the asylum application. Also, there are certain restrictions about who is considered a spouse: Proxy marriages and polygamous marriages generally do not count. "Children" generally include biological children, stepchildren, adopted children, children born out of wedlock, and even unborn children. The child must have been under 21 at the time the principal applicant's I-589 was filed. Also, the child must remain unmarried until the I-730 is approved and the child/beneficiary is in the United States. There are exceptions to all these rules—and exceptions to some of the exceptions. The Manual covers a number of different situations, but if you are not sure, talk to a lawyer. Aside from spouses and children, no other relatives can benefit from an I-730.

The I-730 cannot be filed until asylum is granted, and it must be filed within two years of the date asylum is approved (again, there are exceptions). A separate I-730 must be filed for each family member.

When we file an I-730 for one of our asylee clients, we generally include proof of asylum status (copy of the approval letter or Immigration Judge's order), proof of identity (copy of passport or other identity document), evidence of the relationship (copy of marriage certificate or birth certificate), evidence of the beneficiary's identity (copy of passport), and two passport-style photos of the beneficiary. Depending on the case, evidentiary requirements vary, so talk to a lawyer to be sure.

Beneficiaries who are inside the U.S. will receive an interview at their local USCIS office and, if approved, they will receive asylum status. It is possible to file for a family member who is in the United States even if the person entered the country illegally or overstayed a visa, or if the person has criminal or immigration issues, including people with a final order of removal. However, such cases are complicated, and starting the I-730 process for such a person could cause more harm than good. So if a potential I-730 beneficiary has criminal or immigration issues, it is important to consult with a lawyer *before* you start the I-730 process.

If the beneficiary is overseas, USCIS will forward the I-730 (via the National Visa Center) to the appropriate embassy. The embassy will contact the beneficiary about a medical exam and other required evidence (which varies from embassy to embassy), and to schedule an interview. If the case is approved, the beneficiary will receive a travel packet, which acts like a visa and allows her to come to the United States. Be aware that the travel packet has an expiration date, and the person must enter the U.S. before the document expires. Upon arrival, the person will undergo another inspection at the airport, and—if all goes well—enter the U.S. as an asylee.

As the Manual points out, the processing time for an I-730 is not predictable. Most cases where the beneficiary is inside the U.S. take at least a year. Cases where the beneficiary is overseas take longer—a two-year wait is not uncommon. In my office, we have seen cases go more quickly, but that is not the norm, especially these days. For cases outside the normal processing time, it is possible to make an inquiry. Pages 57 to 60 of the Manual give some

helpful advice on that score.

A few final points: For the interview, adult beneficiaries should have some awareness of the principal's asylum case. Beneficiaries are often not questioned about the principal's case, but if they are, it is better to know the basics (and if you do not know, don't guess; just say "I don't know"). Also, any documents not in English that are submitted with the I-730 should include certified English translations (see Chapter 6). Original documents are generally expected at the interview, so try to make sure the beneficiary has those. Lastly, remember that if a principal asylee becomes a U.S. citizen, or if the relationship ends through death or divorce, and the dependent is still an asylee (as opposed to a lawful permanent resident), the dependent will lose his status (and have to apply for *nunc pro tunc* asylum). For this reason, it is best for dependents to apply for residency as soon as they are eligible, which for most people is after one year of physical presence in the U.S. as an asylee.

In asylum-land, there is nothing more positive than family reunification. If you've been granted asylum, the Family Reunification Practice Manual is an excellent resource to help bring family members together.

I Hate Withholding of Removal. Here's Why

I was once in court for an asylum case where the Department of Homeland Security attorney (the prosecutor) offered my clients Withholding of Removal as a "courtesy" in lieu of asylum. DHS did not believe that my clients were legally eligible for asylum but made the offer to settle the case. I negotiated as best I could for asylum, and I think the DHS attorney listened carefully, but ultimately, he was unmoved. When the Immigration Judge (IJ) learned that DHS would agree to Withholding, he remarked that the offer was "generous," which I took as a sign that he wanted us to accept it. In the end, my clients did not agree to Withholding of Removal, and so the IJ indicated he would issue a written decision at a later date.

So what is Withholding of Removal? Why did the IJ view an offer of Withholding as generous? And why did my clients refuse this offer?

Withholding of Removal under INA § 241(b)(3) is a lesser form of relief than asylum. If a person has asylum, he can remain permanently in the U.S., obtain a travel document, petition to bring immediate relatives here, and become a lawful permanent resident and then a U.S. citizen.

A person with Withholding of Removal, on the other hand, has technically been ordered deported, but the deportation is "withheld" vis-à-vis the country of feared persecution. This means that the person cannot be deported to that country, but she could (theoretically) be deported to a third country. A person with Withholding of Removal is eligible for an employment authorization document (EAD), which must be renewed each year. However, unlike with asylum, a person with Withholding of Removal cannot leave the U.S. and return, she is not eligible to become a resident or citizen, and she cannot petition for family members. In addition, on occasion, ICE (Immigration and Customs Enforcement) may attempt to deport the person to a third country. Normally, this consists of ICE ordering the person to apply to various countries for residency. This is essentially a futile exercise, and it usually involves hours of wasted time preparing applications and sitting around the ICE office. Maybe it is designed to intimidate the person into leaving, but at a minimum, it is another stressful hassle that the Withholding-of-Removal recipient must endure.

The bottom line for Withholding of Removal is that those who have it are never truly settled here. They risk losing their jobs and drivers' licenses if their EAD renewal is delayed (which it

often is). They cannot qualify for certain jobs or certain government benefits. They usually cannot get in-state tuition for college. They can never travel outside the U.S. to visit relatives or friends, even those who are gravely ill (more accurately, they can travel, but they cannot then return to the United States). They are here, but not really here.

For me, Withholding of Removal is more appropriate for some recipients than others. For instance, one reason a person gets Withholding instead of asylum is that he has criminal convictions that make him ineligible for asylum. In the case of a convicted criminal, it is easier to justify denying the benefits of asylum, even if we do not want to send the person back to a country where he could be persecuted.

In other cases, it is more difficult to justify Withholding. If a person fails to file for asylum within one year of his arrival in the United States, he generally becomes ineligible for asylum. He remains eligible for Withholding, but downgrading his status from asylum to Withholding because he failed to file on time seems a harsh consequence for a relatively minor infraction.

Other people—like my clients mentioned above—might be ineligible for asylum because the government believes they were resettled in another country before they came to the U.S. “Firm resettlement” is a legal construct and it does not necessarily mean that the person can live in the other country now (my clients could not).

Despite the limitations of Withholding of Removal, many IJs (and DHS attorneys) seem to view it as a generous benefit, and they encourage asylum applicants to accept Withholding as a way to settle removal cases. They also tend to take a dim view of applicants who refuse an offer of Withholding: If the person is so afraid of persecution in the home country, why won’t she accept Withholding and avoid deportation to the place of feared persecution? I understand their perspective, but I think it fails to account for the very basic desire of people like my clients to make the U.S. their home. They don’t want to live forever unsettled and uncertain. Having escaped danger, they want to live somewhere where they can make a life for themselves and—more importantly—for their children. Withholding does not give them that.

Frankly, I think that most IJs and DHS attorneys underestimate the difficulty of living in the U.S. with Withholding of Removal. And these difficulties are not limited to practical problems related to jobs and drivers’ licenses, attending and paying for school, and the indefinite separation from family members. For my clients, at least, Withholding of Removal does not alleviate the stress of their situation. They have fled uncertainty only to find more uncertainty. Will they be deported to a third country? Will they lose their job if the EAD renewal is delayed? If their driver’s license expires and they must drive anyway, will they be arrested? Can their children afford college? If they buy property and invest in life here, will they ultimately lose it all? Such uncertainty would be bad enough for the average person, but we are talking here about people who have already had to flee their homelands. Asylum is a balm to this wound; Withholding of Removal, in many cases, is an aggravating factor.

Perhaps if IJs and DHS attorneys knew more about the consequences of Withholding of Removal, they would be more understanding of asylum applicants who are reluctant to accept that form of relief, and they would be more generous about interpreting the law to allow for a grant of asylum whenever possible.

The What and the Why of Protection Under the UN Convention Against Torture

When a person applies for asylum, she generally seeks three different types of relief: Asylum, Withholding of Removal under INA § 241(b)(3), and relief under the United Nations

Convention Against Torture.

Of the three, asylum is the best form of relief—if you win asylum, you can remain permanently in the United States, you can get a travel document, you can petition to bring certain immediate family members to the U.S., and you can eventually get a Green Card and become a U.S. citizen.

But some poor souls do not qualify for asylum. Perhaps they filed too late, or maybe they are barred due to a criminal conviction or for some other reason. Such people may still be eligible for Withholding of Removal under INA § 241(b)(3) or relief under the United Nations Convention Against Torture (CAT). In the previous section, we discussed the benefits (or lack thereof) of Withholding. Here, we'll talk about CAT: Who qualifies for CAT? How does it differ from asylum and Withholding? What are its benefits?

To qualify for CAT, you need to show that it is “more likely than not” that you will face torture at the hands of your home government or by a non-state actor with the consent or acquiescence of the home government. If you fear harm from a terrorist group, for example, you likely cannot qualify for CAT, unless the group is controlled by the government or acting with government sanction.

Of the applicants who fear torture, there are basically two categories of people who receive CAT: (1) Those who are ineligible for other relief (asylum or Withholding) because there is no “nexus” between the feared harm and a protected ground, and (2) Those ineligible for other relief because of a criminal conviction.

Let's talk about nexus first. “Nexus” is a fancy word for “connection.” There has to be a nexus between the feared persecution and a protected ground. An applicant may receive asylum or Withholding only if she fears persecution on account of race, religion, nationality, political opinion or particular social group. In other words, if you fear that you will be harmed in your home country because someone hates your political opinion, you can receive asylum. If you fear harm because someone wants to steal your money, you probably don't qualify for asylum, since common crimes do not generally fall within a protected category.

In my practice, we sometimes encounter the nexus issue in cases from Eritrea. That country has a form of national service that is akin to slavery. People who try to escape are punished severely. However, fleeing national service does not easily fit into a protected category, and thus many Eritreans who face persecution for this reason cannot qualify for asylum or Withholding. Such people are eligible for CAT, however, since the harm is perpetrated by the government and constitutes torture.

Now let's discuss the other group that sometimes receives CAT—people with criminal convictions. Some crimes are so serious under the Immigration and Nationality Act (INA) that they bar a person from asylum and Withholding of Removal. For example, if you murder someone, you can pretty much forget about asylum or Withholding. Drug crimes are also taken very seriously under the INA, as are domestic violence offenses. In fact, there is a whole area of law—dubbed “crimmigration”—that deals with the immigration consequences of criminal behavior. Suffice it to say that certain convictions will block you from asylum and/or Withholding, and it is not always intuitive which crimes are considered the most serious under the immigration law.

If you are ineligible for asylum or Withholding due to a conviction, you will not be barred from CAT. The United States has signed and ratified the CAT, which basically says that we will not return a person to a country where she faces torture. So even the worst criminals may qualify for CAT relief.

So what do you get if you are granted CAT?

There are two sub-categories of CAT: Withholding of Removal under the CAT (which is different from Withholding of Removal under INA § 241(b)(3)) and Deferral of Removal under the CAT. This means that the Immigration Judge will order the applicant deported but will “withhold” or “defer” removal to the country of feared torture. Of the two types of relief, CAT Withholding is the more stable status. It is granted to people who do not qualify for asylum or “regular” Withholding due to a nexus problem. It is also available to certain criminals, but not the most serious offenders. Deferral can be granted to anyone who faces torture in the home country, regardless of the person’s criminal history. Deferral is—theoretically at least—more likely to be revoked if conditions in the home country change. In practical terms, however, there is not much difference between the two types of CAT relief.

For both types of CAT relief, the recipient receives an employment authorization document (EAD) that must be renewed every year. The person cannot travel outside the U.S. and return. He cannot petition for relatives to come to the United States. He can never get a Green Card or become a U.S. citizen (unless he is eligible for the Green Card some other way, such as based on marriage to a U.S. citizen).

CAT beneficiaries who are detained are not necessarily released. If the U.S. Government believes that the person is a danger to the community or security of the United States, she can be kept in detention forever (in practical terms, this is pretty rare, but it is certainly possible).

Also, sometimes ICE harasses CAT (and Withholding) beneficiaries by ordering them to apply for residency in third countries. ICE officers know very well that third countries are not clamoring to accept people whom we want to deport, so essentially, this is a pointless exercise. When my clients are in this situation, I advise them to comply with ICE’s demands, and eventually (usually), ICE will leave them alone.

CAT relief is certainly better than being deported to a country where you face torture. But for many people, it does not offer the security and stability of asylum. I view CAT as a last resort. We try to get something better for our clients, but we are glad it is available when all else fails.

The Forgotten Path to Asylum: “Other Serious Harm”

In most cases, to obtain asylum, an applicant must demonstrate a well-founded fear of persecution based on race, religion, nationality, political opinion or particular social group. But there are a couple of exceptions: “Humanitarian Asylum” and “Other Serious Harm.”

Humanitarian Asylum allows an applicant to receive asylum if she “demonstrate[s] compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution.” 8 C.F.R. § 208.13(b)(1)(iii)(A). In other words, we don’t send a person back to a country where she faced severe past persecution based on a protected ground, even if it would be safe for her to return to that country today. I had a case that illustrates this type of relief—my client was a ten-year-old Tutsi girl in Rwanda in 1994. When the genocide began, she went with her mother and two siblings to hide in a church. The Interahamwe militia arrived and separated the people in the church into two groups: one group that would live and one that would die. The little girl fainted (mercifully) before she could see her mother and one sibling murdered. As an adult, she was in the U.S. seeking asylum. For some reason, the Asylum Office referred her case to the Immigration Court, where she hired me. We were able to get Humanitarian Asylum based on the severity of her past persecution. In a sense (the legal sense), this was an easy case. Humanitarian Asylum is well known and relatively common.

A less-well-known form of relief is asylum based on “other serious harm.” To obtain asylum on this basis, an applicant who has suffered past persecution based on a protected ground must establish that “there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” 8 C.F.R. § 208.13(b)(1)(iii)(B). Put another way, if an asylum applicant suffered past persecution based on a protected ground, but he no longer has a well-founded fear of future persecution based on that ground, he can still obtain asylum if he demonstrates that he could suffer “other serious harm” in his country. This “other serious harm” does not have to be based on a protected ground, and it does not have to be related to the original persecution.

I had a case once where this would have been an appropriate form of relief had I known about it at the time. My case involved a guard who worked for the Special Court for Sierra Leone—the court that tried war criminals from the time of the civil war. During the civil war, my client was persecuted based on his political party affiliation. In 1991, rebels killed his parents in order to retaliate against him for his political activity. More recently, my client was working for the Special Court, and he was assigned to protect an important witness. Former rebels who did not want the witness to testify asked my client to murder the witness in exchange for money. He refused and reported the incident to his superiors. After his refusal, the former rebels repeatedly threatened to kill him, they broke into his house and left a warning note, and finally they invaded his house to kill him. He ran from the house and fled the country.

My client satisfied the first prong for “other serious harm” relief—he was persecuted on account of his political opinion during the time of the civil war. He also satisfied the second prong—he was facing harm or death because he failed to comply with the demands of the former rebels to murder the witness. Unfortunately, at the time, I did not know about relief based on “other serious harm.”

Luckily for my client (and me), the Immigration Judge felt that my client qualified for Humanitarian Asylum based on the severity of the past persecution, and so asylum was granted. However, the more appropriate form of relief was asylum based on “other serious harm.” I learned about this avenue of relief at the First Annual USCIS Ombudsman’s Conference, which took place about a week after my case. Aside from the bad timing, it was a great conference, and since then, I have relied on “other serious harm” to assist a number of people obtain asylum in the United States.

Applying for a Work Permit When You Have an Arrest Record

In 2019, USCIS modified the [form I-765](#), which is used to apply for an Employment Authorization Document (EAD). The new form, Question 30, requires asylum seekers to disclose whether they “have...EVER been arrested for and/or convicted of any crime.” What is the purpose of this question? What if you have been arrested or convicted of a crime? Can you still get an EAD?

First, the new question applies to asylum seekers whose EAD is based on category c-8. People who already have asylum, and most others, are not required to reveal their arrest history when they request an EAD.

Under 8 C.F.R. § 208.7(a)(1), “an applicant for asylum *who is not an aggravated felon* shall be eligible” for an EAD. This clearly refers to people who have been convicted of an “aggravated felony,” but it presumably also refers to people who admit to having committed an aggravated felony, even if they have not been convicted. The purpose of the question, then, is to determine whether you are an “aggravated felon” (convicted or not) and if so, to deny you an EAD.

So what is an “aggravated felony”? The term is defined in INA § 101(a)(43), which lists all sorts of crimes that are aggravated felonies. Some of the behavior is quite bad (murder, rape); other behavior seems less severe (passing a bad check, certain illegal gambling offenses). In some cases, a conviction is required. For example, a “theft offense” is an aggravated felony only if the term of imprisonment is at least one year. In other cases, a conviction is not required: if you committed the bad act, you are an aggravated felon.

On first glance, then, it may seem easy to determine whether someone is an aggravated felon: just compare the person’s offense with the crimes listed in INA § 101(a)(43). Unfortunately, things are not nearly so simple. Indeed, there is a whole sub-specialty of law—dubbed with the clever portmanteau “Crimmigration”—devoted to analyzing how a criminal offense interacts with the immigration law. The problem is compounded by the fact that criminal laws vary significantly by state and by country, and that we have precious little guidance from the Board of Immigration Appeals or the federal courts. In short, the analysis of whether a particular crime is an aggravated felony can be very complicated and often involves more guess work than seems appropriate for a case in the United States, a country where the rule of law is (supposedly) paramount. According to the I-765 instructions, “USCIS will make the determination as to whether your convictions meet the definition of aggravated felony.” Given the complexity of the analysis in some cases, I fear that USCIS will not always get this right.

All this means that any person who checks the “yes” box for question 30 should be prepared for trouble. Depending on the situation, that trouble could range from delay to outright denial of the EAD.

Who needs to check “yes” for Question 30? According to the form itself, you must check “yes” if you were arrested for, or convicted of, any crime. (According to the form instructions, p. 8, “minor” traffic offenses do not require you to check “yes,” but more serious traffic offenses, including alcohol- or drug-related offenses, require a “yes.”) What if you were arrested, but it was not for a crime? As I read the form, you could get away with checking “no.” However, the I-765 instructions are a bit different. They read, “If you were ever arrested or detained by a law enforcement officer for any reason in any country, including the United States, and no criminal charges were filed,” you must submit evidence about those arrests. Thus, even if you were arrested for a political reason (i.e., not a crime), you would have to check “yes.” How to resolve the conflict between the form and the instructions? I do not know. For my clients, I would probably check “no” if the arrest was not for a crime, but I would circle the question on the form and write “see cover letter.” I would then provide an explanation in the cover letter. I would also provide some evidence about the arrest. My concern about simply checking “no” is that USCIS will accuse the client of lying about an arrest (for a crime or otherwise) and that this would create problems down the line. By providing an explanation, I am trying to protect the client from this danger.

So what happens if you must check “yes” on the I-765 form? First, you will need to get some evidence of the arrest. For a criminal arrest (especially in the U.S.), this would normally consist of the arrest record and the court disposition (the final outcome of the case). Court documents should be certified by the clerk. To get such documents in this country, you would normally contact the court where the case was heard and ask the clerk for a certified copy of the case. Obtaining such records from overseas will likely be more challenging.

What about for political arrests? USCIS does not provide guidance here, but presumably, you have to get what you can: court and police documents, lawyer documents, letters from witnesses. Sometimes, people are arrested for a crime, but the arrest is politically motivated (this is called a

“pretextual” arrest). How USCIS will handle such cases, we do not know. But if this is your situation, you would want as much evidence as possible to show that the arrest was pretextual. Maybe letters from people familiar with the case, country condition information (explaining, for example, that the government falsely charges political opponents with crimes) or expert reports would help.

What if the police stopped you, but did not actually arrest you? What about an illegal detention where you were not charged with any crime? Again, it is unclear what to do. Depending on the situation, you could potentially answer “no” to Question 30, but I think you need to be careful, as you do not want to be accused later of failing to disclose an arrest. Provide an explanation, and talk to a lawyer if you need help.

Even where a person has an arrest or conviction that is not an aggravated felony, USCIS could potentially deny the EAD. The I-765 instructions note, “USCIS may, in its discretion, deny your application if you have been arrested and/or convicted of any crime.” Thus, even if your arrest or conviction (or admission of a crime) is not an aggravated felony, USCIS could deny the EAD. Presumably, this denial would be based on the discretionary language of INA 208(d)(2): “An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General.”

Finally, what if you are denied an EAD due to an arrest or conviction? Potentially, this is a decision that can be appealed (using [form I-290B](#)). However, a discretionary denial is unlikely to be reversed (since USCIS has discretion to do as it pleases, within limits), and given the complicated legal analysis associated with some aggravated felony determinations, an appeal of that issue might be difficult (and would likely require help from a lawyer). Given that an appeal is expensive, it probably makes sense to consult with a lawyer about whether there is any chance for success.

Since 2020, when USCIS added Question 30 to the I-765 form, we have not seen any data about EAD denials. As a result, we still do not have clarity about how USCIS will handle political arrests or whether they will deny EADs for small matters, in the exercise of discretion. Also, it is unclear whether people with arrests are facing longer delays in the EAD process. For people with any sort of arrest, I do think it will be important to get court records and certified dispositions (final results) for all arrests. I also think it is important to present a legal argument in cases where the EAD could be denied as an aggravated felony or as a matter of discretion. In short, if you have to check “yes” on question 30, it is probably best to consult with an attorney to help you present your application for an EAD. This is an unfortunate expense for asylum seekers, who are probably already overburdened, but if you need a work permit, it is probably money well spent.

The Perils and Pitfalls of Applying for a Green Card After Asylum Is Granted

It happens now and again that a former asylum client returns to our office for help after USCIS denies their applications for citizenship. The applications are sometimes denied due to mistakes the former clients made on their I-485 forms (the application for a Green Card). These cases illustrate the danger of incorrectly completing the I-485 form, and this danger is particularly acute for people with asylum.

Let’s start with a bit of background. After a person receives asylum, he must wait for one year before applying for his lawful permanent resident (LPR) status (the Green Card). The form used to apply for the Green Card is the I-485. In the good old days (before 2017), this form used to be

six pages long. Now it is 18 pages. The old I-485 form contained 32 yes-or-no questions; the new form contains 92 such questions.

Many of these questions are difficult for me to understand, and I am a trained lawyer who speaks reasonably decent English. So you can imagine that people with more limited English, who are not familiar with the complicated terms and concepts contained in some of the questions, might have trouble answering.

In my clients' cases, two questions in particular caused them trouble (these are from the old I-485). The first question was, "List your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place since your 16th birthday." My clients had been involved with political parties back home, but were no longer members of those parties in the United States. The clients did not carefully read the question, and instead of listing their "past membership," they instead answered "none" (because they are no longer members).

The second question asked whether the clients had ever been "arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations." In fact, my clients had never been arrested for "breaking or violating any law or ordinance." They were arrested in their home countries for exercising their supposedly lawful political rights, and they were correct to answer "no" to this question. Nevertheless, USCIS viewed their answers as deceptive.

My clients' problems were compounded by the fact that they were never interviewed for their Green Cards, so a USCIS officer never went over the questions with them and never gave them an opportunity to correct the errors.

The result of all this—confusing questions, carelessness, and no interview—was that my clients obtained their Green Cards, but also sowed the seeds for future problems. Five years later, these problems appeared when the clients tried to naturalize, and USCIS went back and carefully reviewed their prior applications.

To me, my clients' errors were clearly honest mistakes. Indeed, in their asylum applications, the clients had already informed USCIS about their party memberships and about their arrests, and so they had nothing to gain—and everything to lose—by failing to mention these issues in the I-485 form. But that is not how USCIS sees things. To them, the errors were "misrepresentations," which disqualified my clients for citizenship.

To solve the problem, my clients had to re-apply for citizenship and provide an explanation about the errors. While they were ultimately able to obtain citizenship, the whole fiasco caused a lot of unnecessary stress and expense. Unfortunately, this is the reality nowadays for all applicants: if you leave yourself vulnerable, USCIS will bite you.

So what can be done? How can you protect yourself when completing the form I-485?

The key is to read each question carefully and make sure you understand what it means. This is time consuming and boring but given that USCIS is looking for excuses to deny cases and cause trouble, you have little choice if you want to be safe.

Even using a lawyer is no guarantee. Until recently (when USCIS started looking more closely for reasons to deny cases), I had a tendency to gloss over some of these questions. I am more careful now, but it's not easy. Many of the questions are ridiculous: Are you a prostitute? Did you gamble illegally? Were you a Nazi in WWII? But intermingled with these questions are others that require closer attention: Did you ever have a J visa? Have you ever received public assistance? Have you ever been denied a visa? It's easy to skim over these questions, but the consequences of an erroneous answer can be serious.

Also, some questions are tricky and can't easily be answered with a "yes" or a "no." For example, my clients indicated that they had not been arrested for a crime, and this was correct; but they had been arrested for their (lawful) political activities, and USCIS took their answers as misrepresentations. What to do? When we complete I-485 forms and we encounter questions like this, we normally check "no" (or "yes" if that seems more appropriate) and circle the question. Next to the question, we write, "Please see cover letter," and on the cover letter, we provide an explanation: "I was never arrested for a crime, but I was arrested by my home government for political reasons." At least this avoids the problem of USCIS labeling your answer a misrepresentation.

In the end, the only real solution here is to read each question carefully, make sure you understand the question, and answer it appropriately. If the question is not amenable to a yes-or-no answer, or if you think an explanation is required, circle the question and provide an explanation. If you don't understand something or are not sure, ask for help. It's better to get the form correct now, even if that involves extra time or money, than to make mistakes that will cost you later on.

Applying for a Green Card While Asylum Is Pending—a/k/a Alternatives to Asylum

If you add up all the people with pending asylum cases at the Asylum Offices, Immigration Courts, and Board of Immigration Appeals, there are well over one million souls waiting in limbo. Many will be waiting for years. During that time, some applicants will inevitably become eligible to obtain legal status in the U.S. through other means. In this section, we will discuss alternative paths to a Green Card for those with a pending asylum case.

Part 1: Marriage to a U.S. Citizen

We'll start with the easiest and most common path to a Green Card for asylum seekers already in the country: marriage to a United States citizen.

As a preliminary matter, I should say that the rules discussed here apply not only to spouses of U.S. citizens, but also to other "immediate relatives" of U.S. citizens. Immediate relatives are (1) spouses, (2) unmarried children of U.S. citizens where the child is under 21 years old, and (3) parents of U.S. citizens where the U.S. citizen child is over 21 years old.

Second, I should note that under U.S. immigration law, same-sex marriage is allowed, and such couples are treated the same as heterosexual couples for purposes of immigration.

With that out of the way, let's talk about obtaining a Green Card by marrying a U.S. citizen. Not everyone who marries a citizen is eligible to obtain a Green Card, but many people are. If you entered the country lawfully (usually with a visa), you have not been ordered deported, and you have no serious criminal issues, you are most likely eligible to adjust status (i.e., obtain your Green Card without leaving the United States) based on the marriage. Check with a lawyer to be sure you are eligible, as there is no sense starting the process (and paying a lot of money), if you are not legally able to get your Green Card.

Cases at the Asylum Office: The process of applying for a Green Card varies depending on whether you have a case pending with the Asylum Office or the Immigration Court. Normally, for Asylum Office cases, we file the I-130 (petition for alien relative), the I-485 (application for a

Green Card), and accompanying forms and evidence with USCIS. This includes filing for a work permit and Advance Parole, which will allow you to work and travel while the Green Card application is pending.

If you are lucky, USCIS will process the case normally and you will get a Green Card. If the marriage is less than two years old, you will receive a Conditional Permanent Resident card that is valid for two years. Prior to the card's expiration, you will need to file another form (I-751) to obtain the lawful permanent resident card (also known as the Green Card). If the marriage is more than two years old, you should receive the lawful permanent resident card, which is valid for ten years. Once you have the temporary or permanent Green Card, you can [inform the Asylum Office](#) and close your case.

Some Green Card applicants are not so lucky, and their cases get delayed. If that happens to one of our clients, we contact the Asylum Office and tell them about the pending Green Card. In some mysterious way, the Asylum Office sometimes helps move things along (it may be that the Asylum Office has a file that USCIS needs to adjudicate the marriage case). If that doesn't work, we can try withdrawing the asylum case to pursue only the Green Card case, but it is generally preferable to keep the asylum case alive until you the Green Card is issued.

Cases in Immigration Court: The process is different for people in court or before the Board of Immigration Appeals. For one thing, you don't normally file the I-130 and the I-485 together. Instead, the U.S. citizen spouse files the I-130 petition alone. The purpose of this form is to get USCIS to "approve" the *bona fides* of the marriage (in other words, to agree that the marriage is true).

In contrast to I-130 cases where the beneficiary is not in Immigration Court, the burden of proof is higher, meaning the U.S. citizen spouse needs to submit stronger evidence that the marriage is real. This is because USCIS suspects that people in court may get married in order to avoid deportation, and so such cases are flagged for extra attention. Technically, the couple is asking for a "*bona fide* marriage exemption." In practice, while USCIS often asks for a formal declaration from the couple that the marriage is *bona fide*, the standard of evidence is not discernibly different from "regular" I-130 marriage cases.

Once the I-130 is pending, we typically inform the court and give them a copy of the I-130, the supporting evidence, and the I-130 receipt. Depending on the stage of the case, we often ask the Immigration Judge for a continuance, so that USCIS has time to process the I-130 petition. If there is a processing delay from USCIS, we contact [DHS](#) (the office of the prosecutor) and ask whether they can help facilitate the I-130, which they usually agree to do. This can sometimes magically move things along at USCIS.

Once the I-130 is approved, we inform the court and then try one of two paths to get the Green Card. Either we ask the judge to terminate proceedings so the person can "adjust status" (i.e., obtain a Green Card) with USCIS, or we ask the Immigration Judge to grant the Green Card in court. Often, the Immigration Judge will make this decision for us. But if you are in this situation and you find yourself with a choice, you should know that there are advantages and disadvantages to each approach.

If you decide to go with USCIS, which is probably the more common choice, the first step is to get the judge to terminate proceedings. (Be sure that you get an order "terminating" proceedings, not an order to "administratively close" or "dismiss" proceedings, which keeps jurisdiction with the judge and blocks you from obtaining a Green Card from USCIS.) When we tried this in the past, the DHS attorneys and the judges were amenable to termination, as that makes life easier for them. However, in a recent case, the DHS attorney would not agree to

terminate proceedings until we completed the I-485 and provided proof that we paid the fee. The problem is, the fee has to be [paid in a particular way](#) for cases in Immigration Court. We paid the fee and received the receipt. After that, the case was terminated. We then tried to use the fee receipt to “pay” for the I-485. In the past, USCIS has accepted the fee receipt in lieu of payment, but this time, they refused, and so my client had to pay the fee a second time! Since then, I have tried harder to get proceedings terminated without the fee receipt, which has usually worked, and avoids the problem of paying double fees.

Once the case is terminated, the applicant can adjust status with USCIS. It is pretty common to see delays in such cases, where the person was previously in removal proceedings. But ultimately, everyone who does this seems to end up with a Green Card, and it is easy to get a work permit and travel document (Advance Parole) while the case is pending with USCIS.

Alternatively, you can ask the judge to schedule an Individual Hearing to approve the Green Card in court. This can be faster (depending on the judge’s schedule) and should avoid the problem of double fees, but it is more difficult to get a work permit while you are waiting. Also, you cannot travel outside the U.S. until the Green Card is granted (if a person in Immigration Court leaves the U.S., he has effectively deported himself). Once the judge approves the Green Card, you will need to make an [Info Pass appointment](#) to obtain the physical card.

Some Exceptions: Not everyone who enters the country illegally, or who has a criminal conviction or a deportation order, is ineligible to get a Green Card through marriage to a U.S. citizen. However, if you fall into one of these categories, you would want to talk to a lawyer about your eligibility.

For people who entered illegally, there is a law called INA § 245(i) that allows certain people to pay a fine and obtain their Green Card despite the unlawful entry. To qualify, you would have had to be present in the U.S. since at least December 20, 2000, and have had a family member or employer file an immigrant petition or labor certification for you (or possibly for a parent) on or before April 30, 2001. There are other requirements too, and so you would want to discuss the specifics of your case with a lawyer. Also, potentially you can leave the U.S. with a “[provisional waiver](#)” and obtain your Green Card overseas. This can also be problematic, especially for asylum seekers who cannot go to the U.S. Embassy in their home country, and so you would want to check with a lawyer before trying this option.

For people with a criminal conviction, there are possible “waivers” available. A waiver is a form (usually with a steep fee) that basically asks the government to forgive your crime and allow you to obtain your Green Card. Many waivers require that you have citizen or resident relatives (parent, child or spouse) in the U.S. and that the relative(s) would suffer some type of hardship if you were deported. Again, you would want to talk to a lawyer about this option.

People with a deportation order, or some other type of immigration issue (such as the J-1 two-year home-residency requirement), might also be eligible to adjust status. But especially for people with a deportation order, it is very important to talk to a lawyer. Part of the Green Card process involves an interview with USCIS, and there have been many examples of people with deportation orders being detained by ICE at their interview. A lawyer can’t stop you from being detained, but she can evaluate the likelihood of a problem, and help you weigh that risk against the possibility of a successful outcome.

For eligible asylum seekers who marry a U.S. citizen, the likelihood of obtaining a Green Card is quite high. However, the process can be bureaucratically challenging. For all these reasons, if you can afford a lawyer to get you through the system, that is probably a good idea.

Part 2: Family, Job, DV Lottery, and More

Aside from obtaining a Green Card through marriage to a U.S. citizen, there are a number of other ways that asylum seekers can “adjust status” (i.e., get a Green Card) without leaving the United States. We’ll take a look at some of those options here.

As a preliminary manner, we need to talk about two concepts: *lawful status* and *unlawful presence*.

A person has lawful status in the United States if she arrives with a visa (or a visa waiver), does not violate the terms of that visa (by, for example, working without authorization), and the [period of authorized stay has not yet expired](#). Such a person is considered “in status.”

The second concept is called “unlawful presence.” If you remain in the United States after your authorized stay has ended, you are unlawfully present. Each day you remain in the U.S. after your status has expired, you accrue one day of unlawful presence. If you have more than 180 days of unlawful presence, and you leave the United States, you are barred from returning for three years. If you have one year or more of unlawful presence, and you leave the U.S., you are barred from returning for ten years. In attorney-speak, this is known as the 3/10 year bar. It is important to note that this bar only goes into effect if you leave the country. If you remain in the U.S., the 3/10 year bar has no effect. If you are (or will be) subject to the bar, it is still possible to return to the United States, but you need a [waiver](#) (or a [provisional waiver](#)), which can be difficult and expensive to obtain.

For people who entered the U.S. illegally, there are a whole set of other issues. In short, most such people will have to leave the U.S. to get their Green Cards, and this will likely be very difficult since they may face various bars to returning. People in this situation may be eligible for a provisional waiver, or they may be able to obtain their Green Card under INA § 245(i) (discussed below). If this is you, talk to a lawyer about how to proceed, and make sure the lawyer maps out the whole process for you—how will you get from where you are now to a Green Card? Will you have to leave the U.S.? How will you return?

One last point: assuming you are “in status” and eligible to obtain your Green Card in the United States (called “adjusting status”), you normally must file the application (form I-485) before your lawful status expires. If you do that—even if your status expires while the I-485 is pending—you should be eligible to adjust status. If you have to leave the U.S., talk to a lawyer before you go, as you want to be sure you are eligible to leave, get the Green Card, and return. (For more about leaving the U.S. to get a Green Card, see below.)

With these preliminaries out of the way, let’s discuss some ways a person with a pending asylum case might obtain a Green Card.

Family Petition: Here is a list of family-based immigration categories (aside from immediate relative categories, which were discussed above)—

- A Lawful Permanent Resident or LPR (also called a Green Card holder) can file for a spouse
- An LPR can file for a child who is under 21 and unmarried
- A U.S. citizen can file for an unmarried child who is over 21 years old
- A citizen can file for a child who is married

- A citizen can file for a sibling

If you are in one of the above categories, your family member can file a [petition](#) for you. The different categories have different wait times, which you can see at the [U.S. State Department Visa Bulletin](#). Also, certain countries—including Mexico, China, India, and the Philippines—may have extra-long wait times, which you can also see on the Visa Bulletin. Once the date on the Visa Bulletin matches or passes the filing date for the form I-130 (called the “priority date”), you can apply for a Green Card. However, you might need to leave the United States in order to obtain the Green Card.

So how do you know whether you have to leave the U.S. to get your Green Card?

In order to get your Green Card based on one of the above categories *without leaving* the United States, you need to have entered the U.S. lawfully and still be “in status” (as discussed above). A pending asylum case is not considered “in status” for this purpose. Meaning, you need to have some other lawful status that has not yet expired (F-1 or H-1b are two common possibilities). Given the long wait times for many of these categories, few people will be eligible to obtain their Green Cards without leaving the country.

There are exceptions to the general rule. The most common exception is under INA § 245(i). That section of the law states that a person who was physically present in the U.S. by December 20, 2000, and who was the beneficiary (or, sometimes, the child of a beneficiary) of a family- or employment-based petition, or a Labor Certification petition, filed by April 30, 2001, may be eligible to obtain a Green Card based on one of the above categories *without leaving* the U.S. If you think you might be eligible under INA § 245(i), talk to a lawyer to be sure. One other possible exception involves people with [TPS \(Temporary Protected Status\)](#), but such cases are often complex, and you would need to talk to a lawyer about what to do.

Employer Petition: There are various types of employment-based petitions for a Green Card, called EB-1 through EB-5 (EB means “employment-based”). Some categories have a [waiting period](#) (and certain countries have extra-long waits); other categories do not. Also, certain categories allow you to self-sponsor (EB-1, EB-2/National Interest Waiver, and EB-5). Other categories require an employer to sponsor you. Some categories allow for “premium processing,” which means you can expedite the case by paying an additional fee. In general, [employment-based cases are complex](#), and you would probably want to use a lawyer to help you.

As with family-based petitions, unless you are “in status” (and a pending asylum case does not count), you would need to leave the U.S. to get your Green Card (though there is a [possible exception](#) to this general rule). Be aware that if you have unlawful presence, you could be barred from returning after you leave, per the 3/10 year bar (discussed above). Finally, employment-based immigrants may benefit from the same exceptions as family-based immigrants: INA §245(i) and perhaps TPS. In short, this can get very complicated, very quickly, so talk to a lawyer if you think you may be eligible to adjust status based on a job.

One word of caution for the EB categories: I have seen a number of instances where the immigrant hired (and paid) a lawyer to help with an employment-based Green Card, only to learn later that he (the immigrant) was ineligible to actually get the Green Card. The lawyer successfully completed the first step of the process (the petition or I-140), but the immigrant was ultimately ineligible to get the Green Card due to the 3/10 year bar, a prior removal order or for some other reason. The attorney knew or should have known this in advance—before the client started spending money on the case—but for whatever reason, did not inform the client. The short answer here: make sure when you talk to a lawyer, you have her explain the entire process,

whether you need to leave the U.S. to get your Green Card, and how you will do that and return. To be extra safe, you should get all this in writing.

Diversity Visa Lottery: If you win the Visa Lottery, and you are “in status,” you may be able to adjust status, as discussed above. If you are no longer “in status,” you would have to leave the U.S. to get your Green Card (unless you meet an exception, such as INA § 245(i), as discussed above). As always, be aware of the 3/10 year bar and any other bars to re-entry. Also, if you plan to leave the U.S. to collect your Green Card overseas, talk to a lawyer about the process, as the Lottery can be tricky (not everyone who “wins” the lottery ends up with a Green Card), and you do not want to take get stuck outside the country.

Some Other Random Ideas: Aside from the more common ways to obtain a Green Card, there are some more obscure paths as well. Some of these might allow you to obtain a Green Card without leaving the U.S. If you think you might qualify for one of these visas, talk to a lawyer to evaluate your case. For a number of these options, your best bet might be a [non-profit organization](#), as many of these visas apply to particularly vulnerable people, who are often served by non-profits. Without further ado, here are a few of the less-well-known paths to a Green Card:

- **S Visa:** The semi-mythical “snitch visa” for people who cooperate with the government in a criminal or terrorism investigation (see below for more on the S visa).
- **T Visa:** This visa may available to victims of “severe trafficking,” including forced prostitution and slavery.
- **U Visa:** Victims of certain crimes who assist law enforcement may be eligible for a U visa.
- **SIJ Visa:** The Special Immigration Juvenile Visa may be available to minors who are abused, abandoned or neglected. If you are under 21 years old and you are not with a parent or guardian, you may qualify.
- **VAWA:** Under the Violence Against Women Act, certain battered spouses, parents, and children are eligible for a Green Card. Both men and women can qualify under VAWA.
- **Section 13:** Former diplomats who cannot return to their country potentially qualify for a Green Card (for more on Section 13, see below).

Part 3: Applying for a Green Card Overseas

Finally, let’s talk about leaving the U.S. to get a Green Card at a U.S. Embassy.

Some non-citizens are eligible for a Green Card only if they leave the United States and process their case at an embassy overseas. This is generally because the law does not allow a person who is “out of status” to “adjust status” and get the Green Card in the U.S. As we discussed, a pending asylum case does not confer status on the applicant, and so certain asylum seekers must leave the U.S. if they hope to get a Green Card based on a family relationship, a job or some other basis.

Of course, if possible, it is safer to get your Green Card in the United States. But if that is not an option and you must leave the country to process your case, how do you know whether you

can return? What is the safest way to leave and come back to the U.S.? And what about asylum seekers who cannot go to the U.S. Embassy in their home country?

First and most important, if you plan to leave the U.S., you should understand that you are taking a risk. From a legal perspective, it is a lot easier to prevent you from returning than to kick you out once you are here. For this reason, it is imperative to talk to a lawyer before leaving the country to process a Green Card application. Make sure the lawyer explains the basis for your eligibility and explains each step of the process (and preferably puts it all in writing). You need to know how you are eligible for the Green Card, and how you can leave and return safely. Also, you should think about a back-up plan: what if the U.S. Embassy denies the Green Card? How will you return to the United States then?

Keep in mind that whether a person can successfully leave and return depends on many factors specific to the case: Do you have a 3/10 year bar? Are you eligible for a provisional waiver or some other waiver? Are there any other bars to obtaining the Green Card or re-entering the U.S.? Might there be a prior deportation order? All this needs to be discussed with a lawyer, and if you have any doubts about your prior immigration history, you should file a [Freedom of Information Act](#) request to get a copy of your file. You don't want to leave the U.S. unless you are pretty certain that you can return.

Assuming you are eligible to leave and process your case at a U.S. Embassy overseas, what happens if something goes wrong? Sometimes, people who seem eligible for consular processing arrive at the embassy and learn that there are problems with the case. Such people can get stuck outside the United States. Sometimes, a case can be un-stuck, but other times, there is no way to return. What then? If you have a pending affirmative asylum case, you can apply for Advance Parole (AP) before you leave the United States. AP is permission to leave the U.S. and re-enter later on. If you have AP, and if something goes wrong at the embassy, you can still return to the United States using AP as your back-up plan. Coordinating the timing of AP and the embassy interview can be challenging, but if you manage it, you will be able to return safely to the U.S. even if your Green Card is denied.

Finally, asylum seekers have a special problem when it comes to consular processing. Normally, a person would process her case at the U.S. Embassy in her home country. But asylum seekers have told the U.S. Government that they fear harm in their home country. What to do?

One choice is to try processing the case in the home country anyway. Depending on the asylum case, you might be able to argue (to the U.S. Government) that it is safe for you to visit your country for a short trip, but you cannot live there over the long term. Obviously, this reasoning works better where the persecutor is a non-government actor. If the persecutor is the government itself, they could presumably arrest you as soon as you arrive at the airport.

But even if the persecutor is not the government, returning to the home country involves some risk to your immigration status. The U.S. Government may conclude that your original asylum application was fraudulent since you voluntarily returned to your country. This could result in a denial of your asylum claim and a denial of any other application for an immigration benefit. So it is preferable to process your case in a third country.

However, processing the case in a third country is not always easy. If you are trying that, you would be well-advised to talk to a lawyer who has significant experience with consular processing. The benefit of processing the case in a third country is that it is (presumably) safer, since no one is trying to harm you in the third country, and you avoid the problem of the U.S. Government suspecting that your asylum case was fake. The downside is that if the consular processing fails, you will be stuck in a third country. Another downside is that you may need a

visa to visit the third country. Coordinating the visa, the consular processing, and the AP sounds like a real challenge, but if the stars align, this would probably be the safest way for an asylum seeker to obtain a Green Card overseas.

One last point: While I have been referring to obtaining the Green Card overseas, this is not exactly what happens. If the consular processing is successful, you will receive a packet that you bring with you when you come to the United States. The packet is opened at the port of entry, and if all goes well, you should get your lawful permanent resident status at that time (in the form of a stamp in the passport). The actual Green Card comes later by mail.

So that's it. There are alternatives to asylum available to some applicants, and those paths are worth considering. However, they are often tricky, so it would be a good idea to talk to a lawyer to assist you with the process.

Asylum and the DV Lottery (and DV Lottery Scams)

The Diversity Visa Lottery was created by Congress to increase immigration from countries that have traditionally sent us few migrants. Every year, 50,000 people “win” the lottery and are then (probably) able to immigrate to the U.S.

What about people with pending asylum cases? Can they use the Lottery as an alternative to asylum? The answer: it depends.

First, not all countries are eligible for the Lottery. Countries that have sent us large numbers of immigrants in the past are not included in the Lottery. Even if you were born in one of the “banned” countries, you [might be eligible](#) for the Lottery if your spouse’s country does not appear on the list, if your parents were not born in one of the countries on the list, or if your parents were not lawful residents of a listed country at the time you were born.

Besides country-of-origin restrictions, the other requirement for eligibility is that applicants must have a high school degree or the equivalent, or have “two years of work experience within the past five years in an occupation requiring at least two years of training or experience to perform.”

If you meet these two requirements, you can apply for the DV Lottery. This is [free](#) and actually [pretty easy](#). The website to apply for the Lottery is www.dvlottery.state.gov

There are also a number (probably a large number) of websites that will “help” you apply for the Lottery, for a fee. In the best case, this is a waste of money (it is just as easy to apply yourself). In the worst case, it is a complete fraud.

Unlike most other applications, I recommend that people do not use a lawyer for the Lottery and do not use a service. It is best to do it yourself.

However, if you win the Lottery, you should hire a lawyer to guide you through the Green Card process. Winning the Lottery does *not* guarantee that you will get a Green Card, and whether you can successfully take advantage of winning the Lottery depends on many factors and can be complicated—especially for people with asylum cases pending.

So let's say you have an asylum case pending, should you try the Lottery? The easy answer here is “yes.” There is no harm in trying. If you win the Lottery while your asylum case is pending, you can potentially obtain your lawful residency (your Green Card) and close out your asylum case. Your spouse and minor children can also get their Green Cards as your dependents.

The problem is that not all asylum applicants will be eligible to “adjust status” and become residents of the United States, and this is where it gets tricky.

An asylum seeker who is “in status”—meaning she is lawfully present in the U.S. on a visa—can usually “adjust status” if she wins the DV Lottery. “Adjusting status” means obtaining a Green Card without leaving the U.S. A pending asylum case is not considered “in status” for this purpose, and so an asylum seeker without some other valid status cannot adjust status.

Unfortunately, most asylum applicants will not be “in status” for long enough to take advantage of the Lottery. For example, if you came here on a B visa, you are normally only permitted to remain in the U.S. for six months. The fact that you filed for asylum does not extend your “in status” period. Since the Lottery process takes much more than six months, you will be out of status by the time you can file for a Green Card, which means you cannot “adjust status.” Instead, you would have to leave the United States and get the Green Card overseas.

Certain asylum applicants—those with long term visas, like F-1 students or H-1B workers, who do not violate the conditions of their visas—might be able to remain in status long enough to adjust status and become lawful permanent residents without leaving the United States.

So if you are an asylum seeker who is out of status, can you leave the U.S. and collect your residency overseas? Maybe.

The key here is something called “unlawful presence.” Once your lawful stay in the U.S. expires, each day here is considered one day of unlawful presence. If you accrue more than 180 days of unlawful presence and then leave the U.S., you are barred from returning here for three years. If you accrue one year or more of unlawful presence and you leave, you cannot return for ten years. This is known as the 3/10 year bar. A person who has an asylum case pending does not accrue unlawful presence. So for example, if you came on a B visa that was valid for six months, you overstayed your visa, and you filed for asylum four months after the visa expired (ten months after you arrived in the United States), you will have four months of unlawful presence. Once you file for asylum, you stop accruing unlawful presence, so even if your case takes two more years, you will still only have four months of unlawful presence, and you will not be subject to the 3/10 year bar if you leave (though you might be subject to other bars).

Assuming you are not subject to the 3/10 year bar, it may be possible to leave the U.S. and obtain your residency overseas based on the DV Lottery. However, for asylum seekers, this might mean returning to the country of feared persecution, which can be dangerous and might also raise suspicion at the U.S. consulate that your asylum case was not legitimate (if you can return to your country for the Lottery, maybe you never really feared persecution there). For asylum seekers (and others), it may be possible to leave the U.S. and pick up the Green Card in a third country, which would be the safer option.

If you are an asylum seeker who is subject to the 3/10 year bar and you leave to collect your residency, you will then need [special permission to return](#). Such permission will be difficult or impossible to obtain for most asylum seekers, and so people subject to the bar will most likely be unable to obtain their residency based on the DV Lottery.

Finally, asylum seekers who entered the United States without inspection are ineligible to adjust status and thus cannot take advantage of the DV Lottery. (There may be some rare exceptions to this rule; you can talk to a lawyer about that.)

The bottom line here is that if you win the Lottery, you need to consult with a competent attorney. For asylum seekers, the ability to adjust status—or possibly leave the U.S. and return with residency—is crucial. It is very difficult to navigate these waters without the advice of someone who knows what he is doing. It makes sense to apply for the Lottery on your own, but if you win, it’s time to hire a lawyer.

Section 13: An Asylum Alternative for Diplomats

Diplomats who cannot return to their country can claim asylum, like anyone else. But an alternative form of relief is available: [Section 13](#) of the Immigration and Nationality Act allows certain individuals who entered the United States under diplomatic status to obtain a Green Card. To be eligible for residency under Section 13, you must demonstrate all of the following—

- You entered the United States as an A-1, A-2, G-1, or G-2 nonimmigrant
- You failed to maintain your A-1, A-2, G-1, or G-2 nonimmigrant status
- Your duties were diplomatic or semi-diplomatic
- There is a compelling reason why you or your immediate family cannot return to the country which accredited you as a diplomat
- You are a person of good moral character
- You are admissible to the United States for permanent residence
- Granting you a Green Card would be in the national interest of the United States

Several of these requirements are a bit tricky. First, you must show that your duties were [diplomatic or semi-diplomatic](#). “Aliens whose duties were of a custodial, clerical, or menial nature, and members of their immediate families, are not eligible for benefits under section 13.” Second, you must show a [compelling reason](#) why you cannot return to the country that accredited you. Fear of persecution might qualify as a “compelling reason,” but the law does not seem limited to such claims. Finally, you would need to show that granting residency is in the [“national interest”](#) of the United States. Courts have not clearly defined the term “national interest” for this purpose, but it has to be something more than simply being a healthy, hard-working person who can contribute to society.

To apply for Section 13 relief, a former diplomat must file an I-485 form with supporting documents. The diplomat may also apply for a work permit (I-765) and a travel document (I-131) while the application for permanent residency is pending.

So what is the advantage of Section 13 over asylum? For one thing, it appears that Section 13 does not require any nexus between the feared harm and a protected ground (race, religion, nationality, particular social group or political opinion). Another advantage is that if the case is approved, the former diplomat immediately obtains a Green Card; an asylee must wait for one year before applying for residency. A third advantage is that the diplomat can apply for a work permit at the same time as he applies for the Green Card (asylum seekers cannot apply immediate for a work permit). Finally, a Section 13 application will probably be adjudicated more quickly than an asylum application.

The main disadvantage is that only 50 people per year can qualify for a Green Card under Section 13, and so USCIS is looking for reasons to deny these applications. A case where the home government has changed and, as a result, you now face a threat of persecution may be a winner, but a case where you fear harm due to a pre-existing problem (such as an on-going civil war) may well be denied. Another disadvantage of Section 13 is that the former diplomat would

not be eligible for some of the special benefits available to asylees (like housing assistance and job placement). A third issue is that diplomats must show that granting them residency is in the U.S. “national interest” (whatever that means). A final disadvantage is the cost: to apply under Section 13, the former diplomat needs to pay the fee for form I-485, and if the diplomat has dependents, each dependent must pay the fee as well.

I imagine Section 13 would come in handy for diplomats from a country like Syria. Although I have not heard about mass defections from that embassy, one can only hope that professional diplomats would have the courage to abandon a regime that is murdering thousands of people. If properly implemented, Section 13 allows such people to take a stand against their government and remain safely in the United States.

The Great S Visa Hoax

The S visa—colloquially known as the “snitch” visa—is a visa available for people without immigration status who cooperate with law enforcement officers. The S visa is a non-immigrant visa, but it can lead to a Green Card once “the individual has completed the terms and conditions of his or her S classification.” “Only a federal or state law enforcement agency or a U.S. Attorney’s office may submit a request for permanent residence as an S non-immigrant on behalf of a witness or informant.”

In other words, when a non-citizen cooperates with the government in a criminal investigation, the government can apply for that person’s lawful permanent residency. The cooperating witness himself cannot independently apply for the Green Card this way.

The number of S visas available nationwide is quite limited. According to the [Justice Department](#), 200 visas are available each fiscal year for “aliens who provide critical, reliable information necessary to the successful investigation or prosecution of a criminal organization, and an additional 50 per fiscal year [are available] for aliens who provide critical, reliable information concerning a terrorist organization and who qualify for a reward under the Department of State’s rewards program.”

While the visa is rarely granted, it seems to be regularly promised. The result: many non-citizens who cooperate with law enforcement expect to receive an S visa, only to be left with nothing. I’ve witnessed this phenomenon in a few of my own cases.

In one case, a young woman was enlisted by her boyfriend to transport heroin from her country to the U.S. She was arrested upon arrival and immediately cooperated with American law enforcement. Thanks to her assistance, several drug traffickers were arrested and prosecuted. In the course of the criminal investigation, law enforcement officers promised her an S visa. Once the investigation was complete, the government failed to deliver the S visa. My client was eventually released from jail, married, and started a family. The Department of Homeland Security (DHS) left her alone for a while, but eventually placed her into removal proceedings. She feared (quite reasonably) that the drug traffickers she informed on would seek revenge against her if she returned to her country. We applied for deferral of removal under the Convention Against Torture (the only relief she was eligible for after her conviction). However, because she was such a low-level member of the conspiracy, she was unable to identify specifically who might harm her in her country. DHS fought hard to have her deported, and the Immigration Judge ultimately found that we could not demonstrate a more-likely-than-not probability of torture, so she was ordered deported. What particularly bothers me about this case is that my client’s cooperation led directly to her fear of harm, but the U.S. Government didn’t

care. When they got what they wanted from her, the law enforcement agents dropped her like yesterday's news.

In a second case, my client discovered that his attorney was operating a scheme to file fraudulent employment-based immigration petitions and false asylum claims (and no, I was not his attorney at the time—sheesh). He reported the fraud to law enforcement and actively participated in the investigation. In the end, the attorney was sentenced to prison and disbarred. Throughout the investigation, DHS and the FBI repeatedly—and in writing—promised the client an S visa and told him that the visa was being processed. Once the investigation ended, law enforcement suddenly changed their mind and informed my client that they would not pursue an S visa for him. The client had a legitimate claim for asylum, but he failed to file a case because he was relying on the U.S. Government's promise of an S visa. As a result, he missed the one-year filing deadline to submit his asylum application. (An asylum applicant must file his case within one year of arrival in the U.S. or meet an exception to the one-year filing requirement; otherwise, he is ineligible for asylum.) We litigated the case in court. In the end, the Immigration Judge denied asylum because the client had not filed within one year of arrival. The judge found that reliance on the government's promise of an S visa did not qualify as an exception to the one-year bar. Instead, he granted my client Withholding of Removal, a less-desirable form of relief.

In both these cases, the government promised something, my clients relied on the promise, and the government failed to deliver. I understand the government's need to obtain cooperation from witnesses, even to the extent that government agents sometimes lie to witnesses to secure their assistance. However, in the case of the S visa, some cooperating witnesses (like my clients) face real harm—including possible persecution or death in the home country—when the government breaks its promise.

So what can be done?

It seems to me that any non-citizen who relies on the good will of the U.S. Government in an S visa case is being taken for a fool. The offer of an S visa is not enough—cooperating witnesses need an attorney to press the government to keep its word. And this is not something that can be done after the criminal investigation is complete. Once the government gets what it wants (i.e., cooperation), there is nothing to prevent it from reneging on its promise.

Non-citizens with potential asylum claims are particularly vulnerable. For them, I would want a letter from the ICE Office of the Chief Counsel agreeing that the S-visa process constitutes “exceptional circumstances” excusing the one-year asylum bar. That way, in the (likely) event that the S visa does not come through, at least the person will not be barred from seeking asylum because she missed a filing deadline.

In short, if law enforcement officers promise you an S visa, you should understand that in many cases, they will not follow through with their promise. But if you take steps to compel the government to issue the S visa, and you have a back-up plan in the event that the S visa does not come through, you will maximize the chance that your cooperation will lead somewhere other than a dead end.

U.S. Citizenship for Asylees

The final step in the asylum journey is U.S. citizenship. When an asylee applies for citizenship, there are some unique issues to be aware of, and we'll discuss those here.

First, let's talk about the time frame. As you probably know, the wait time for an asylum case

is unpredictable. Some (lucky few) people file a case and complete it within a few months, but the large majority of asylum applicants wait years for a decision. If you win your asylum case at the Asylum Office or in Immigration Court, you have asylum status and are eligible to file for your Green Card after one year of physical presence in the U.S. This means that if you leave the United States during this period, you have to wait additional time to apply for the Green Card. For example, if you leave the country for two weeks, you have to wait one year and two weeks from the date you received asylum before you are eligible to apply for a Green Card.

The time frame to process a Green Card is also unpredictable. If you check the USCIS processing times, you will see that [wait times](#) range from under one year to over 3½ years. In my practice, most asylees seem to get their Green Cards in one or two years. When an asylee receives a Green Card, the card is back-dated one year. Meaning, if you receive your Green Card on December 1, 2020, the card will indicate that you have been a lawful permanent resident (a Green Card holder) since December 1, 2019. Most people will be eligible to file for citizenship five years after the date listed on the Green Card (so in this example, December 1, 2024). And in fact, you are allowed to mail the citizenship form (the N-400) up to 90 days before the five-year anniversary (in our example, this would be about September 2, 2024). That said, if you leave the United States for significant periods of time, or for any one trip of six months or more, or if you've recently moved to a new state, you might have to [wait longer than five years](#) to apply for citizenship.

Processing times for the N-400 are also all over the map, but most offices seem to complete their cases between six months and two years after filing. So overall, from filing for asylum to becoming a U.S. citizen, most applicants are looking at a wait time of between eight and 13 years.

Now let's talk about some of the challenges that asylum seekers face on the path to becoming U.S. citizens.

First is the Green Card form, the I-485, itself. The problem here is that this form contains dozens of questions, many of which are quite confusing. Mistakes on this form can lead to issues during the naturalization process. I've written above about some of the pitfalls on the I-485. The problem is compounded by the fact that most principal asylees are not interviewed during the Green Card process, and so a USCIS officer never asks you to clarify or correct your answers on the I-485. (All dependent asylees are supposed to be interviewed during the Green Card process, but this does not always happen.) Thus, if you make a mistake on the I-485, or if your answers between the I-589 (the asylum form) and the I-485 are inconsistent, this could cause problems at the naturalization stage, and could even cause USCIS to deny your application for citizenship.

The best way to protect yourself here is to make sure that the I-485, the I-589, and any other forms or visa applications you submitted are consistent—in terms of addresses, jobs, family members, membership in organizations, arrests (including political arrests), lies to the U.S. Government (including when you applied for a visa), etc. If there are inconsistencies, you should explain those on the I-485 supplement page or in the cover letter. Also, make sure to keep a copy of all the forms and documents you submit to USCIS, so you will have those when you prepare for naturalization. If you do not have copies of your forms and documents, you can obtain them from the government through a [Freedom of Information Act](#) request.

A second challenge is the N-400, the Naturalization Form. This form also contains dozens of confusing questions, and the answers must be consistent with the answers you gave on your prior applications (forms I-589 and I-485). If not, you should explain the inconsistencies. During the naturalization process, USCIS looks closely at your entire history, and so issues that may have

been overlooked during the I-485 process (where most people do not receive an interview) often come to light after the N-400 is filed.

One question that sometimes causes problems on the N-400 is whether you have ever given false or misleading information to the U.S. Government. Say, for example, you listed your membership in a church on your I-589 but forgot to list that membership on the I-485. USCIS could—and I have seen this happen—accuse you of lying on the forms, since there is an inconsistency between the I-589 and the I-485, and you failed to mention this “misrepresentation” in response to the question on form N-400. The best way to avoid a problem is to be sure that all your forms are consistent, but if you do make a mistake, you can explain what happened and hopefully overcome the problem. (In my experience, when you explain the inconsistencies, USCIS will generally approve the application.)

Another challenge is the naturalization interview. Sometimes, asylees are asked about their asylum case during this interview. Of course, by the time you naturalize, many years may have passed since the events of your asylum case, and so you may not remember all the details. For this reason, it is a good idea to review your asylum case prior to the naturalization interview. Also, if you are asked a question and do not remember the answer, it is better to say that you do not know, rather than to guess and risk making an inconsistent statement. For the most part, officers rarely ask detailed questions about the old asylum case, but they could, and so you should [prepare accordingly](#).

Finally, if the N-400 is approved, you will be scheduled for an oath ceremony and sworn in as a United States citizen. The whole affair is a long and often stressful process, but once the asylum case is approved, there is far less uncertainty and it is mainly a question of navigating the bureaucracy. If you keep copies of all your forms and documents, and you are careful that each application is consistent with prior applications, you should have little trouble moving through the process and—finally—becoming a U.S. citizen.

Chapter 2: Preparing an Asylum Application

Answering the Impossible Question: What Are the Chances That I Will Win My Case?

One of the most common questions I hear at initial consultations with asylum seekers is, “What are the chances that I will win my case?” It’s a reasonable question. People want to know the likelihood of success before they start any endeavor. The problem is, it’s impossible to answer this question. Why is that?

One reason is mathematical. Probabilities are tricky to calculate and even trickier to understand. Also, it is very hard to apply probabilities in a meaningful way to a single event. What does it mean, for example, when the weather report shows a 30% chance of rain? If you run 100 computer simulations of the weather, it will rain 30 times. But in the real world, it will either rain or it won’t. The problem is that we do not have complete information to start with, and there are too many variables to predict precisely how the weather will evolve over time. Without sufficient information, we have to approximate, and we are left with a range of possible outcomes and probabilities. As Niels Bohr observed, “Prediction is very difficult, especially if it’s about the future.”

Another difficulty is that predicting case outcomes involves human beings, and we are a notoriously capricious species. At the outset of a case, the lawyer may not know whether the client can get needed evidence, or whether she can remember her testimony, or how a witness will behave. Also, the lawyer may not know who the fact finder will be. (With Immigration Court cases, we usually know in advance; for Asylum Office cases, we never know until the day of the interview.) Also, what if the fact finder is in a particularly good or bad mood on the day of the case? Or what if she is hungry during the case (one Israeli study famously correlated favorable parole decisions to whether the judge had recently eaten lunch!)? These “human factors” can greatly affect the decision, and few of them can be known in advance.

That’s not to say we know nothing about the likelihood of success. For Immigration Court cases, there is data available about the [grant rates of individual judges](#). Also, there is some data available about Asylum Office grant rates (see Chapter 9). Of course, all of this is very general and does not necessarily bear much relationship to the likely outcome in a given individual’s case, but it’s better than nothing.

As a lawyer, once you get a sense for asylum cases, you can at least give the client some idea about the outcome. I can tell a strong case from a weak case, for example. If the client has a lot of credible evidence, has suffered past persecution on account of a protected ground, and faces some likelihood of future harm, the client has a strong case. The most I will say to such a prospective client is that “if the adjudicator believes that you are telling the truth, you should win your case.” I might also say that since the corroborating evidence is strong, it is likely that the adjudicator will believe the claim.

I do think there is a basic human desire behind the question about the chances for success, and that is the desire for certainty. Asylum cases now take years, and it is very difficult to live your life for so long under the threat of deportation. When the clients ask about the likelihood of success, I know part of what they want is reassurance. Even if the case is weak, they want to feel like they have a chance. They want to feel that what they are building in the U.S. while they wait

for a decision will not all be lost. How, then, do we balance the need for certainty with providing an honest evaluation of the case?

For my clients, I try to give them both honesty and hope. In the beginning, I give the client my honest assessment of the case and the likelihood of success. Knowing my assessment (whether it is good or bad), if the client decides to go forward, my focus shifts to creating the strongest case possible with the facts and evidence available, and to helping reassure the clients so they feel some hope. I try to encourage the client to do what is within their power to make the case better: gather evidence, talk to witnesses, find experts, etc. At least this helps empower the client a bit, and it gives them some agency over their case outcome.

Different lawyers do things differently, and there are probably many “right” ways to balance realism and hope. There are also wrong ways. Any lawyer who “guarantees” you will win an asylum case is a lawyer you should avoid. No lawyer can guarantee a win because we do not make the decisions—the government does. Also, lawyers who make dubious promises (“I am good friends with your judge, so I can get you a quicker hearing date”) are probably lying to get your business. Be careful. And remember that offers that seem too good to be true probably are. For all its flaws, the American immigration system is largely free from corruption. Lawyers don’t have special relationships with adjudicators that can change outcomes or speed adjudication. When a lawyer oversells hope at the expense of realism, you are safer to seek a different attorney; one who is more interested in telling the truth than in selling you his services.

So when a prospective client asks me the chances for success, I’ll try to give the best evaluation I can, so that the person can make an informed choice about whether to file an asylum case. Once the case is started, I will try to address weakness and gather evidence to maximize the chances for a win. I will also try to encourage the client, so that she has some hope during the long wait.

The Most Important Question on the I-589 Asylum Form

If you’re reading this book, you’re probably already familiar with the form I-589, Application for Asylum and Withholding of Removal. Whether your case is in Immigration Court or the Asylum Office, this is the form that you use to apply for asylum, Withholding of Removal under INA § 241(b)(3), and protection under the United Nations Convention Against Torture.

At the beginning of the asylum interview or the court case, the applicant has an opportunity to make corrections to the I-589. It’s not a problem to make corrections and, generally, correcting errors on the original form does not reduce the likelihood that the application will be granted. In the worst case, the applicant will need to explain any mistakes, but even this is fairly rare.

You might think that the most important questions on the I-589 are the ones on page 5 related to why you need asylum. It makes sense, since that is the whole point of the form. But, *au contraire*, in asylum world, things that make sense are rarely the correct answer. The questions about asylum are generally easy to answer on the form, and you have ample opportunity to elaborate on your answer in an affidavit or at the interview.

So what is the most important question on the form? It’s the question that appears on page 1, near the very beginning of the form, in Part A.I., Question 6: “What other names have you used (include maiden name and aliases)?” What’s so important about this question? I will endeavor to explain. But first, a bit of background.

Every asylum applicant must undergo a security check. The check is a bit of a mystery, but it

involves a biometrics check and a name check. The security check also involves multiple data bases, and it can be quite time-consuming—some people wait years for the completion of their checks. Theoretically—and hopefully—the check will be completed before the interview or the court case. That way, the applicant can receive a decision shortly after being interviewed. If the check is not complete, or if new information arises at the interview and the check must be augmented, the case will be delayed—possibly for a very long time.

In my office, for example, we have dozens of clients who have been interviewed, but are still waiting for decisions in their cases. Some have been waiting for weeks or months; the longest-delayed applicants have been waiting over five years! Most of these delays seem to be because the security background checks are not complete. For people who are single, or whose spouse and children are with them in the United States, the wait may be tolerable (stressful and unpleasant, but tolerable). For people who are separated from their spouse and children, the wait is horrific. How can a mother or father be apart from small children for months or years? Yet this is what many applicants are enduring today.

Which brings us back to the question about “other names used.” If you fail to include every name you have used in your life, the Asylum Office may have to start the security background check all over again for any names that you add to the form during your asylum interview or your court case. So while it is not a problem to correct this question, adding a new name to the form could cause months (or more) of delay. For this reason, it is important to include all names you have used when you first submit the form.

When you write your name on the I-589 (Part A.I., questions 3, 4, and 5), you generally write your name as it appears on your passport. What “other names” should be listed on the form? You should include the name on your U.S. visa, including the notorious “FNU” or “first name unknown,” which often appears on U.S. visas for people who have only one name. If you have a maiden name, include that. Also, list any different spellings of your name that you (or others) have used. If you have nicknames, pseudonyms or aliases, list those too. Of course, if you have ever changed your name, list all previous names you have used. If you ever list your name as “son of” or “daughter of,” include that. Finally, different countries and cultures have different naming conventions. Sometimes, a person’s name is the given name, followed by the father and grandfather’s name, or a tribal name. You should list all iterations of your name.

It is important to answer all questions on the I-589 form as completely and as accurately as possible. But the question about “other names used” is particularly important. If you forget to include all the names you have used, it could cause additional long delays in your case. To paraphrase the immortal Dr. Seuss, “Be your name Buxbaum or Bixby or Bray, or Mordecai Ali Van Allen O’Shea, make sure to include all your names on the I-589 form. Then you’ll be off to great places. So, get on your way!”

The Philosophy Behind the Asylum Affidavit

If you ask three lawyers how to write an asylum affidavit, you’re likely to get three (or more) opinions.

An applicant’s affidavit is the heart of her asylum case. It explains who she is, what happened to her, and why she needs protection. It’s also an opportunity to address weak points in the case and to mitigate inconsistencies that may have come up in prior encounters with U.S. Government officials.

Given its importance, it’s not surprising that different lawyers have different ideas about how

to write a good affidavit. Some lawyers write long, very detailed affidavits. Others write short, perfunctory affidavits or do not write affidavits at all. Most of us—including me—fall somewhere in the middle.

There's probably no definitive answer here, but for me, the arguments for a detailed—but not too detailed—affidavit are the most convincing.

One problem with providing a lot of detail in an affidavit is that it creates more opportunities for inconsistencies: the more facts in the affidavit, the more the applicant has to remember. For example, if the written statement indicates that the applicant ate peppered tuna with Nicoise salad before he was arrested, he'd better say that he ate peppered tuna with Nicoise salad when he testifies. Otherwise, the adjudicator might take the inconsistency as a lie, which could cause the applicant to lose his case.

Taken to an extreme, the concern about consistency between the written and oral testimony might suggest that the best approach is a less-detailed affidavit, or even that no affidavit is needed at all. From the attorney's point of view, this would be nice, since the affidavit represents a large portion of the work we do. And it's always convenient when the best interest of the client (avoiding inconsistencies) and the best interest of the lawyer (laziness) are aligned.

However, there is a major risk involved with using a minimal (or non-existent) affidavit. First, under the REAL ID Act, an applicant is required to submit evidence when it is available. Typically, this consists of letters attesting to the persecution or other aspects of the case, medical reports, police records, and country condition information. Many of these documents will include dates (for example, a letter might indicate that the applicant was arrested on May 15, 2010) or other details. It is important that the applicant herself is aware of all these dates and details, and that her testimony is consistent with them. Writing an affidavit, and having the applicant read it, is one way to help ensure consistency between the applicant's testimony and her supporting evidence.

Also, the affidavit is useful for ensuring consistency among all the different pieces of evidence. Instead of comparing each letter to every other letter, you need only compare each letter to the affidavit. As long as every document is consistent with the affidavit, every document should be consistent with every other document. And if everything is consistent, it bolsters the applicant's credibility.

In theory, a lawyer could write out the affidavit to help the applicant with his story and to help ensure consistency, but then not give the affidavit to the Asylum Officer or Immigration Judge. In this way, you would gain the benefits of having an affidavit while avoiding the risk of inconsistencies created by submitting the affidavit. But I'm not a fan of this approach, as I think the affidavit benefits the decision-maker in several ways. For one thing, it gives the decision-maker a detailed understanding of the case, which, if presented correctly, should go a long way towards producing a successful outcome.

Second, it allows the applicant to point out and mitigate weak points in his case. Most Asylum Officers and Immigration Judges are pretty smart, and they're experienced enough to home in on problems in a case. If the problems can be overcome and explained in the affidavit, it will help satisfy the decision-maker before she even meets the applicant. This will allow the decision-maker to focus on the parts of the case that you want to emphasize.

In addition, in court, an applicant's oral testimony is often incomplete. Court testimony is commonly truncated to save time (especially if the Immigration Judge and DHS attorney are already familiar with the story from the affidavit and thus do not need to hear the applicant repeat his entire tale). Should the application for asylum be denied, the affidavit is useful on appeal, and

many lawyers—including yours truly—have used affidavit testimony to help win an appeal with the Board of Immigration Appeals or the federal circuit court.

For all these reasons, I think a comprehensive affidavit is beneficial to the case. But of course, it is possible to include too much detail, which can trip up an applicant. The trick is to find the balance between providing the necessary information to convince the decision-maker and humanize the client, but not so much information that the client can't keep track of it all and the legally relevant facts become obscured by irrelevant detail. Enough, but not too much. It's an art, not a science, and with experience, each lawyer develops a style that works for his clients and hopefully helps achieve the clients' goals.

The Asylum Affidavit

The heart of an asylum case is the applicant's affidavit. In the affidavit, the applicant tells her story and explains why she needs protection. Here, we'll discuss some aspects of the asylum affidavit.

Part 1: The Passive Tense Should Not Be Used

One of the most common problems in affidavits is the overuse of the passive voice. Not to be all English teacher-y, but I've seen too many affidavits where I have no idea who is doing what to whom, and one reason for this confusion is the use of the passive voice. I imagine that if an affidavit is confusing for me as an attorney reviewing the case, it is quite possibly fatal to the applicant's chances for success with an Asylum Officer or an Immigration Judge.

Of course, most asylum seekers are not native English speakers, and the overuse of passive voice stems as much from linguistic and cultural differences as it does from poor English grammar. The problem is not confined to *pro se* (unrepresented) applicants, however, but extends to cases prepared by *notarios* and attorneys as well—people who should know better.

Here is a made-up, but close-to-real-life example of an affidavit written in the passive voice—

On June 10, 2005, I was arrested at my house. I was taken to the police detention center. There, I was interrogated and beaten.

If I had inherited this case (perhaps because the applicant was referred to court by the Asylum Office), each of the above sentences would have been more annoying to me than the last. I want to know who arrested the applicant and whether anyone witnessed the arrest. Also, who took the applicant to the detention center? How did he get there? Who interrogated the applicant? How many times was he interrogated? Who beat him? How many times was the applicant beaten? What injuries did he sustain? Did he say anything during the beating? Did the interrogator(s) say anything? Here is an (abbreviated) example of how the above statement might be re-written—

On June 10, 2005, three soldiers came to my house. My father answered the door. The leader of the group ordered my father to bring me to the door. When I came to the door, the soldiers handcuffed me and drove me to the Central Police Station. At the station, they put me in a holding cell with ten other prisoners. After an hour, a guard brought me to a small office. There were two soldiers standing in the room and a security agent sitting at a desk.

The agent ordered me to sit down. He asked me why I participated in an opposition demonstration. When I denied that I participated in any demonstration, he slapped me hard across my face. My nose started bleeding.

You get the idea. By reducing or eliminating passive voice from the passage, we have a much better idea about what happened. I also added more detail, which is discussed below. The problem with passive voice is that it makes it more difficult to understand what is happening in the story. If the fact finder cannot understand what is happening, she cannot compare the applicant's testimony to the written affidavit. Comparing the written and oral statements is one method for determining credibility. Therefore, overuse of the passive voice makes credibility determinations more difficult and makes it more likely that your case will be denied. Thus, in the immortal words of Dorothy Parker, "The passive tense should not be used."

Part 2: Details, Details...

Now let's talk about the appropriate level of detail that should be included in an affidavit.

One problem that I've encountered in many affidavits is that they contain too little detail for important topics and too much detail for irrelevant topics. One reason for this is that victims of persecution often avoid focusing on the painful or depressing aspects of their cases—they do not want to relive difficult memories. Another reason is that the asylum seekers do not always understand what information is legally relevant.

When preparing an affidavit, it is important to keep in mind the requirements for asylum: the applicant must demonstrate a well-founded fear of persecution based on a protected ground. Often, the applicant has suffered past persecution, and this creates a presumption of future persecution. In some cases, there are other legal issues: did the applicant file within one year of her arrival in the U.S.? Is there a "material support" issue? Are there changed conditions in the home country so that it is now safe to return there? Once you know the legal issues in the case, you can focus on developing the factual record related to those issues.

The easiest example of this is past persecution. In most cases, if an asylum applicant demonstrates past persecution based on race, religion, nationality, particular social group or political opinion, he will receive asylum. To prove past persecution, the affidavit needs to provide sufficient detail about the claimed persecution so that the fact finder can evaluate whether the applicant was, in fact, persecuted. If the affidavit merely says, "I was tortured" or "I was beaten," that is insufficient.

Various courts have defined the term "persecution," and that definition includes "the infliction of suffering or harm." To demonstrate suffering or harm, the applicant must explain in detail what happened. For example, instead of "I was beaten," give some detail—

As soon as I left the opposition political party meeting, three policemen stopped me on the street. They accused me of supporting the opposition party. One of the men punched me in the stomach. The blow was very painful, and I could not breathe for a few moments. I fell to the ground and I was in too much pain to stand up. When I saw the armed policemen above me, I was afraid they might kill me. While I was on the ground, another officer kicked me with his military boot in my back. It felt like he broke my ribs and I cried out. Afterwards, there was a large bruise on my back.

This iteration of the affidavit emphasizes why the police attacked (political opinion) and

describes the details of the beating. It also mentions that the physical assault was painful (since we are trying to demonstrate suffering). It is questionable whether one punch and one kick would qualify as “past persecution,” but when you provide more details about the event, and explain how painful and frightening it was, you make it more likely that the fact finder will conclude that there was past persecution.

I also like to think about the affidavit in terms of time. For less important events, time moves quickly, and one paragraph of the affidavit may cover days, months or years. But for legally relevant events, such as a police beating, time slows down. So one paragraph about a beating might cover only a few seconds. Remember—the fact finder is not interested in reading a novel. She just wants to know whether the applicant meets the requirements for asylum. When the affidavit focuses on the legally relevant facts, it makes the job of the Immigration Judge or the Asylum Officer easier. And a happy fact finder is more likely to grant relief.

One final point about adding more details to the affidavit. I find that such details are quite helpful in the event of an appeal. In many cases, there is limited time for testimony, and applicants sometimes gloss over details of the story. When that happens, the transcript on appeal may be somewhat lacking. If so, you can use details from the affidavit to supplement the transcript and make a more compelling appeal brief.

While obtaining legally relevant details can be time consuming, it greatly increases the chance for a successful outcome and is well worth the trouble.

Part 3: The Trauma of Discussing Trauma

In this section, I want to discuss how to provide details about sensitive topics, like rape or the murder of a loved one.

For obvious reasons, most asylum applications involve discussing unpleasant events. However, some events are more unpleasant than others. For example, I worked on a case where my client witnessed the murder of her mother and siblings during a genocide in her country. At the time of these murders, my client was just 11 years old. In another case, a client was arrested while returning from a political rally. While she was in custody, two policemen raped her. In a third case, my client quit his political party and, in a revenge attack, he was shot six times and left for dead.

This is pretty horrific stuff. So how does a lawyer present these events in a credible manner without forcing the clients to relive their trauma?

First, I think it is helpful if the client understands *why* he needs to explain the painful aspects of his case. I am no psychiatrist, but I believe that when a client is educated about the requirements for asylum, he feels more in control of his case and this might make it easier for him to talk about past trauma.

Second, it is important to establish a rapport with the client, so she feels comfortable and safe discussing difficult issues. While this may seem obvious, it is often difficult for busy attorneys to spend the extra time our clients need in order to feel more comfortable.

Third, it is often not necessary to provide a lot of detail about a traumatic event in order to establish past persecution. For example, in my case—where the political activist was raped by the police while returning from a demonstration—we provided details about her political involvement, the demonstration, and her detention. When it came to the actual rape, we stated that the police raped her, but we provided no further details about the incident. If she has established her credibility and the fact finder believes that she has been raped, that is enough to prove past persecution. USCIS has some good training materials for Asylum Officers, which

discuss this point—

The asylum officer can elicit sufficient detail to establish credibility and gain an understanding of the basis of the claim without probing too deeply into all the details of a painful experience.

This is a key point—it is not necessary to provide all the details about an event like a rape. The fact that the person was raped is, in-and-of-itself, sufficient to show past persecution.

Finally, and to their credit, Asylum Officers, DHS Attorneys, and Immigration Judges tend to be sensitive to an applicant's trauma. I tell my clients about this, as I believe it helps reassure them and makes it easier for them to discuss their history.

While it is probably not possible to prepare a case without discussing traumatic events to some extent, it is possible—and important—to minimize the secondary trauma our clients suffer while preparing their asylum applications.

The Prevalence of Evidence

If the asylum seeker's affidavit is the heart of her application, evidence might be considered the lungs: it provides the oxygen that allows the heart to function. Or maybe anatomical analogies are just weird. The point is, evidence in support of an asylum application is crucial to the application's success. But what is evidence? And what happens if you can't get it?

Let's start with a bit about the law. The REAL ID Act of 2005, INA § 208(b)(1)(B), provides

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. *Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.*

In other words, if you claim that something happened (e.g., you were unlawfully detained), you are required to provide evidence about it (a police document), and if you are unable to provide such evidence, you should be prepared to explain why you could not get the evidence (maybe the police in your country don't issue receipts for illegally arresting people).

This means that you should try to get evidence supporting your case. Different lawyers may have different views on this, but I think you should obtain evidence for every claim you make in your affidavit and I-589. That includes evidence not directly related to the asylum claims, such as evidence of education, employment, awards and certificates, membership in organizations and religious institutions, travel to third countries, documents used to obtain your U.S. visa(s), birth certificates for you and your immediate family members, all passports for you and your immediate family members, marriage and divorce documents, national ID cards, military service records, arrest records, and general medical records. In other words, evidence about who you are and what you've been doing with your life.

Of course, you also need to get evidence related to your asylum claim. So if you were arrested, harmed or threatened, get evidence about what happened: police and court documents, medical records and photos of injuries or scars, copies of any threats. If your case involves political activity in your country or elsewhere (including in the United States), get party membership cards, receipts, letters from the party, and photos at political events. If it is a religious case, get evidence of your religion: letters from church leaders and/or members, photos at religious events, certificates, membership documents, and government IDs, which sometimes list religion. If the case is based on nationality, ethnicity or race, get evidence that you belong to the group in question, such as identity documents.

For people claiming asylum based on membership in a particular social group (PSG), the evidence needed depends on the group. For LGBT cases, get evidence of sexual orientation, such as membership in gay rights groups and evidence of past relationships. If your PSG involves family members, get evidence of familial relationships—birth and marriage certificates, photos, and other family documents, including evidence that other members of your family were harmed or threatened. If you have a domestic violence case, get evidence of the relationship (marriage certificate, birth certificates of children, photos together, other documentation that you were in a relationship) and of the harm.

If there are newspaper or magazine articles, country reports or human rights reports—or even blog posts or Facebook posts—that support your asylum claim, include those. If you are using a newspaper or magazine, make sure to include the cover page of the newspaper, and the entire article. If you are using an on-line source, make sure to include the website address.

You should also get letters from family members, friends, and colleagues who can attest to your problems. (See below for an article about how to write a good letter.) In many cases, it is impossible to get direct evidence of harm, and so letters from people attesting to your problems are all that you can get. While letters from family members and friends are not as valuable as more direct evidence, they are still valuable, and we always include such letters if we can get them.

Some people have scars or other evidence of physical harm (including female genital mutilation). In such cases, you should get a forensic medical report to help bolster your claim about how you received the scar. (In other words, that the scar was caused by torture as opposed to a car accident or disease.) Of course, the doctors who write such reports do not know for sure how you received a particular scar, but they can state that the scar is consistent with your explanation of how you got it. If you cannot afford a forensic exam (or find a doctor to do the exam *pro bono*), you might include photos of the scars, if they are visible and you feel comfortable taking a picture of your exposed skin. Normally, we have our clients take a close-up of the scar and also a photo from farther away, so we can see the person's face (so we know the scar is on that particular person's body).

We also sometimes submit other types of expert reports. The most common are psychological reports (that indicate the person has post-traumatic stress disorder or PTSD, for example). In my opinion, the most effective reports are the ones created in the course of treatment. The less-effective reports are those created after one or two meetings with the asylum seeker, where the report was created for purposes of the asylum case. Sometimes, we also use expert reports related to country conditions, though these days, we can usually find what we need on the internet.

If any of your close family members applied for or received asylum, refugee or other humanitarian status (including Special Immigrant Visa or SIV status) in the U.S. or abroad, try to

get evidence of that status. In general, it is helpful to show that other family members, who are often similarly situated, have been persecuted or have already received asylum. Indeed, we recently litigated a case in Texas where our client's close family members all had SIV status (meaning that the U.S. Government determined those family members faced a threat in the home country due to their cooperation with the U.S.). This evidence alone was enough to convince the judge to grant asylum to our client.

You should also submit country condition information. Some lawyers submit lots of country condition information. I am not one of those lawyers. I think that redundant reports are counterproductive and distracting. It is standard procedure to submit the U.S. State Department [Report on Human Rights Practices](#) for your country. Also, if applicable, we submit the State Department [Report on International Religious Freedom](#) for the particular country. Unfortunately, the State Department reports sometimes white wash the humanitarian situation in different countries (this is especially problematic for Central American countries), and so we sometimes submit the State Department [Travel Advisories](#), which are designed to advise U.S. citizens traveling abroad and which tend to be more realistic. If those reports are not sufficient, we submit country reports from other credible organizations, like [Human Rights Watch](#) or [Amnesty International](#). There are also issue-specific reports from groups like the [Committee to Protect Journalists](#), [Doctors Without Borders](#), and [International Christian Concern](#), to name a few. If there are news articles from credible sources, we submit those too (if they are relevant and not redundant). Finally, if there are specific articles or reports from less-reliable sources that speak directly to the issues in the case, we submit those as well.

For people who fear harm from non-government actors, such as terrorist groups or domestic abusers, you have to obtain evidence that the home government is not able and not willing to protect you. Also, you have to demonstrate that you cannot live safely anywhere in your country. The country condition reports discussed above can help with these requirements, as they often show that the government is unable to protect people and that violence is country wide.

Of course, any documents not in English need to be properly translated. (See Chapter 6 for more about translations.)

Finally, it is important to review all the evidence to ensure that it is consistent with your statement and with the other evidence submitted. For example, if your statement says that you lived in a red house, your witness letters should not say that you lived in a blue house. Inconsistent evidence can lead to a determination that you are not credible, so be careful about this.

The evidence for each application is case-specific. If you have an attorney, one of the attorney's jobs is to evaluate your case and determine what evidence is helpful. If you do not have an attorney, you should do your best to obtain as much evidence as possible. This will help increase your chances for a successful outcome.

Letters from Witnesses

One key piece of evidence in most asylum cases is the witness letter. Under the REAL ID Act, asylum applicants are required to obtain evidence where such evidence is reasonably available. Often, the only evidence that is reasonably available is a letter from a witness. So what makes a good witness letter?

First, the witness needs to identify herself and state how she knows the applicant. While this may seem like a no-brainer, you'd be surprised how many witnesses don't include this

information. I prefer that the witness state her name, address, phone number, and email address. Then she should describe how she knows the applicant—for example, “Mr. X and I met in the church choir in 2003.”

Next, the witness should list what she knows about the applicant’s claim—here, the attorney should emphasize to the witness, or to the applicant who will relay it to the witness, that she should focus on the legally relevant facts. Extraneous material is a distraction. I can’t tell you how many witness letters I’ve seen where the witness rambles on about how he hopes everything is fine in America and that he is praying for the applicant. Who cares? Instead, the witness should mention what he knows about the case. One way to start this section of the letter is like this: “Mr. X asked me to write what I know about his problems in Cameroon. Here is what I know...”

Also, I prefer that the witness write about what he has seen with his own eyes. Did the witness see the applicant engage in political activity? Did he see the applicant get arrested? Did he see the applicant’s injuries after he was released from detention? The witness should write what he saw and the date that he saw it. Secondhand information is admissible, but most fact finders will give such information little weight.

I also hate when witnesses make general statements, like “Please don’t return to Ethiopia, it is dangerous here.” Not helpful. We want specific information about why it is dangerous, not general, conclusory statements that really tell us nothing. A better letter might say, “Please don’t return to Ethiopia, as the police came to the house on March 4, 2012 and they asked about you.”

My clients often ask how long the letters should be. My hope is that the letters will be under one page, though sometimes more space is necessary if a witness has a lot of information. I prefer that the witness gets to the point and doesn’t waste time with irrelevant information, so hopefully that leads to shorter letters. Also, the longer the letter, the greater the possibility for inconsistencies.

Finally, I prefer that the witness include a copy of her photo ID (passport, work ID, school ID, etc.). If the witness and the applicant know each other from school, for example, it would be nice to have some evidence that the witness attended the school (like a transcript). Of course, this assumes that the applicant has also included evidence that he attended that school.

One final note about witness letters: unless they are consistent with the applicant’s affidavit, they will harm the case. I would rather submit no letter than an inconsistent letter. For this reason, it is important to compare the witness letters with the applicant’s affidavit (and his other evidence) to ensure consistency. While people often have different recollections of events—even dramatic events—the fact finder in an asylum case will likely draw a negative inference from inconsistent statements, and this could cause the application to be denied as not credible.

Witness letters are often crucial to a successful asylum application. A well-crafted letter will help your case and could make the difference between a grant and a denial.

Expert Reports in Asylum Cases

In order to win an asylum case, you have to prove that there is a reasonable possibility you will face harm in your home country. To do this, you need evidence: evidence about any past harm, evidence of threats against you, evidence about country conditions, etc. One piece of evidence that can be helpful is a report from an [expert witness](#). Here, we’ll discuss the different types of expert reports and how they can help your case.

First, let’s briefly examine the difference between a “fact witness” and an “expert witness.” A

fact witness is someone who knows about some aspect of your case. For example, maybe your cousin saw the police arrest you from a political rally. Your cousin knows about one piece of your story, and she can write a letter explaining what she knows. She is a fact witness. An expert witness usually does not have any first-hand knowledge of your case. Rather, according to the Federal Rules of Evidence, an expert is someone with “with scientific, technical, or other specialized knowledge” who can “assist the trier of fact to understand the evidence or to determine a fact in issue.” For example, if you are a member of a small ethnic group that is persecuted by your home government, you might find a professor who has studied your group and who can write a report explaining how the government treats members of your ethnic group. The professor is an expert witness.

In terms of admitting expert testimony, the Federal Rules of Evidence are [not binding](#) in Immigration Court or at the Asylum Office, but they do provide useful guidance. To be admissible under the Federal Rules, expert testimony must meet [three criteria](#): (1) It must be relevant, meaning it will “assist the trier of fact to understand the evidence or to determine a fact in issue;” (2) The expert witness must be “qualified as an expert by knowledge, skill, experience, training, or education;” and (3) The expert’s testimony must be reliable, in that it “is based upon sufficient facts or data...is the product of reliable principles and methods, and [the expert] witness has applied the principles and methods reliably to the facts of the case.” The standard for admitting evidence in immigration proceedings is [more liberal](#): the “sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.” Nevertheless, by following the guidance from the Federal Rules, you can help ensure that any expert testimony is given maximum credence by the Asylum Officer or Immigration Judge.

Expert testimony is usually submitted in writing, in the form of an expert report. Accompanying the report is the expert’s CV or a statement of qualifications. It is also helpful to list instances where the expert has previously been recognized as an expert witness by other courts. Expert witnesses sometimes come to court to testify (or sometimes testify by telephone).

Expert testimony can be used to support different aspects of an asylum claim. Probably the most common expert report we use is a forensic medical or dental exam. In these reports, the doctor or dentist examines an asylum applicant’s injury to determine whether that injury is consistent with the applicant’s description of what happened. For example, we once had a client who was stabbed in the arm by members of the Taliban. He had a large scar running the length of his forearm. Of course, no medical expert can determine whether the injury was caused by the Taliban. But the expert can opine about whether the scar is consistent with a knife wound. Some experts can also discuss the approximate age of a scar based on its appearance. To create a report, the client would normally need to appear for an in-person examination and give a written description of the incident to the doctor. For this reason, we try to complete the client’s affidavit (or at least the relevant portion of the affidavit) before he goes to see the doctor. That way, he has a description of the incident to bring with him to the exam.

A subset of the forensic medical exams is an evaluation of female genital mutilation/cutting (FGM/C). Victims of FGM/C are often able to obtain asylum, and such exams are crucial to these cases. The World Health Organization has [categorized FGM/C](#) in terms of severity, and it is helpful for the doctor to explain what category the client’s FGM/C fits into.

Another common type of report that we see are mental health evaluations. These are created by psychologists or other mental health professionals to evaluate the psychological harm (such as post-traumatic stress disorder) caused by persecution or the threat of persecution. Sometimes, these reports are generated during the course of treatment; other times, the client visits the mental

health professional one time or a few times and obtains an evaluation for purposes of the asylum case. I tend to prefer the reports created by a treating professional, but in many cases, asylum applicants do not have access to health insurance and cannot afford treatment. In such cases, it may be possible to obtain a *pro bono* evaluation, which the client can use to bolster her asylum claim. We also use these reports to try to expedite asylum cases. For example, if the report indicates that the applicant's mental health is being harmed by the long wait, we can sometimes convince the Asylum Office or the court to expedite the person's case.

Country condition experts can also assist with asylum cases. In my own practice, I use such experts only rarely, as most of the information we need can be found on-line in human rights reports or news articles. However, in specialized situations, a country condition expert can be critical. For instance, an expert can help establish that a person belongs to a particular social group by showing that the society in question recognizes that social group as a distinct entity. Another example is where an expert is needed to interpret a foreign law, such as whether an adoption is legally valid.

In short, there are many ways that experts can help bolster an asylum case. A good starting point for identifying experts and utilizing them effectively is the [*Asylum Expert Handbook*](#) created by Professor Deborah M. Weissman and her students at UNC Chapel Hill Law School. Other helpful resources include the [expert database](#) at the Center for Gender & Refugee Studies at UC Hastings Law School and the country condition [expert list](#) from the Rights in Exile Programme. Some experts on these lists work *pro bono*; others charge a fee.

Not all asylum cases need testimony from an expert witness (indeed, most of my own cases do not), but where it is needed, it can make the difference between a denial and a grant.

What Is “Persecution”?

Language is intensely personal. When I say the word “house,” I have one image in mind, and when you hear it, you have your own image in mind. Indeed, every person on Earth who hears the word “house” will have his own mental image of what that means. Despite all this, we manage to communicate.

But when we move from interpersonal communication to the more precise language of the courts, the problem becomes more acute. Perhaps it was best summed up by Supreme Court Justice Potter Stewart, who famously declined to define the term “pornography.” Instead, he stated, “I know it when I see it” (less well-known was his next line: “and I enjoy seeing it at least twice a day”).

In asylum law, we have a similar problem—not with pornography, heaven forbid—but with another “p” word: “persecution.”

“Persecution” is not defined by statute, and the Board of Immigration Appeals or BIA—the agency tasked with interpreting the immigration law—has failed to provide much useful guidance (as usual). And so the buck has been passed to the various federal circuit courts.

An [article](#) by Scott Rempell, an associate professor at South Texas College of Law/Houston, surveys the landscape with regards to definitions of “persecution.” Professor Rempell finds that while certain conduct is universally viewed as persecution, there exists “staggering inconsistencies” among the various federal appeals courts: “eleven different appellate courts independently pass judgment on [the BIA’s] assessments of whether harm rises to the level of persecution—a significant number of spoons stirring the persecution pot.” The study revealed what Professor Rempell calls an “unequivocal chasm” in the consistency of persecution

decisions—

For example, the results [of the study] illustrate how a one-day detention involving electric shock compelled a finding of persecution, while a ten-day detention involving electric shock did not. Similarly, while several weeks of psychological suffering necessarily established persecution, several years of even greater psychological suffering failed to cross the persecution threshold.

To those of us who have litigated these cases in the federal courts, Professor Rempell's observation rings all-too true. But quantifying the problem is quite difficult because, as Professor Rempell notes, the cases are so fact-specific—

Courts... compare and contrast to previous persecution cases. And due to differing opinions on what the harm threshold should be, panels are free to emphasize or deemphasize any factual nuance they choose between the cases that they are reviewing and previous cases they have decided.

Despite this problem, the article attempts to categorize the different types of harm and discern areas of consistency and inconsistency. Professor Rempell identifies five broad areas of conduct that courts consistently find to be persecution—

(1) Brutal and systematic abuse, where the applicant has sustained harm on a consistent basis over a prolonged period of time; (2) Sufficiently Recurrent Combination of Cumulatively Severe Harms, where there is an ongoing pattern of physical, psychological, and other types of harm, as long as the harms cumulatively establish a sufficiently high level of severity; (3) Recurrent Injury Preceding a Harm Crescendo, where there are multiple incidents of relatively severe harm that culminate in particularly egregious harm; (4) Sufficient Harm Preceding a Substantiated Flight Precipitator, where a series of harmful events culminates in a credible and substantial threat of harm, causing the applicant to flee; and (5) Sufficiently Severe or Recurring Sexual Abuse.

The problem with this list (aside from the fact that I did not give you all the details of the Professor's analysis) is pretty obvious—we are stuck using words to describe harm, and this is difficult. One person's idea of "brutal and systematic abuse" may not be the same as the next person's. Nevertheless, the list gives us the broad parameters of what constitutes persecution in all federal courts.

When the persecution is less severe—as it is in most contested cases—things become trickier. Professor Rempell identifies four areas where the appellate courts produce inconsistent decisions

(1) A single instance of physical abuse and detention; (2) Psychological harm where there is a single fear-inducing incident; (3) Psychological harm where there are continuous fear-inducing incidents; and (4) "Other Harm Inconsistencies," where courts looked at similar incidents and reached opposite conclusions concerning persecution.

The disparities between judges and circuits when it comes to determining persecution are stark. For example, the First Circuit (New England) reversed the BIA's persecution finding in just 5% of cases. The Ninth Circuit (California, et al) reversed the BIA's findings in 65% of

cases.

Professor Rempell attributes much of the disparity to “the way courts interpret the meaning of persecution, and how they characterize and measure harm.” “The fact that decades of adjudications involving over a million asylum claims have failed to yield a consistent approach on the systematic harm question is nothing short of astounding.” So what’s to be done?

The article suggests some preliminary reforms, but the bottom line is this: immigration agencies—and specifically the Board of Immigration Appeals—need to provide “guiding principles” on what constitutes persecution. Of course, these inquiries are fact specific and it is difficult to quantify physical or psychological harm, but as Professor Rempell says, the “fact-intensive nature of persecution inquiries...should not act as a shield to prevent the creation of general severity principles, by means of regulation or adjudication.”

As a lawyer who frequently encounters the question, “What is persecution?” I believe Professor Rempell’s article is important. He has quantified a problem that we have all experienced in our practice. Now it’s time for the BIA to do something about it.

That Pesky Nexus

To receive asylum in the United States, an applicant must show not only that he faces persecution in his home country, but also that the feared persecution is “on account of” a protected ground: race, religion, nationality, particular social group or political opinion.

This means that if MS-13 gang members want to kill you because you refuse to join the gang, you probably won’t qualify for asylum. On the other hand, if the Ethiopian government wants to detain you for a year because you attended an anti-government protest, you probably will qualify. To me, the regime created by the nexus requirement seems incongruous and unjust.

I’ve seen this play out in many of my cases, where we often have to shoehorn our client’s claim into a protected category. For example, Eritreans who flee the national service (really, a form of never-ending slavery) would not ordinarily receive asylum since the (very serious) harm they face for trying to escape is not generally “on account of” a protected ground. One strategy to help such people obtain asylum is to show that the Eritrean government views them as enemies. In other words, that it imputes to national service evaders an anti-government political opinion. Sometimes this works; sometimes it doesn’t. But the question is, why do we have an asylum system that forces us to contort legitimate claims so that they fulfill the nexus requirement?

In theory, the nexus requirement exists because it reflects our values. We care about political expression and the exercise of religion, and so we protect people who face persecution on those grounds. It also exists because some Dead White Men created relatively arbitrary categories that seemed appropriate in the post-WWII world. So would we be better off without it?

For me, the nexus requirement is an arbitrary way to limit the number of people eligible for asylum. That the nexus requirement has worked so well in this regard is more an accident of geography than anything else. It just so happens that the main reasons people from Mexico and Central America flee their countries are not reasons that easily fulfill the nexus requirement (fear of gangs and cartels, domestic violence). Imagine if we lived next to China, where many refugees face political persecution (or persecution for forced family planning, which is considered political persecution under U.S. asylum law). Or what if we lived next door to Iran or Afghanistan, where people flee due to religious persecution. The nexus requirement would do little to stem the flow of refugees from those places.

So if we eliminated the nexus requirement, how could we keep from being overwhelmed by

asylum seekers?

The first question, I suppose, is, would we be overwhelmed by asylum seekers if we gave asylum to everyone who faces persecution irrespective of nexus? Certainly, the number of people eligible would go up. And we have seen that asylum seekers respond to policy changes (witness the surge of credible fear interviews at the U.S.-Mexico border from Central American refugees that began around 2013). So it certainly seems possible that the number of asylum seekers would increase, but by how much, no one can say. If I had to guess, I would say that the increase would not be as dramatic as we might imagine. Why? Because asylum seekers who want to come here will come here and try for asylum regardless of the odds. Just because you have a one in ten million chance of winning the lottery does not mean you won't play. So while I suspect that if the nexus requirement were eliminated, more people would be incentivized to come here, I am not sure that many would actually change their behavior and make the trip.

There are, of course, other ways to limit the number of asylum seekers. One way is to change the level of proof. Instead of a 10% chance of future persecution (the current standard for asylum), how about a 50% chance or a 75% chance? While this would reduce the number of people qualifying for asylum, it would also result in legitimate refugees being returned to countries where they face persecution. Also, given the arguments above, I doubt it would do much to actually reduce the number of people coming here for asylum.

Another option would be to resettle anyone qualifying for asylum to a third country. In other words, if a person wins asylum in the U.S., she will be resettled in Argentina. While this would likely reduce the number of people seeking asylum here, I doubt whether many other countries would agree to such a scheme. Also, I imagine there would have to be some sort of reciprocity, so if people were granted asylum in Greece, for example, they might be resettled here. While this plan eliminates some of the incentive for seeking asylum in the U.S., I just don't see how it could work in the real world.

In the end, the nexus requirement is not going away any time soon. I do think it is helpful and important to recognize, however, that the requirement really is quite arbitrary. And for the foreseeable future, we lawyers will continue looking for ways to fit our clients' cases into one of the protected categories.

The One-Year Asylum Filing Deadline and What to Do About It

The law (INA § 208(a)(2)(B)) requires that people who wish to seek asylum in the United States file their applications within one year of arriving here.⁹² Those who fail to timely file are barred from asylum unless they meet an exception to the rule. (They may still qualify for other—lesser—humanitarian benefits such as Withholding of Removal and protection under the United Nations Convention Against Torture.)

So why do we have this rule? And what are the exceptions?

Congress created the one-year bar in 1996. Its ostensible purpose is to prevent fraud. If you really fear return to your home country, the theory goes, one year should be enough time to figure things out and get your application filed.

For most people, I suppose that this is true—they can ask questions, find help, and file for asylum within a year. But this is easier for some than for others. People who are less educated, people whose life experiences have taught them to mistrust and avoid authority, people who are isolated and socially disconnected, people who are depressed: such people might have a harder time with the one-year bar (and of course, many of these characteristics are common among

asylum seekers). Others will have an easier time: well-educated people, people who speak English, people who have a certain level of self-confidence, and people who are engaged with the community.

There are also certain populations that seem to have difficulty with the one-year rule. At least in my experience, many LGBT asylum cases seem to be filed after the one-year period. I suspect there are several reasons for this. For one, an immigrant's primary connection to mainstream America is her community in the United States. But if she is afraid to reveal her sexuality to her countrymen living here, and she cannot get their help with the asylum process, she may be unable to file on time. Also, there is the coming-out process itself. People in certain countries may not have even conceptualized themselves as gay, and so the process of accepting their own sexuality, telling others, and then applying for asylum may be lengthy and difficult.

Asylum seekers like those discussed above are sometimes blocked by the one-year rule, but in these cases, the rule is not preventing fraud; it is harming *bona fide* applicants.

Where the rule seems more likely to achieve its intended purpose is the case of the migrant who has spent years in the United States without seeking asylum, and now finds himself in removal proceedings. Such people often file for asylum as a last-ditch effort to remain in the U.S. (or at least delay their deportation). Many people from Mexico and Central America are in this position, and the one-year rule often blocks them from obtaining asylum. (In addition, such applicants often fear harm from criminals; this type of harm does not fit easily within the asylum framework and contributes to the high denial rate for such cases.)

Although there may be situations where the one-year bar prevents fraud, the majority of immigration lawyers—myself included—think it does little to block fake cases, and oftentimes it prevents legitimate asylum seekers from obtaining the protection they need. In short, we hate this rule, and if I ever become king, we will find other, more effective ways, to fight fraud. Until then, however, we have to live with it.

So for those who have missed the one-year filing deadline, what to do?

Under INA § 208(a)(2)(D), there are two exceptions to the one-year rule: changed circumstances and extraordinary circumstances. If you meet either of these exceptions, you may still be eligible for asylum. Federal regulations—specifically 8 C.F.R. §§ 208.4(a)(4) & (5)—flesh out the meaning of these concepts. First, changed circumstances—

(4)(i) The term “changed circumstances”...refers to circumstances materially affecting the applicant’s eligibility for asylum. They may include, but are not limited to: (A) Changes in conditions in the applicant’s country of nationality or, if the applicant is stateless, country of last habitual residence; (B) Changes in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or (C) In the case of an alien who had previously been included as a dependent in another alien’s pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those “changed circumstances.” If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a “reasonable period.”

It is a bit unclear how long this “reasonable period” is. A few months is probably (but no guarantee) okay, but six months is probably too long. So if there are changed circumstances in your case, the sooner you file for asylum, the better.

The regulations also define extraordinary circumstances—

(5) The term “extraordinary circumstances”...shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish...that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien’s failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

- (i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;
- (ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;
- (iii) Ineffective assistance of counsel...
- (iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;
- (v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and
- (vi) The death or serious illness or incapacity of the applicant’s legal representative or a member of the applicant’s immediate family.

Again, if you have extraordinary circumstances, you must file within a “reasonable period.” How long you have to file has not been clearly defined, so the sooner you file, the safer you will be in terms of the one-year bar.

When it comes to asylum, the best bet is to file within one year of arrival. But if you have missed that deadline, there are exceptions to the rule. These exceptions can be tricky, and so it would be wise to talk to a lawyer if you are filing late. It is always a shame when a strong asylum case is ruined by a one-year issue. Keep this deadline (emphasis on “dead”) in mind, and file on time if you can.

Internal Relocation: If You Can Live Safely in Your Own Country, You Can’t Qualify for Asylum Here

Under existing rules, where an applicant fears harm from non-state actors, Asylum Officers

and Immigration Judges should determine whether the applicant can live safely anywhere in the home country—in other words, whether the applicant can internally relocate. If the applicant can live safely within her home country, she is probably ineligible for asylum. The burden of proof in “internal relocation” cases varies, depending on whether the government is the persecutor, and whether the applicant has suffered past persecution. Section 208.13 of 8 C.F.R. states—

In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

This means that where the government is *not* the persecutor, and the applicant has not suffered past persecution, the applicant must demonstrate that there is no place in his country where he can live safely. How do you show this? First, according to *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012), internal relocation must be “reasonable under all the circumstances.” According to the relevant regulations, 8 C.F.R. § 208.13, “adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.” An example from my practice would be a single woman from Afghanistan who fears persecution from the Taliban because of her political activities. Given the restrictive culture in Afghanistan and the generally high level of violence throughout the country, especially against women, it would not be reasonable to expect her to pick up and move to a new city.

Where the persecutor is the government, or where the applicant has demonstrated past persecution, the applicant enjoys a presumption that internal relocation is impossible. Under these circumstances, the U.S. Government has the burden to show by a preponderance of the evidence that safe internal relocation is possible. An example of government persecution and internal relocation might be an Evangelical Christian from Eritrea. The government there persecutes people from “banned” religions, including Evangelicals. Since the Eritrean government controls the entire country, internal relocation is not possible. The situation might be different in a country where the government does not control all its territory. For example, an applicant who fears persecution from the Iraqi government might be questioned about whether she could “internally relocate” to Kurdistan, since that area has some autonomy from the central government of Iraq. In this example, there are restrictions on a non-Kurd’s ability to live in the Kurdish region, and so I doubt that the U.S. Government could demonstrate that internal relocation is possible, but they might make that argument.

If you are concerned about internal relocation, what can you do? Whether the burden is on you or on the government, it is a good idea to submit evidence that internal relocation is impossible. This is relatively easy where the government is the persecutor and controls the entirety of the nation’s territory. In other cases, where the persecutor is a non-state actor, things become more complicated.

Under *Matter of M-Z-M-R-*, the “internal relocation” analysis is really a two-step process: first,

is it possible to relocate within the country and avoid persecution? And second, is internal relocation reasonable under all the circumstances? Based on this framework, the first thing to do is to submit evidence that the persecutor can reach you anywhere in the country. Typically, that would be country reports or news articles showing that, for example, gang members or terrorists are ubiquitous throughout the country. The State Department puts out a [crime and safety report](#) designed to advise U.S. citizens traveling to different countries. These reports tend to present an honest evaluation of safety conditions, and can be helpful to asylum seekers, especially given that the State Department tends to white-wash country conditions in many of its other human rights reports. Some additional helpful sources include [UNHCR RefWorld](#), [Human Rights Watch](#), and [Amnesty International](#), to name a few. Of course, if you previously tried to relocate and the persecutor found you, that would also be important evidence.

If there are places inside your country where the persecutor cannot reach you, you can still avoid an asylum denial by showing that internal relocation is not reasonable. Such a determination is very country specific, but perhaps there is generalized violence that makes it unsafe to relocate, or maybe there are no jobs, or maybe there are cultural issues (like the single woman in Afghanistan). Some countries have laws that prevent people from relocating internally (like the rules in Kurdistan or the *propiska* internal passport in Russia). In other cases, a person's age or health might make relocation impossible. Whatever the reason, try to obtain evidence in support of your claim.

It is important for asylum seekers—particularly those who fear harm from non-state actors—to address the question of internal relocation. Failure to do so could result in the denial of an otherwise-strong asylum application.

The Obscure Swedish Diplomat Who Gave Us “Particular Social Group”

Odds are, you've never heard of Sture Petrén. But if you are a refugee who has escaped persecution on account of female genital mutilation, domestic violence or sexual orientation, you may owe him your life.

Sture Petrén—full name: Bror Arvid Sture Petrén—was born in Stockholm, Sweden, on October 3, 1908. He studied law and philosophy at Lund University, and then served in various law courts in his home country from 1933 to 1943, when he was appointed as an appellate judge. In 1949, he was recruited by the Ministry of Foreign Affairs, where he served as the Director of the Legal Department for the next 15 years. More significantly from the point of view of history, Judge Petrén was appointed to the Swedish delegation to the United Nations General Assembly, where he served from 1948 to 1961. He went on to other prestigious posts domestically and internationally: he was a member—and eventually President—of the European Commission of Human Rights, he was a member of the International Court of Justice, and he served as a judge on the European Court of Human Rights. In 1972, Judge Petrén was knighted by the Swedish king. He died in Geneva on December 13, 1976.

For all his accomplishments, it seems that Judge Petrén's most notable achievement is probably one that he himself did not think much about at the time: in November 1951, he added the phrase “particular social group” to Articles 1 and 33 of the United Nations Refugee Convention.

In the fall of 1951, the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons held a series of meetings to hash out the Convention on the Status of Refugees. The original Convention listed four protected categories: race, religion, nationality, and political

opinion. The Swedish delegation, led by the good Judge, introduced an amendment to Article 1 adding the phrase “particular social group” or PSG. Judge Petrén offered little in the way of explanation for the addition. In the [transcript from November 26](#), he says only that the other protected categories suggest the inclusion of a “reference to persons who might be persecuted owing to their membership of a particular social group.” “Such cases existed,” said the Judge, “and it would be as well to mention them explicitly.” Without further discussion, the amendment was [adopted](#) that same day. Fourteen members voted in favor of the amendment, none opposed, and eight abstained (though history apparently does not record how each country voted).

A week later, Judge Petrén introduced the same amendment to Article 33 (non-refoulment), so it would be in conformity with Article 1. (Modern-day U.S. immigration law derives the asylum/refugee definition from Article 1 of the Convention; the Withholding of Removal definition comes from Article 33.)

Does the origin of the phrase PSG shed any light on the term’s meaning today? What—if anything—can we learn from the historic record?

First, it seems that Judge Petrén’s addition to the Convention was [based on](#) the draft of a planned law in Sweden called the National Alien Act, which went into effect in 1954. The National Alien Act was, in turn, based on the existing Swedish practice of protecting aliens who were members of a PSG, though Swedish law from the 1950s apparently does not define PSG. To the extent that the modern-day Swedish Alien Act is instructive, it seems clear that sexual orientation and gender were not consider particular social groups. The modern law offers protection to people in a PSG, homosexuals, *and* people who face persecution on account of gender. As one commentator [observed](#), it would be superfluous to separately list PSG, sexual orientation, and gender, if sexual orientation and gender were considered PSGs.

I could not find a copy of the old Swedish law (upon which the Convention definition of PSG was purportedly based), but it would be very surprising—even for a forward-thinking country like Sweden—if the 1950s law separately protected people based on gender and (especially) sexual orientation. My guess is that the Swedish law listed PSG as a protected category but left the term undefined. Of course, this does not mean that PSG was meant to encompass sexual minorities and women under Swedish law or under the Convention definition. The Dead White Men who created the Convention may have been progressive for their time (though there are arguments that they were not), but it seems more than unlikely that the idea of specifically protecting gays and women was even on their radar. At least I could find no evidence in the historic record to support such a notion.

A second question is what Judge Petrén understood the term PSG to mean. I am not sure whether his understanding is relevant to anything other than historical curiosity, but it seems almost certain that he had no intention of dramatically (or even modestly) expanding the protected categories. Rather, PSG was meant as a safety net to catch people who did not easily fit into the other categories—people like aristocrats and linguistic minorities, to name a few. Indeed, Judge Petrén’s [comments](#) indicate a realist, as well as an idealist. After noting that Sweden was a country of asylum in the past, he states, “but the fact must be taken into account that its capacity for absorbing large numbers [of refugees] was limited and that, particularly in the present serious state of world affairs [post-WWII], considerations of national security must play a certain part.” This does not necessarily sound like someone who wanted to greatly expand the classes of people covered by the refugee definition.

To a large degree, of course, all this is academic. The goings-on in 1951 are a long way from our reality today. Perhaps an Originalist—like a Justice Scalia—might parse Judge Petrén’s

words and look back to post-War Swedish law to suss out some meaning that informs our definition of PSG today. However, given that the Convention and mid-20th Century Swedish law are pretty far removed from current U.S. asylum law, the Originalist inquiry seems like a stretch.

Moreover, laws and norms change over time. The vagaries of the past are fodder for debate today. To me, such debates are healthy and—hopefully—lead us in the direction of Justice. Although Judge Petrén probably had no intention of altering the refugee definition so dramatically, he certainly planted the seed that led to protection for many thousands of people. Intended or not, that is his extraordinary legacy.

Seeking Asylum May Be Dangerous to Your Health, Your Children’s Health, and Even Your Unborn Baby’s Health

The asylum process was designed for speed. The regulations, specifically INA § 208(d)(5) (A)(iii), require that, absent “exceptional circumstances,” USCIS should adjudicate an affirmative asylum petition within 180 days. That time frame went out the window with the “surge” of new applications at the Southern border in 2013, if not before. These days, cases typically take a few years (and cases referred to Immigration Court can take even longer).

The effect of these delays on asylum applicants is about what you’d expect. I often hear from clients who are suffering from depression, anxiety, and other stress-related illnesses. Some have diagnosable conditions, and we regularly obtain letters from physicians to help us expedite cases. The problem of delay is particularly dire for applicants separated from spouses and children, but few people seem immune to the stress caused by not knowing whether they (or their loved one) will be returned to a place where they fear harm.

Several recent [studies](#) have helped shed light on how the immigration process impacts people’s health, including the health of their children and even their unborn children.

One [study](#) stems from a well-known immigration raid in Postville, Iowa in 2008. Almost 400 undocumented workers—mostly Guatemalan—were arrested and charged with crimes such as identity theft and document fraud. Most were deported. Researchers at the University of Michigan at Ann Arbor examined the birth certificates of 52,000 children born before and after the raid. They found that “Latina mothers across the state were 24% more likely to give birth to undersized babies in the year after the raid than in the year before.” By comparison, the “weight of non-Latino white babies stayed constant, suggesting that Latino populations were uniquely stressed by the incident.”

“Low birth weight is associated with developmental delays, behavioral problems and an increased risk of chronic disease,” among other problems.

Another [study](#) suggests that immigration raids can have deleterious effects on adults, as well. In November 2013, in the midst of an on-going health study of Latinos in Washtenaw County, Michigan, ICE conducted a high-profile military-style raid on the local community. “The 151 people who answered the survey after the raids reported worse general health than the 325 who had already completed it.... Many said that after the raids, they were too afraid to leave their homes for food or medical care, and displayed symptoms of post-traumatic stress disorder.”

After President Trump signed the first executive order against non-citizens in 2017, the American Academy of Pediatrics [warned](#) that, “Prolonged exposure to serious stress—known as toxic stress—can harm the developing brain and negatively impact short-and long-term health.... The message these [immigrant] children received today from the highest levels of our federal

government exacerbates that fear and anxiety.”

These reports focus on undocumented non-citizens who fear removal for themselves and their children, but my guess is that the results would be similar for asylum seekers, who also face uncertainty. The reports also reflect what I am hearing from my clients.

So if you are in this situation, what can you do to help alleviate stress related to asylum delays?

First, you can try to take some affirmative action. Ask to expedite and/or short-list your case. File a motion to advance. Whether such efforts will ultimately make the case any faster is unpredictable, but taking action may be better than waiting passively.

Second—and I often tell this to my clients, most of whom have strong cases—try to live like you will win your case. Learn English, go to school, get a job, buy a house, etc. You really can’t put your life entirely on hold for years waiting for a decision in your asylum case. You have to live. Obviously, this is easier said than done, and I myself would have a very hard time following such advice, but those who can put the case out of their minds and go on with life will be better off than those who dwell on it.

Third, stay engaged. There are support groups for refugees, asylum seekers, and victims of persecution. There are also churches, mosques, and other institutions that can help. Being able to discuss problems, share information, and talk (or complain) to people who understand your situation is useful, and maybe cathartic.

Unfortunately, it seems unlikely that the long delays and uncertainty faced by asylum seekers will go away anytime soon. During the wait, it is important to take care of yourself and your family, and that includes taking care—as well as you can—of your mental health.

Beware the Well-Meaning Advice of Friends

Recently, I worked on a couple cases where my clients received bad advice, which got them into trouble.

The first case involved an Afghan woman with an otherwise strong asylum claim. As a young girl, she and her family were refugees in Iran. Someone in her community advised her that it would be better not to tell the U.S. Government (or her attorney) that she had been in Iran. The community adviser thought it would harm my client’s chances for relief if she revealed that she had spent time in Iran. The client took this advice and did not tell the U.S. Government (or me) that she had lived in Iran for a few years. The problem, of course, was that the U.S. Government—and the Asylum Officer who interviewed her—knew that she had been in Iran. Nevertheless, she denied having been there. After the interview, she told me that she had, in fact, been in Iran, and we submitted a letter to the Asylum Office explaining what happened. Luckily, the Asylum Officer accepted our explanation and the client still got asylum, but her lie damaged her credibility, and could easily have resulted in a denial.

The second case involved a woman who had been in the United States for more than one year. She was still in lawful status when conditions in her country changed, causing her to fear returning. About eight months after the changed circumstances, she went to a reputable non-profit organization to ask about asylum. She did not speak to an attorney. Instead, she was advised by a paralegal (or maybe a secretary) that she was ineligible for asylum since she missed the one-year filing deadline. In fact, the client met two exceptions to the one-year filing deadline: first, changed circumstances, since country conditions changed, giving rise to her fear of persecution; and second, extraordinary circumstances, given that she was still in lawful status

when she went to the non-profit seeking advice about asylum. I recently litigated this case and the Immigration Judge granted asylum, but it was a close call. Had the client filed for asylum in a more timely manner, it would have been a much easier case.

In both cases, the advisers were (probably) well meaning, but in each case, they gave advice that greatly reduced the client's chances for success. So my question is, when people don't know what they are talking about, why do they feel compelled to open their mouths and release some sort of useless—and worse than useless—noise?

I remember a similar phenomenon from when I lived in Nicaragua. I would need to find the post office, for example, and so I would ask someone on the street. The person would give an answer, like, "Walk two blocks towards the lake, make a left at the church and you'll see it on the next block." In fact, the person had no idea where the post office was; he just didn't want to admit that he didn't know.

So what gives? Maybe in part, it's because people like to look knowledgeable and don't like to admit ignorance. People often think they know more than they do, or that they understand the way things work, when they don't. This can be a particular problem in an area like immigration law, where the rules of logic and common sense often do not apply.

To quote philosopher and poet Noah ben Shea, "To be wise, we only have to go in search of our ignorance." Indeed, had my clients' advisers simply stated that they did not know, it would have saved everyone a lot of trouble.

And so here is my advice for asylum seekers: be careful when taking advice from friends or community members who "know how things work." The law can be complicated and it sometimes changes. Just because your friend got asylum does not make him an expert—no two cases are the same, and what worked for one person might result in disaster for another. It feels uncomfortable and self-serving for me to tell people to hire a lawyer, but time and time again, I see people whose cases (and lives) have been screwed up by bad advice. So find a reputable attorney and pay for some decent advice. In the long run, it may save you a lot of money and a lot of heartache.

Lessons Learned from Cases Lost

They say that those who do not learn from history are doomed to repeat it. In that spirit, I'd like to discuss some asylum cases that I've lost (or at least that were referred by the Asylum Office to the Immigration Court) and why the cases were not successful.

I am prompted to write about this topic by an unpleasant experience at the Asylum Office. My client was an Iraqi man who claimed to have been kidnapped by a militia, which targeted him due to his religion. Unfortunately—and despite our directly asking him about his travels—the man failed to tell us that he had been to Jordan and applied for refugee status there through the UN. At the interview, the client again denied that he had ever been to Jordan, but then the Asylum Officer told him, "Service records indicate that you applied for refugee status in Jordan in 2011." (Whenever an Asylum Officer begins a sentence with "Service records indicate...", you know you are in trouble.) The client then admitted that he had been in Jordan for a year. At this point, it was obvious to me that things were only going to get worse from there, and so I recommended that the client end the interview immediately, which he did. That is the first time I ever had to end an interview in this way, and, frankly, it is pretty upsetting. The case was referred to court, and ultimately (after even more derogatory information came out about the client), he was deported from the United States. So what are the lessons?

First, and most obvious: don't lie to your lawyer. In the above example, if the man had told me about his time in Jordan, we could have dealt with it. He didn't and so we couldn't. Unfortunately, many immigrants take the advice of their "community" over that of their lawyer. Asylum seekers need to understand the role of the attorney: it is our job to represent you in a process that can be confrontational, and so the government can use information from your past against you. If you don't tell your lawyer about past problems (especially when he specifically asks you), we cannot help you avoid future problems.

Another lesson is that the U.S. Government often knows more than you think they know. If you have crossed a border, it's likely that the government knows about it. The Asylum Officer (or the DHS attorney—the prosecutor) will have access to anything that you said during any previous contacts with the U.S. Government (including during visa interviews). The Asylum Officer also probably has access to anything you said in interviews with other governments or the United Nations. So if you lied in a prior encounter with the U.S. Government or any other government, you'd be well advised to inform your attorney. That way, he can try to mitigate the damage. Also, in asylum cases, if a person lies to obtain a visa in order to escape persecution, the government will usually forgive the lie if the person qualifies for asylum. *See Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).

A different area where we see clients get into trouble is with family relationships. Sometimes, a client will say he is single when he's married, or that he has five children when he has two. Of course, if the client listed different relatives on a visa application, the U.S. Government will know about it, and the lie will damage the client's credibility. Why would a client lie about this? The most generous explanation, which has the virtue of being true in some cases, is that the client considers the listed relative to be his child, but there is no formal adoption and the client does not understand the legal niceties of the question. In many societies, people who raise a relative's child consider that child their own. As long as the client explains the situation and the Asylum Officer doesn't think the client is trying to hide something, she should be fine; but again, if the client doesn't tell the lawyer, the lawyer cannot properly prepare the case.

Speaking of family cases and cases where the government knows more than you'd think, I had one case in which the woman got married, but did not list the marriage on her asylum form (and did not tell me). In fact, she really did not consider herself married—she signed a marriage contract, but never consummated the marriage, and she seemed to have put it behind her. Unfortunately for her, the Asylum Officer somehow knew that she was married. (My guess is that her "husband" filed an immigration application listing my client as his wife.) The result: her case was denied and referred to court. Had she informed me (and the Asylum Officer) that she was married or had signed a marriage contract, she likely would have been approved—her brother's case was approved under the same circumstances. So again, the lesson is that the government may know more than you think they know.

The bottom line here is that when preparing an asylum application, it is a bad idea to lie. The U.S. Government knows a lot. How do they know so much? I don't know. Maybe ask Edward Snowden. But the point is, if you are filing an asylum application and you are not forthcoming with your responses, you risk losing your case.

Chapter 3: Credibility and Fraud

Credibility Determinations Are Not Credible

In an asylum case, evaluating credibility is probably the most difficult determination a fact finder has to make: is the applicant telling the truth about his claim?

Over time, various courts have examined how to decide whether an applicant is telling the truth. One of the main methods used to determine credibility is to look for inconsistencies in the person's testimony and evidence. In some ways, this is an effective means of judging credibility. For example, in one case I reviewed, an Ethiopian asylum seeker claimed to have been detained and mistreated by her government. DHS had evidence that she had actually been living in Italy during the period that she claimed to have been detained in Ethiopia. Thus, it was pretty clear that her claim was fraudulent. However, the vast majority of inconsistencies are far more subtle.

A much more common scenario is one in which an asylum applicant is found not credible because he gives the wrong date for an arrest or participation in a political event. Such an inconsistency tells us little about whether the applicant is lying or telling the truth because human memory does not work that way. Most events are not tied to a particular date in our memories.

For instance, I was once in a car accident. I remember many details of the accident, but I cannot tell you the day (or month or year) that it happened. As a lawyer, when I prepare the client's affidavit, I ask him to list all the relevant dates as accurately as possible. Often, this involves hazarding a guess or estimating the correct date. Once we have agreed upon the (hopefully) correct date, the client memorizes that date. Later, in court or at the Asylum Office, the client may not actually remember the date of the event. Instead, he is reciting the date that we reconstructed in my office.

The recitation (or regurgitation) of dates to the fact finder may be a decent test of the applicant's memory, but it is of little value in assessing his credibility. The corollary, of course, is that failure to remember dates—except in the most extreme circumstances—should not be used to support a negative credibility finding.

Another technique to evaluate credibility is to look for inconsistencies between an applicant's testimony and the testimony of her witness. However, this is not very reliable either. I tried a little experiment once that illustrates the point: I previously co-taught Immigration Law at George Mason University. My co-teacher and I had dinner a month prior to class. To demonstrate a marriage interview to the class, the co-teacher waited outside and the students asked me a series of questions about the dinner. She returned and they asked her the same questions. Our answers were only partially consistent. The class then voted on whether we actually had dinner. About half the class thought we had dinner; the other half thought that we were lying about having dinner.

If this is the level of consistency when two immigration lawyers are questioned about a recent event, it seems likely that non-lawyers who are not familiar with the U.S. immigration system, and who may be recalling traumatic incidents, might respond inconsistently to questions about more distant events. Therefore, it is unfair to base an adverse credibility finding on minor inconsistencies between a respondent's and a witness's testimony.

Two other common methods for testing credibility are to assess the applicant's demeanor and

the level of detail in her testimony. Demeanor includes things like “body language,” “looking at the judge,” “responsiveness” to questions, and whether the applicant’s answers are “vague.” Such evaluations are quite subjective and—because the Immigration Judge actually sees the respondent in person while the Board of Immigration Appeals does not—are subject to great deference by reviewing courts. The problem, of course, is that cultural differences and different personalities can be confused with deceptive demeanor. This mischaracterization is particularly true in asylum cases, where the applicant often has faced persecution by the authorities and is nervous to present herself before a tribunal. These issues, along with the inability of reviewing courts to oversee demeanor determinations, make demeanor a poor method for judging credibility.

“Lack of Detail” is often seen on referrals from the Asylum Office, but it is less common in Immigration Court. When I see this reason as a basis for a “not credible” finding, my initial reaction is to blame the Asylum Officer. If the Officer wanted more detail, she should have asked more questions. But this is not exactly what is meant by “lack of detail.”

An example will illustrate the point. An asylum seeker (represented by my friend) was asked to describe the conditions of her detention. She responded, “I was locked up and I was interrogated.” The officer repeated the question and received a similar answer. As my friend points out, even someone who has never been to prison knows that detained people are locked up and interrogated. Thus, this testimony lacks detail because anyone—whether they had been imprisoned or not—could have provided it. In this situation, the Asylum Officer or her attorney should have asked additional, more specific questions, such as, “What did you do every day in detention?” or “How was the food?” or “Describe your prison cell.” If the asylum seeker could not provide additional information, a finding of “lack of detail” might have been more appropriate.

“Lack of detail” is a poor basis for a credibility determination because Asylum Officers and immigration lawyers do not always ask enough questions to distinguish between an applicant who is *unable* to provide additional details versus an applicant who does not provide additional details because he does not understand the type of information the Asylum Officer is looking for.

For both “demeanor” and “lack of detail,” if there are outright lies or clear problems with the person’s testimony, he can properly be found not credible. However, in many run-of-the-mill situations, the methods discussed above are not a reliable measure of whether the applicant is telling the truth.

So what is a good way to determine credibility?

One method that I previously doubted, but now have begun to view as a more reliable means for assessing credibility is “plausibility.”

What do we mean by plausibility? When a fact finder determines that an event is not believable, it is considered implausible. For example, I worked on a case where the Immigration Judge initially found my client’s testimony implausible. The client was an Ethiopian political activist who passed through government security at the airport even though a warrant had been issued for her arrest. The IJ did not believe that a person who was wanted by the government could pass through airport security.

I previously felt that plausibility was a poor basis for determining credibility because it is difficult to know whether a particular event is plausible. In the above example, it turns out that many high-level political activists who had been jailed by the government were able to leave the country through the airport. In my Ethiopian case, after we presented this evidence, the client received asylum.

As I've thought about it more, I've come to believe that my case was decided in the proper way. The IJ was concerned about a legitimate plausibility issue. We presented evidence to satisfy that concern. The case was granted.

Astronomer Carl Sagan famously said, "Extraordinary claims require extraordinary proof." Mr. Sagan's axiom can be applied in the asylum context. If an applicant makes a claim that the IJ finds implausible, he should be given an opportunity to demonstrate that the claim is, in fact, plausible. The more implausible the claim, the better the evidence the applicant will need to provide to demonstrate plausibility. This seems like a reasonable method for assessing credibility.

But in truth, no method of determining credibility is completely reliable. This problem exists in all areas of the law, but it is particularly acute in the asylum context where so much rests on an applicant's unsupported testimony. The various methods of determining credibility can certainly help ferret out the most egregious untruths, but beyond that, I have real doubts about their effectiveness. In the end, fact finders must reach their conclusions using the imperfect tools that are available. Given all that rides on these decisions, it is not a task I envy them.

I Don't Know, I Don't Know, I Don't Know

If you are an asylum seeker waiting for your interview, repeat these words: "I don't know." Again: "I don't know." Say them out loud: "I don't know." One more time: "I don't know." These three words may mark the difference between an asylum grant and a denial, but too few asylum seekers ever utter them.

I have previously written about how it is important for lawyers to use these same words, and I might even go as far as saying that if you visit a lawyer and he or she never says, "I don't know," you might be better off finding a different lawyer. When we do not know or acknowledge the limits of our own ignorance, we risk giving bad advice.

Asylum seekers also need to practice their I-don't-knows. If you can learn to master these three little words, you might save yourself a whole lot of trouble. Why? Because too many applicants answer questions when (1) They do not understand the question, (2) They do not know the answer, or (3) They do not remember the answer. And if asylum applicants give an answer when, in fact, they do not know, it starts them on a path that could easily end in a denial.

Here's an example from a case I worked on: the asylum applicant's father was prominent in his country's government, but the applicant did not know much about his father's position. The Asylum Officer asked for some details about the father's job, and the applicant answered. But the applicant really did not know the answer. He just made a series of assumptions based on the limited information he did know. It turns out, the assumptions were wrong, and the applicant's testimony ended up being inconsistent with the testimony of other family members. Fortunately, we had a good Asylum Officer whose questions brought my client's assumptions to light, and so I think the applicant's credibility was not damaged. Nevertheless, had the applicant just said, "I don't know" instead of assuming, he would have avoided a potential pitfall (and—more importantly from my point of view—he would have saved his attorney a few unwelcome heart palpitations).

Having observed many such interactions, I always advise my clients to say that they do not know or do not remember if that is the case. But most people don't fully grasp the importance of only answering when they know the answer. If you guess—about a date or an event—and you are wrong, you risk creating an inconsistency, meaning that your spoken testimony may end up

being different from your written statement or evidence, or different from information that the U.S. Government already has about you (from your visa application, for example). The Asylum Officer or Immigration Judge may view inconsistencies as an indicator that you are not telling the truth. The theory (flawed, in my opinion) is that people who tell the truth will present consistent testimony in their oral and written statements, and in all the interviews with the U.S. Government. The bottom line is this: if your testimony is inconsistent, the adjudicator may view you as a liar and deny your case on this basis.

I get that it is not always easy to say that you don't know. Most applicants understand that it is important to answer the questions; after all, that is why they are at the interview or in court in the first place. And of course, not answering can create other issues. (It is common to hear adjudicators ask, "Why can't you remember?" to applicants trying to recall relatively obscure events from many years in the past.) Plus, in the stressful environment of the Asylum Office or Immigration Court, many applicants feel they need to give an answer, even if they are not sure what the answer is.

Indeed, there are times when saying "I don't know" can be a real problem for a case. One of my clients was asked about his prior political activity. He had no evidence showing his political involvement, and so his testimony took on added importance. In that case, if he were asked about the philosophy of his party or the party's leadership, the inability to answer might be viewed as evidence that he was not active in the party. Fortunately, in our case, the client knew the basic beliefs of the party and the names of its leaders. He was also able to describe in detail his political activities. His involvement in the party was years ago, but I suspect that if he had told the judge that he did not remember or did not know, it would have negatively affected his case.

It is preferable to know your case and answer the questions that are asked. So review your affidavit and evidence before your hearing. Practice answering questions with your lawyer or with a friend. Try to remember the dates of events. Know the names of relevant people and places, and about your political party or religion, or whatever forms the basis of your asylum claim. Try to remember all this, but if you can't, don't be afraid to say, "I don't know." As we have seen, not knowing can be a problem. But not knowing and guessing can be a disaster.

The Credibility Trap

One of the most disheartening phrases to hear at an asylum interview is when the officer says, "Government records indicate that..." This usually means the government has information contradicting the applicant's testimony. Here are a few examples from interviews I attended—

Government records indicate that you applied for a visa from a third country. Can you explain why you said you never applied for any other visas?

Government records indicate that you traveled outside the United States since your first arrival here. Can you explain why you said you had not left the U.S. since that time?

Government records indicate that your neighborhood in Syria was controlled by rebel forces at that time. Can you explain why you said the neighborhood was under government control?

The first two questions were for a Pakistani client. The third question was for an Iraqi. Both

applicants were denied and referred to Immigration Court.

As I see it, there are a number of problems with these “gotcha!”-type questions. For one, they are vague, in that the Asylum Officer does not state exactly what information the government has, and it is difficult to adequately respond to a question that you really don’t understand. For another, some of these questions rely on information that is easy for the applicant to forget or overlook. Finally, the “gotcha!” information possessed by the government is not always accurate.

In the first example above, it seems unfair to impugn an applicant’s credibility based on his failure to remember applying for a visa years after the fact. A visa application is not a major life event, and if the person did not actually get the visa and visit the country, it’s easy to see how he might forget about filing an application, especially since some visa applications are done online and the person may never even have visited the country’s embassy.

In the other examples above, the government’s information seems to be inaccurate. My Pakistani client swears he never left the U.S. since he first arrived here, and I believe him. He has no reason to lie and his I-94 record, available at the Customs and Border Protection website, does not indicate that he re-entered the country after his initial arrival. In the case of my Iraqi client, she was simply baffled to hear that her neighborhood was controlled by non-government forces. She says she lived in that neighborhood the entire time, and I trust her on-the-ground experience over the Asylum Officer’s “information.” Of course, it is possible that my clients are incorrect, or that—for some indiscernible reason—they are lying, but in these examples, I have more confidence in them than I do in the government.

What’s important to understand here is that the United States government wants to test an asylum applicant’s credibility, but it has limited means to do so. Asylum Officers can question applicants extensively to try to ferret out lies, but a more effective approach is when the officer can compare an applicant’s testimony with information the government knows to be true. And the government knows a lot. It knows about every U.S. visa you have ever applied for—and what you told the embassy during the visa application process. It knows about visa applications to other countries. (Which countries share such information with the U.S., I am not sure, but it is safest to assume that the government knows about *any* visa application to *any* country.) It knows about applications made to the United Nations. It knows a lot about a person’s travel history. It also knows about your relatives’ travel and visa histories (including ex-spouses). The government knows about any arrests or contacts with U.S. (and perhaps some foreign) law enforcement. Of course, it knows about any other U.S. immigration application made by you or your family members, and it probably has copies of all such applications. The government may know about your employment and education histories, and whether you have used any other names. The government also knows about conditions in your home country, including information about political parties, rebel groups, and terrorist organizations.

In short, Asylum Officers can—and do—gather significant independent evidence about an applicant’s case. Even where this evidence does not bear a direct relationship to the asylum claim, they can compare that evidence to your testimony and use that to determine whether you are credible (and remember, for the Asylum Officer, inconsistent = not credible). If the Asylum Officer determines that your testimony is incredible because, for example, you lied about your travel history or how you obtained your visa, she could conclude that you are lying about other, more significant, aspects of your case. If that happens, your application for asylum is likely to be denied.

So what do you do? First, don’t lie. Even about small things that you think are insignificant. The Asylum Officer may ask you questions about aspects of your life that seem irrelevant or

embarrassing. If that happens, think about why they might be questioning you on that topic. What might they know? Do your best to answer honestly. Don't guess! If you guess wrong, the Asylum Officer might assume you are lying. If you don't remember or do not know, tell the officer that you don't remember or you don't know.

Also, prior to the interview (ideally, when you prepare the affidavit), think about the times when you (or your family members) had contact with the U.S. Government, the UN, or other foreign governments. What did you say on your applications and in your interviews? Did you lie? If so, the time to admit that is in your asylum affidavit and at the asylum interview. You are much better off coming clean and explaining any old lies than hoping that the Asylum Officer won't know about them. Correcting the record in this way does not guarantee that the old lie won't be used against you, but in most cases, adjudicators appreciate the honesty, and they are more likely to forgive a misrepresentation that you bring to their attention than one that they bring up in a "gotcha!" question. In addition, in many cases, the law forgives an asylum applicant for lying if that lie was necessary for the person to get a visa and escape from her home country. *See Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). Affirmatively telling the truth and correcting the record is usually the safest approach for people who have something negative in their history.

Turning back to the above examples, maybe the best response to the first question would have been for the applicant to think about why the officer was asking him about other visa applications. If he was not sure about his answer, he might have replied, "I don't remember applying for a visa to a third country, and so I am not sure whether I did or not." This type of equivocal answer would at least have made it more difficult for the Asylum Officer to impugn the applicant's credibility.

What about the second two examples, where the government's information seems to be wrong? Here, I don't know what the applicants could have done other than to state that the Asylum Officer's information is incorrect. That is what my clients did, but obviously, it was not enough. The hope now is that, with the cases referred to court, the DHS attorney (the prosecutor) cannot rely on vague accusations—they will have to provide specific evidence of their claims (that client A traveled outside the U.S. or that client B's neighborhood was controlled by a rebel group). If we are allowed to see the government's evidence, we can (hopefully) refute it.

In an asylum interview, honesty is the best policy. And if you don't remember or don't know, it is best to say that. Finally, if there are "issues" in your past, it is best to bring those up affirmatively and explain them in your asylum application. In these ways, you can improve your credibility and increase the likelihood of a favorable outcome in your case.

On the Morality of Lying to Win Asylum

The Trump Administration was famous for its big lies—related to election fraud, climate change, political opponents, and much else. But from the very beginning, the most oft-repeated lies seemed to involve immigrants: asylum seekers are criminals, separating children from parents at the border was Obama's fault, the asylum system is a scam, non-citizens are voting in our elections, "illegals" get free healthcare and welfare benefits, Democrats support open borders, the Diversity Visa Lottery lets foreign governments choose who gets a Green Card, Muslim refugees were admitted into the U.S. while Christian refugees were refused, immigrants can sponsor all sorts of distant relatives through "chain migration," Central American countries are safe, etc., etc. Though President Trump is gone, many of these lies live on and continue to

influence the immigration debate.

The question I want to address here is this: if the government itself and many influential people lie about asylum seekers, why shouldn't asylum seekers lie if it helps them win their cases?

My interest here is not in practicality: it is clearly a bad idea to lie because you might get caught. Our government has a lot of information about asylum seekers and can use that information to test credibility. Asylum Officers, USCIS Officers, DHS attorneys, and Immigration Judges are good at examining witnesses and ferreting out falsehoods. Even if you get away with lying on an asylum application, the lie could come back to haunt you in the future (when you apply for residency or citizenship, or if you want to sponsor a family member). So there are good, practical reasons to tell the truth: you could lose your case, you could be blocked from any immigration benefits for life, you could end up in jail. And if you do get away with it, you can never really rest easy, and for as long as you are here, you will have to live with the possibility that your lie might be exposed and you could lose the life you've built in the United States. So in practice, lying is a bad idea. Here, though, I am interested in the morality of lying; not the practicality. Is it morally wrong to lie if that lie helps you to remain in the United States?

Before President Trump normalized lying, it would have been easy to answer that question in the affirmative. While President Obama's policies were not always friendly to immigrants—he was called the "Deporter-in-Chief" by some immigration advocates—his Administration never engaged in the type of systematic dishonesty that we saw from President Trump and his team. Despite all the problems during President Obama's term (and there were many problems), at least it felt as though asylum applicants could generally have their cases adjudicated in an environment that was free from overt political interference. Given that people could get a fair shake, the moral justification for lying was a more difficult case to make.

In those distant days before President Trump, it was common to hear asylum seekers express great faith in our system of justice. That was one reason they came here in the first place, and their faith in our system made them more likely to tell the truth. Ironically, the constant barrage of lies from President Trump and his Administration eroded faith in our system, which created an increased incentive for individuals to falsify their own asylum stories. Hopefully, President Biden will restore that lost trust, but it will take time, and when the asylum system is discredited and illegitimate, the moral case for telling the truth is weakened.

Of course, this outlook assumes a sort of *quid pro quo*: if you (U.S. Government) lie about me (asylum seeker), then I can lie to you. This ends-justify-the-means approach has never appealed to my sense of justice, and I am frankly uncomfortable with lying from a moral perspective simply because I believe lying is wrong—regardless of the end goal. But this is a type of morality that is easily deconstructed under various modern theories of legal justice. For example, when my law partner asks me, as he often does, "Do these pants make me look fat?" I always say no, even though those pants do make him look fat. I am lying for the sake of maintaining harmony in the office. Ends justifying means. So perhaps I should be less skittish about the moral implications of lying in other realms.

Indeed, support for the morality of lying for the "greater good" can be found in an old philosophical conundrum, presented by Benjamin Constant to Immanuel Kant in 1797. Kant believed that lying was always wrong. Constant challenged him with a scenario where a murderer is searching for his victim. The murderer arrives at the house of the victim's friend and asks the friend where the victim is hiding. Does the friend have a duty to speak truthfully to the murderer? Constant argues that he does not—

The concept of duty is inseparable from the concept of right. A duty is that on the part of one being which corresponds to the rights of another. Where there are no rights, there are no duties. To tell the truth is therefore a duty, but only to one who has a right to the truth. But no one has a right to a truth that will harm others.

And so today, when the government has established a record of harming asylum seekers by lying about them to send them away, how can we say that asylum seekers have a duty to tell the truth to that same government?

For me, this is a difficult and uncomfortable question. But despite it all—the unfair laws, the torrent of false claims about asylum seekers, the assault on due process—I still think lying is morally wrong in an asylum case. Here's why: first, for me, the idea of asylum is somehow sacred. Our country is offering protection to strangers who need our help. We ask for nothing in return. In this respect, and despite a realpolitik element, asylum represents our highest ideals. And these are not just American ideals. The idea of welcoming the stranger is mentioned again and again in the Bible. Because I view asylum this way, the idea of lying to win one's case feels like the violation of a sacred trust or covenant, and I see that as morally wrong.

Second, lying to win asylum further erodes the system and makes it harder for other asylum seekers to receive the protection they need. It is bad enough that the Trump Administration tried—with some success—to systematically dismantle our asylum system. When asylum seekers lie, they unwittingly aid in this effort and amplify it, and I believe that this is morally wrong.

Finally, I do not believe that two wrongs make a right. Just because the Trump Administration debased itself by lying to harm asylum seekers, I do not think asylum seekers should do the same. I do not think it is moral to lower one's own standards simply because another person has acted immorally, or even when we are operating in a system that has approached moral bankruptcy.

Having said all this, I recognize that I am far less affected by “the system” than the people seeking asylum. I have less to gain and less to lose. Each of us—asylum applicants, attorneys, decision-makers—has to make our own decision based on our own moral imperatives and our own needs. President Trump and his Administration made their choice. They lied to further their agenda. Now, as the Biden Administration works to repair the damage, my hope is that the asylum system can recover, and that asylum seekers can continue through that system with their own morality intact.

When Clients Lie

I once represented a Russian woman who paid a *notario* (or whatever you call the Russian equivalent of a *notario*) \$10,000.00 to concoct a phony story about how the woman was a lesbian who faced persecution in her home country. The application was denied and the woman was referred to Immigration Court.

By the time I got the case, the woman had married a United States citizen (a man) and was facing deportation. We had to decide how best to approach the case, given the client's previous lies. We took an approach that I have used many times since, as it tends to work: we admitted that she lied, explained how the lie happened (basically, a naive young woman following the advice of a high-paid crook), accepted responsibility for what she did wrong, and apologized.

In the end, the client received her Green Card based on the marriage. My favorite moment of the case was when I informed the Immigration Judge that I would have an expert at trial to testify

concerning country conditions in Russia: the husband was African American, and if his wife were deported, he planned to follow her to Russia, where he would likely face problems with skinheads and other racists. The judge, who was also Black, told me, “I don’t need an expert to tell me that there is racism in Russia.” We skipped the expert and won the case.

This basic formula—admit the lie, take responsibility, and apologize—is one that has worked for my clients on numerous occasions.

In another case, our client was an asylee who had been convicted of stealing money from his employer. The crime was an aggravated felony under the Immigration and Nationality Act (because he was sentenced to more than one year in prison). The refugee waiver, under INA § 209(c), is one of the rare waivers that allows an aggravated felon to adjust status, in this case from asylee or refugee to lawful permanent resident.

In that case, we used the same formula. The client took responsibility for his crime, apologized, and promised that he would not engage in such behavior again. We also submitted evidence of rehabilitation. The waiver was granted, the client was released from detention (after a good eight months in jail), and he received his Green Card.

This same strategy can be used for clients who lied to obtain a visa or who entered the country illegally. The fact finder wants to hear that the person accepts responsibility for what she did. And in asylum cases, there really is little to gain from covering up such lies, as people who falsely obtain a visa (or enter the U.S. illegally) in order to escape persecution are not ineligible for asylum. *See Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). In addition, the U.S. Government knows a lot—about immigration violations, criminal arrests, and convictions—and so there is no realistic possibility of ignoring past misdeeds in the hope that they won’t come back to haunt you.

The point of all this is not that an applicant can say the magic words and win permission to remain in the United States. Rather, a person who accepts responsibility for what he did (and tries to turn his life around) is much more likely to receive relief than one who tries to cover it up or blame someone else.

Chapter 4: Delay and What to Do About It

Waiting Is the Hardest Part

The asylum backlog—both in Immigration Court and at the Asylum Office—is years long. Hundreds of thousands of applicants are waiting, seemingly forever, to present their cases and to receive decisions. Many of these people are separated from children and spouses. Even for those who are not separated from family, the lengthy waits and uncertain outcome can have a serious psychological impact. Indeed, the human tragedy of the asylum backlog is apparent to anyone involved with the system.

A 2017 article by Professor Bridget M. Haas, [Citizens-in-Waiting, Deportees-in-Waiting, Power, Temporality, and Suffering in the U.S. Asylum System](#), helps quantify the psychological suffering of those who wait. Prof. Haas followed 26 asylum seekers from seven countries between 2009 and 2012. Only four of the study participants received asylum from the Asylum Office. Twenty-two were referred to court, and the majority of those had their asylum cases denied. Seven of Prof. Haas's subjects left the U.S. or were deported during the period of her study.

The Professor's findings largely comport with what you might expect—

For asylum seekers, my data demonstrate that the liminality associated with asylum—of being “betwixt and between” a particular status or identity—is best understood not as a time of transition but rather as a time of rupture, as “a discontinuity of subjective time, in which powerful forces operate to change perceptions of time, space, and personal values.” The discontinuity wrought by asylum-seeking manifests as suspended life.

In other words, the uncertainty of the waiting period leaves asylum applicants unable to move forward with their lives. They are literally stuck waiting. The problem seems to be compounded by the disconnect between asylum seekers’ expectations and the reality of the asylum process—

Most participants had expected the asylum process to last “a couple of days” or “a matter of weeks.” That the process...would be such an arduous and protracted one was beyond their imaginations. Before filing an asylum application...participants had not conceived of a scenario in which their stories and personal histories would be denied credibility or be deemed undeserving of protection.... Ultimately, the disjunction between expectations of treatment in the United States and the reality they faced was a source of confusion and distress for asylum seekers.

Prof. Haas characterizes the asylum waiting period as one of “existential limbo” where “the very viability of their lives [is] in a state of profound uncertainty.” This manifests in different ways, including “extreme anxiety,” “powerlessness,” and even suicidal thoughts. Asylum applicants had a “sense of being beaten down” by the process. They felt “hopelessness, despair, and futility.” Many felt traumatized by the wait, and “experienced waiting itself...as a form of violence,” which inflicted “enduring psychic distress.” Also, “waiting in limbo was understood as traumatic because of the life-and-death stakes it inhered for asylum seekers and the profound

anxiety this produced.”

The state of limbo often prevents asylum seekers from “taking future-oriented actions,” such as furthering their education, because of a “sense that these actions would be done in vain if [they] were to be deported.”

All this rings true for me. I observe my clients’ suffering firsthand. In some cases—especially for those separated from young children—the damage caused by the asylum process can be worse than the harm caused by the persecution.

Prof. Haas writes about her subjects’ coping methods. She notes that “asylum seekers often engaged in activities that offered a distraction from the pain of waiting.” “Other asylum seekers attempted to resist suffering through the refusal to acknowledge the present state of limbo.” Still others turn to their religion for a sense of hope.

These observations align with how I see my clients coping. I also think it is helpful to try to exert some control over the situation. For example, asylum seekers can attempt to expedite their cases. Even if this does not succeed, it provides an avenue for action, which may be better than passively waiting. Asylum seekers can also try to overcome the inertia of limbo by “taking future-oriented actions,” even if that is difficult: take a class, go to therapy, buy a house, start a family. In a case of giving advice that I probably could not accept myself, I advise my clients to live as if they will be staying here permanently. It’s not easy, but it beats the alternative (going insane).

Finally, Prof. Haas’s article has prompted me to think about the concept of “liminality” in asylum. The word “liminal” derives from the Latin “limen,” meaning “threshold” or doorway. It refers to the in-between times and places in life.

In Judaism, and I imagine in many other religions, liminal spaces are often viewed as holy. We place a mezuzah (a decorative case containing verses from the Torah) in the doorway of our home. We get married under a chuppah (a temporary canopy that symbolizes the new home the couple will create). We Jews spent 40 years wandering the desert in order to transform from slaves to free people. And of course, the Bar or Bat Mitzvah marks the traditional transition from child to adult.

Who are these rituals for? And how do they help? Prior to the Exodus, when G-d decided to kill the first-born sons in Egypt, G-d instructed the Jews to place blood on their door posts, so the Angel of Death would pass over their homes. One rabbinic discourse explores whether the blood was on the outside or the inside of the doors. Was it meant for G-d, the Egyptians or the Jews? I like the idea that the blood was on the inside of the door, that it was meant to remind the Jewish people of why we were being spared, and of the sacrifice that all Egyptians were making for our freedom. I think there is value in such reminders.

Perhaps by specifically noting these liminal times as transitory, and by recognizing their transformative nature, we can more easily endure the waiting. Whether it is even possible to view the asylum wait time in these terms, I do not know. But one way or another, this period will end. Each of us has only so much control over our own destinies. For asylum seekers, the future is more uncertain than for many others. We are all left to do our best in the time that we have. Put another way, we are all precarious fiddlers on the roof, and so we might as well play the best song that we can.

How to Expedite an Asylum Interview

These days, the estimated wait time for an affirmative asylum case is somewhere between

eternity and forever. It can best be expressed numerically as ∞ . Or maybe as $\infty + 1$. In other words, affirmative asylum cases can take a long damn time.

For some people, this wait is more of a problem than for others. For example, if your spouse and children are outside the United States waiting for you, and especially if they are living in unsafe or unhealthy conditions, the wait can be intolerable. A growing number of people are abandoning their cases simply because they cannot stand the separation. Others are moving to Canada, which apparently has a faster system than we have in the States. The problem is not simply that the wait *is* long—and the wait is long. The problem is that we cannot know how long the wait will be. Maybe the interview will come in six months; maybe in three years. Maybe the decision will come shortly after the interview; maybe it will take months or years. This unpredictability contributes to the difficulty of waiting for a resolution to the case.

For others—single people without children or families that are all together here in the U.S.—the wait may be stressful, but it's far more bearable. I advise my clients in this position to live as if they will win their cases. What else can they do? To live under the constant stress of potential deportation is unhealthy. And the fact is, most of my clients have strong cases, and the likelihood that they will succeed is pretty high. So it is best to live as normally as possible. Find a job, start a business, buy a house or a car, go to school, make friends, get on with life. In the end, if you lose your case and have to leave the United States, you will have time to wind down your affairs and sell your belongings. For now, though, if I may quote the late, great Chuck Berry, “Live like you wanna live, baby!”

But what if you want to try to expedite your case? How can you maximize the chances that the Asylum Office will move your case to the front of the line?

First, before you file to expedite, you need to complete your case. The affidavit must be finished and all the evidence must be organized and properly translated (if necessary). If you expedite a case and the case is not complete, it could result in real problems. For example, I once had a client put himself on a short list without telling me. Then one day, an Asylum Officer called me and said that they wanted to schedule his interview for the following week. The problem was that the evidence was not submitted (or even gathered) and the affidavit was not done. The client insisted on going forward, and so, while I helped with interview preparation, I withdrew from the case. I did not want to remain affiliated with a case that was not properly put together, and I did not want to represent a person who took action on his case without informing me. In general, there is no value in expediting a case only to lose because you are not prepared for the interview, so make sure your case is complete before you try to expedite.

Second, you need a good reason to expedite. Remember, you are asking to jump your case ahead of thousands—maybe tens of thousands—of people who are also waiting for their asylum interviews. Why should the Asylum Office allow you to do that? One common reason is that the applicant has a health problem (physical or mental). If that is your reason, get a letter from the doctor. Also, provide some explanation for how an early resolution of the asylum case might help improve your situation. For example, maybe you have a health problem that is exacerbated by the stress of a pending case and resolution of the case will alleviate your symptoms.

Another common reason to expedite (and in my opinion, the most legitimate reason to expedite) is separation from family members, especially if those family members are living under difficult or dangerous circumstances. If an asylum applicant wins her case, she can file petitions to bring her spouse and her minor, unmarried children to the United States. Many people come to the U.S. to seek asylum not for themselves, but because they fear for the safety of their family. Since it is so difficult to get a U.S. visa, it's common to see asylum seekers who

leave their family members behind, in the hope that they can win asylum and bring their family members later. So when the wait for an interview (never mind a decision) is measured in years, that's a real hardship. For our asylum-seeker clients with pending applications, we have seen cases where their children were attacked in the home country, where family members went into hiding, where children could not attend school or get medical treatment, where families were stuck in third countries, etc., etc., etc. Such problems can form the basis for an expedite request.

To expedite based on family separation, get evidence about your family's problem overseas. That evidence could be a doctor's note for a medical problem or an injury that they suffered, or a police report if a family member was attacked or threatened. It could be a letter from a teacher that the child cannot attend school due to instability in the country. It could be letters from the family members themselves explaining the hardship, or letters from other people who know about the problems. Also, sometimes family members receive threat letters or their property is vandalized. Submit copies of such letters or photos of property damage. It is very important to submit letters and evidence in support of the expedite request. Also, remember to include evidence of the family relationship—marriage certificate or birth certificates of children—to show how the person is related to the principal asylum applicant.

There are other reasons to request an expedited interview as well: until an asylum case is granted, applicants may not be able to get certain jobs, they cannot qualify for in-state tuition, they face the general stress of not knowing whether they can stay. While these issues can be quite difficult to deal with, the Asylum Offices generally consider them less compelling than health problems or family separation. If you try this path, you want to get the strongest evidence possible. For example, a letter from a prospective employer indicating that they cannot hire you until your immigration status is regularized.

Once your case is complete and you have gathered evidence in support of the expedite request, you need to submit the request and evidence to the Asylum Office. Different offices have different procedures for expediting. You can [contact your Asylum Office](#) to ask about the procedure, but generally, you want to email or mail the request and evidence to your local office.

Alternatively, you can contact your Congressional representative to ask for help expediting your case. It is usually easier to make the request yourself, but sometimes people who do not have luck expediting on their own are able to expedite through their Congress person. As an asylum seeker, you can approach your [Congress person](#) yourself, but the request might be more effective if you have a U.S. citizen friend, church group or employer who can make the request for you.

One last point about expediting asylum cases: the system for expediting cases is not well-developed, meaning that sometimes, a strong request will be denied or a weak request will be granted. There definitely seems to be an element of luck involved in the expedite request process. But of course, unless you try to expedite, you can't get your case expedited. If an initial request is denied, you can gather more evidence and try again (and again). At least in my experience, most—but not all—cases with a good reason to expedite were, in fact, expedited (eventually).

Finally, another option at some Asylum Offices is the “short list.” The short list is a list of applicants who will be contacted for an interview if another case is canceled. To find out whether your local [Asylum Office](#) has a short list, contact them directly to ask (email is best). Because many people add their names to the list, the “short lists” tend not to be very short or very fast. When your name is called, you may not have much notice before the interview (for example, the Asylum Office could call you today and tell you to appear for an interview tomorrow). For this

reason, when you put your name on the short list, your case should be complete and all documents should be submitted. This is particularly crucial since most Asylum Offices require all documents to be submitted at least one week prior to the interview. Once your name is on the short list, the Asylum Office will eventually contact you for an interview. In the event that you are called, but cannot attend, there is no penalty. However, your name may go to the back of the line, and so you might not be called again for some time.

Since the asylum backlog is not going away any time soon, for many people, the only options are to learn to live with the delay or—if there is a reason—to ask for an expedited interview and/or put their name on the short list, and then to hope for the best.

Asylum Decision Delayed Forever? Here Are Some Possible Reasons

These days, most asylum applicants face long waits prior to their interviews. After the interview, some applicants receive a decision in two weeks; others wait months; still others—thankfully, a minority—wait for years without a decision.

Why does it sometimes take so long to get a decision? Our dogged reporters at the Asylumist have come into possession of an internal Asylum Office document that sheds light on this question (ok, in truth, the document is publicly available, but it's not so easy to find). The document is the Quality Assurance Referral Sheet, which lists the categories of cases that must be submitted to the Asylum Division headquarters (HQ) for further review.

Cases submitted to HQ often face substantial delays. So if your case falls into one of the below categories, you can expect a longer wait for your decision. How long? I have no idea. Some of our cases that go to HQ receive decisions relatively quickly. Others languish for months, sometimes years. I have heard that the average wait time at HQ is about a year, but there seems to be no way to predict how long an individual case might take.

Without further ado, here are the asylum-seeker categories that hopefully you don't fall into:

Diplomats and Other High-Level Officials: Any decision—grant, referral to court or a notice of intent to deny—in the case of a sitting diplomat to the U.S. or the United Nations, other high-level government or military officials, high ranking diplomats to other countries, and family members of such people must be reviewed by headquarters. The same is true for any asylum applicant who fraudulently obtained a diplomatic visa.

National Security/Terrorism-Related Inadmissibility Grounds (TRIG): Any decision in a case that would be granted but for a TRIG bar, regardless of whether an exemption to the bar is available, must go to HQ. The TRIG bar is quite broad and many people are potentially affected. This includes people who worked for or supported terrorist organizations (or more accurately, organizations that the U.S. Government views as terrorists), and even includes people who “supported” terrorists under duress. An example might be someone who paid money as ransom or who was forced on pain of death to provide services to terrorists. TRIG is particularly tricky because some cases are placed on an indefinite hold, meaning the applicant will never receive a decision, at least not until the government gets around to enacting new regulations on the subject.

Other National Security: In order to grant a case involving national security issues, where the concern was not resolved through vetting, the case must go to HQ. Aside from terrorism,

national security concerns can include a wide range of activities, including suspected gang membership or involvement in other criminal activities.

Persecutor-related issues: Asylum grants are referred to HQ where evidence indicates that the applicant may have ordered, incited, assisted or otherwise participated in acts of persecution or human rights violations, and the individual has demonstrated that he should not be barred as a persecutor. Also, before a credible applicant is referred to Immigration Court or issued a Notice of Intent to Deny letter based on the persecutor bar, the case must be reviewed by HQ. You might fall into this category if you served in the police or military of your country, if you were a prison guard or if you interrogated prisoners, and if your government has a record of abusing human rights.

Publicized or Likely to be Publicized: High-profile cases that have had or are likely to have national exposure, not just local interest, are subject to HQ review. If your case is getting media attention, or if it could affect relations with your home country, the case will likely be sent to HQ before any decision (good or bad) is issued. One positive note: sometimes, when cases get media attention, they receive priority and decisions can be issued more quickly.

Firm Resettlement: If a person is “firmly resettled” in a third country—meaning, she has the ability to live permanently in a country that is not the U.S. and is not her home country—she is ineligible for asylum. Where the asylum office would have granted the case but for firm resettlement, the case is sent to HQ for review.

Juvenile: Where the asylum applicant is less than 18 years old at the time of filing, the case will be referred to HQ if the Asylum Office intends to deny.

EOIR—Prior Denials: Where an applicant was previously denied asylum by the Executive Office for Immigration Review (the Immigration Judge and/or the Board of Immigration Appeals), the case must be reviewed by HQ before it can be granted.

Discretionary Denials/Referrals: If the Asylum Office intends to deny a case or refer it to the Immigration Court based solely on “discretion,” the case must be reviewed by HQ. This means that the asylum applicant met the definition of a refugee and is otherwise eligible for asylum but is being denied or referred due to reasons that are not legal bars to asylum. A discretionary denial might be for a crime that does not bar asylum, like DUI or failure to pay child support, or for some other lack of good moral character.

National of Contiguous Territory/Visa Waiver Country/Safe Third Country: Where the Asylum Office intends to grant the case of an applicant from a contiguous territory (Canada or Mexico) and the case involves a novel legal issues or criminal activity by the applicant in the U.S. or abroad, the case must be referred to HQ. Also, cases of applicants from countries in the Visa Waiver Program must be referred to HQ before they are granted. In addition, grants of applicants who are nationals of countries with which the U.S. has a Safe Third Country agreement must be referred to HQ (the only country with which we currently have such an agreement is Canada).

Safe-Third Country (STC) Agreement: All cases in which evidence indicates the STC Agreement may apply, irrespective of whether the applicant is eligible for an exception, must be

referred to HQ. This means that anyone (regardless of country of origin) who was first in Canada (the only country with which we have an STC Agreement) and then came to the United States for asylum, must have her case reviewed by HQ.

Asylum Office Request for HQ Quality Assurance Review: Any case for which the Asylum Office Director requests review from headquarters will be reviewed.

As you can see, there are many reasons why a person's case might be referred to the Asylum division headquarters for more review (and more delay). It would be helpful if the Asylum Office could publish some data about HQ review—perhaps how long each category of review takes and how many cases are currently under review. I understand why HQ cannot easily predict how long the review will take for an individual case, but if more information were made public, it would help ease the wait for asylum applicants.

My Asylum Decision Is Delayed. What Can I Do?

These days, delay is a big issue before the Asylum Office interview. But it can also be a problem after the interview. If you've been interviewed and your decision is delayed, here are a few options that might be worth a try:

Inquire Yourself: Contact the [Asylum Office](#) directly to ask about your case. The most effective way to do this is by email. Such inquiries rarely help, but there is no harm in trying. If you have an urgent need for the decision (due to a health problem or family separation, for example), inform the Asylum Office about the situation (and provide some evidence), and ask them to expedite the decision.

Congress: You can contact your [Congressional Representative](#) or [Senator](#) to ask for help with the decision. Generally, in my experience, this option is not very effective, but there is no harm in trying. It may be more effective if you have a U.S. citizen friend, church group or employer who can make this request for you.

DHS Ombudsman: You can inquire with the DHS Ombudsman's office about your case. This office exists to assist people who have delayed or problematic cases. These days, the [Ombudsman's office](#) is not very helpful, but again, there is no harm in trying.

Mandamus: If you have been awaiting your decision for a long time, and you have exhausted the other options, you might try filing a mandamus lawsuit against the Asylum Office. In a mandamus lawsuit, you sue the Asylum Office and ask a federal judge to order the Asylum Office to do its job (i.e., process your case). Generally, the Asylum Office will not want to waste resources litigating Mandamus suits, so they might agree to process the case rather than fight the lawsuit. As I see it, there are two downsides to a mandamus lawsuit: (1) There is not a strong legal basis to force the Asylum Office to process a person's case. The regulations generally require asylum cases to be processed in less than six months, but there are broad exceptions to this time frame, and the Asylum Office can rely on those exceptions to process cases more slowly. Although the suits may not be very strong legally, they can still succeed where the

Asylum Office would rather make a decision in the case than fight the lawsuit; and (2) It can be expensive to hire an attorney to process a mandamus lawsuit. For applicants who can afford this approach, however, it might offer a way to make things faster.

Unfortunately, asylum seekers face delay at every stage of the process. Perhaps some of these ideas can help reduce that delay and allow you to obtain a decision in your case.

Expediting a Case in Immigration Court

For the last few years, the “hot topic” in asylum has been the backlog—the very long delays caused by too many applicants and too few adjudicators. For people whose cases are stuck in Immigration Court, what can they do?

The first thing to note is that the backlog in Immigration Court is huge. According to recent data, there are over 1.2 million cases pending in court (not all of these cases are asylum). The average [wait time](#) for a case in Immigration Court is over 800 days. The slowest court is Colorado, where wait times average over 1,000 days. That’s a long time, especially if you are separated from family members while your case is pending.

Second, advancing a case is not easy. The [Immigration Court Practice Manual](#), page 101, specifically notes that, “Motions to advance are disfavored.” The motion should “completely articulate the reasons for the request and the adverse consequences if the hearing date is not advanced.” Health problems or separation from family may be good reasons to advance.

Third, expediting a case in Immigration Court is not as straightforward as expediting a case at the Asylum Office. There are different approaches that you can take, depending on the posture of your case. For advancing a case (and for the case itself), it is very helpful to have the assistance of an attorney. Indeed, according to [TRAC Immigration](#), 91% of unrepresented asylum applicants in Immigration Court have their cases denied (whether they get other relief, like Withholding of Removal, I do not know). If you can afford a lawyer, it will be to your benefit in expediting and winning your asylum case in court (for information about pro bono--free--lawyers, see Chapter 8).

OK, before we get to the various approaches for advancing a court case, let’s start with a bit of background. A case commences in Immigration Court when the Notice to Appear (NTA) is filed with the court. The NTA lists the reasons why the U.S. Government believes it can deport (or, in the more bowdlerized parlance of our time, “remove”) someone from the United States. After the court receives the NTA, it schedules the “respondent” (the non-citizen who “responds” to the NTA) for an initial hearing, called a Master Calendar Hearing (MCH). At the MCH, the respondent—hopefully with the help of an attorney—tells the Immigration Judge (IJ) whether the allegations in the NTA are admitted or denied, and whether the respondent agrees that he can be deported. In most asylum cases, the respondent admits that he is deportable, and then informs the judge that his defense to deportation is his claim for asylum. The IJ then schedules the respondent for a Merits Hearing (also called an Individual Hearing), where the respondent can present his application for asylum, and either receive asylum (or some other relief) or be ordered deported from the United States. Depending where in this process your case is, the procedures to expedite vary.

If you have the NTA, but the MCH is not yet scheduled: In some cases, the respondent

receives an NTA, but then waits many months before the MCH is scheduled. In this situation, the delay usually lies with DHS (the Department of Homeland Security)—which issues NTAs and files them with the Court—rather than with the Court itself. The Immigration Court has an automated number that you can call to check whether your case is scheduled for a hearing date. The phone number is 800-898-7180. Follow the prompts and enter your nine-digit Alien number (also called an “A number”). The system will tell you whether your case is scheduled and the date of the next hearing. If the system indicates that your “A-number was not found,” this probably means that the NTA has not yet been submitted to the Court. You can also check your case status online at the [EOIR website](#).

If your A-number is not in the system, contact the local [DHS Office of the Chief Counsel](#) and talk to the attorney on duty. Perhaps that person can help get the NTA filed with the Court, so the case can begin.

If your A-number is in the system, but there is no MCH scheduled, contact the [Immigration Court](#) directly to ask the clerk for an update. If the court has the case, it may be possible to file a motion (a formal request) to schedule the case. However, if an IJ is not yet assigned to the case, such a request may disappear into the void. Most lawyers (including me) would generally not file a motion until a judge is assigned, though if you (or your lawyer) are willing, you can give it a try.

While you are waiting for the court to docket your case (i.e., give you a court date), you can gather evidence and complete your affidavit. That way, once the case scheduled, you will be ready to file your documents and ask to expedite.

If the MCH is scheduled: Sometimes, MCHs are scheduled months—or even years—in the future. If your case is assigned to an IJ and you have a MCH date, there are a couple of options for expediting.

First, you can file a motion to advance the date of the MCH. If the MCH is sooner, the final (Merits) hearing will be sooner as well. Whether the IJ will grant the motion and give you an earlier appointment is anyone’s guess. Some IJs (and their clerks) are good about this; others, not so much.

Second, you can request to do the MCH in writing (in lieu of attending the hearing in-person). If the judge allows this, you can avoid attending the MCH and go directly to the Merits Hearing. Just be sure that your affidavit and all supporting documents are submitted, so you are ready to go if and when the IJ schedules you for a final hearing.

Many attorneys, including me, do not like filing motions to advance the MCH or motions for a written MCH. The reason is because they often do not work, and so what happens is this: you prepare and file the motion, call the court several times, and ultimately have to attend the MCH anyway. When lawyers spend time doing extra work, it is fair for them to charge the client additional money. So don’t be surprised if your lawyer tells you that filing a motion will cost extra.

At the MCH: Typically, when you go to the MCH, the IJ gives you the first date available on her calendar for a Merits Hearing. But there are a few things you can do to try to get the earliest possible date.

One thing is to complete the entire case (the affidavit and all supporting documents) and give it to the IJ at the MCH. That way, if there happens to be an early opening, you can take the date (and sometimes, IJs do have early dates—for example, if another case has been cancelled). Many lawyers (again, including me) don’t love this because it requires us to do all the work in advance,

and it often doesn't help. Don't be surprised if your lawyer charges extra for getting the work done early, since many lawyers—and other humans—prefer to put off until tomorrow what we do not need to do today.

Second, you (or your lawyer) can try to talk to the DHS attorney prior to the MCH to see whether any issues in the case can be narrowed. "Try" is the key word here, since it is usually not possible to talk to DHS about the substance of the case prior to the MCH, as they have not yet reviewed the file. If you can talk to DHS and narrow the issues for trial, you can tell the IJ that you expect a relatively short Merits Hearing. It may be easier for the IJ to find a one-hour opening on his calendar than a three-hour opening (normally IJs reserve a three-hour time slot for asylum cases), and so you may end up with an earlier date. Even if you cannot talk with the DHS attorney, you can tell the IJ that you expect to complete the case in an hour and try to convince him to give you an earlier date, if he has one.

Third, if you have a compelling reason for seeking an earlier Merits Hearing, tell the IJ. If you have evidence demonstrating the need for an earlier date, give it to the IJ. Maybe the judge will not have an earlier date available immediately, but at least he can keep the situation in mind and accommodate you if an earlier date opens up.

Finally, if you simply arrive early at the MCH and get in line, you may end up with an earlier Merits Hearing date than if you show up late to the MCH since IJs usually give out their earlier dates first.

After the MCH, but before the Merits Hearing: Waiting times between the MCH and the Merits Hearing are very variable, depending on the Immigration Judge's schedule. Assuming the IJ has given you the first available Merits Hearing date (which is normal—see the previous section), there is not much point in requesting an earlier date immediately after the MCH. Maybe if you wait a few months and if luck is on your side, a spot will open up and your request will be granted. Or—if the judge has an efficient clerk—you can file a motion to advance, and the clerk will save it until a spot opens up for you.

Another possibility is to talk to the DHS attorney to see whether issues can be narrowed, which might make it more likely that the case can be advanced (see the previous section).

Some words of caution: keep in mind that the Immigration Court system is a mess. Judges come and go. Priorities shift, which sometimes causes cases to be moved. It is quite common for court dates to change. Even if you do nothing, a far-off date may be rescheduled to an earlier day, or an upcoming hearing might be delayed. If you successfully advance your court date, it is possible that the court will later reschedule your case to a more distant date (this happened to us more than once). It is difficult to remain patient (and sane) through it all, but maybe being aware of this reality will somehow help.

Also, remember to make sure that your [biometrics](#) (fingerprints) are up to date. If not, you may arrive at the Merits Hearing only to have it delayed (or denied) because the background checks were not complete.

Finally, do not give up. Immigration Judges are human. If they see a compelling reason to expedite a case, most of them will try to help. Explain your situation to the judge, or let your lawyer explain, and maybe you will end up with an earlier date.

Expediting Your Case with USCIS

It's rare that you'll find the words "USCIS" and "fast" in the same sentence, unless there's a

“not” in there somewhere. The agency that processes U.S. immigration benefits is not known for its lightning speed. But if you’re in a hurry, it is possible to expedite your case. USCIS does not always agree to expedite requests, but there is usually nothing to lose by trying.

In fact, USCIS has an entire web page devoted to [expedite requests](#). Note that this page is not for asylum cases (I wrote about expediting asylum cases above). Also, the web page does not provide information about expediting cases outside the United States. For refugees (not asylees) outside the U.S., there is some [limited information](#) about expediting available from USCIS. And for humanitarian parole applications for people outside the country, there is also some [USCIS information](#) about expediting available. Finally, if a case has already been processed by USCIS and is now with the U.S. Department of State, you can find some information about expediting at the [State Department website](#). Also, you can contact the relevant [U.S. Embassy](#) directly to ask for help.

For cases being processed inside the country, the [USCIS web page](#) provides guidance for how to make an expedite request. This guidance applies to applications for Employment Authorization Documents (EAD), I-730 petitions, Advance Parole, Refugee Travel Documents, applications for Lawful Permanent Residency (the Green Card), applications for citizenship, and more.

USCIS considers all expedite requests on a case-by-case basis and has sole discretion to decide to grant or deny such a request. This basically means that you are asking USCIS to do you a favor (expedite), and if they refuse, there is usually not much to be done. Also, in making an expedite request, USCIS requires documentation to support your attempt. USCIS will not expedite any case where [premium processing](#) is available (usually, these are cases involving employment-based applications where you pay an extra fee for fast processing).

USCIS lists the following criteria for [expediting a case](#)—

- Severe financial loss to a company or person, provided that the need for urgent action is not the result of the petitioner’s or applicant’s failure to: (1) File the benefit request or the expedite request in a reasonable time frame, or (2) Respond to any requests for additional evidence in a reasonably timely manner;
- Urgent humanitarian reasons;
- Compelling U.S. Government interests (such as urgent cases for the Department of Defense or DHS, or other public safety or national security interests); or
- Clear USCIS error.

USCIS indicates that “severe financial loss to a company,” means that the company is at risk of failure. For an EAD, you would want to show an equivalent level of difficulty for the individual. Maybe the person will become homeless or be unable to cover medical bills. Whatever the reason, you must show that you are not able to “withstand the temporary financial loss that is the natural result of normal processing times.”

Cases can also be expedited based on “urgent humanitarian reasons.” The most common examples are health problems (mental or physical, for you or a family member) and safety issues (maybe you are petitioning for a relative who is in danger in his home country).

If you can link your case to a “compelling U.S. Government interest,” that could be another reason to expedite. Maybe you are involved with U.S. national security work, for example, and

you need to expedite on that basis.

Finally, if USCIS has made a clear error, you can ask them to expedite a case to correct the error, or maybe even a subsequent case that has been delayed due to the previous error.

Whatever the reason for the expedite request, you would want to provide documentation: a letter from the doctor or your employer, medical records, evidence that your family members are living in unsafe circumstances (letters from your relatives or others who know about the problem, police reports, medical reports, country condition evidence), evidence of financial hardship, a USCIS letter admitting to their error, etc.

You can make a request to expedite at the time you file your case or any time after you receive the receipt.

The better approach is probably to make the expedite request when you file. Include a cover letter that clearly indicates you want to expedite (you can highlight or underline the fact that you are requesting expedition). In the cover letter, include an explanation about why you need to expedite. I prefer to keep my explanations short. In part, this is because I am lazy, but also, I think busy people at USCIS are more likely to read a short and to-the-point explanation than a long, involved explanation. Finally, along with the other evidence required for your application, include documentation supporting your request to expedite.

If you have already filed your application and now seek to expedite, the best approach is to call USCIS at 800-375-5283 (they also have a TTY line at 800-767-1833). To make this call, you will need the receipt number for your application. It is not so easy to reach a real person, but once you do, USCIS will create a service request and forward it to the appropriate office. After that, USCIS may ask for additional evidence in support of your request.

If you do not receive a timely response to your expedite request, you can call USCIS to follow up.

USCIS will (hopefully) agree to expedite the case. For applications that are completed in one step (EAD, Advance Parole, Refugee Travel Document), you should receive a decision in the case and—if all goes well—the requested document. For applications involving more than one step (an I-730 for a relative abroad, for example), the first step will be expedited, but subsequent steps will not necessarily be expedited. So for the I-730, you might still need to contact the State Department or the appropriate U.S. Embassy in order to keep things moving.

If USCIS denies the expedite request, it does not mean that they will deny the application. It only means that they will not reach a decision in an expedited timeframe (conversely, just because USCIS agrees to expedite a case does not mean that they will approve the application).

In our office, we sometimes make expedite requests for our clients. It does not always work, but sometimes it does (this always surprises me), and it can save significant time. For asylum seekers and asylees, many of whom have urgent needs, this can be a real life-saver. To maximize your chances for success, you need a strong reason to expedite and documents to support your request. For such cases, USCIS will evaluate the request and—sometimes—expedite your case.

Chapter 5: Politics, National Security, & Asylum

Where Terror Victims Are Treated as Terrorists

Let's say you own a grocery store in Mosul, Iraq. Your town is conquered by the Islamic State, and an IS fighter comes to your store, grabs your teenage daughter, puts a gun to her head, and threatens to rape and kill her unless you give him a glass of water. You pour a glass of water, hand it to your daughter, and she gives it to the fighter. Now, let's say that you, your daughter, and the IS fighter get to the United States and request asylum. Question: who is barred from receiving asylum? (a) The IS fighter; (b) You; (c) Your daughter; (d) All of the above.

If you guessed "d," you win. By giving a glass of water to the IS fighter, you and your daughter have provided "material support" to a terrorist, and you are both barred from receiving asylum in the United States. Even though you gave the glass of water under duress to save your child's life, and even though it was only one glass of water (what we lawyers call "de minimis"): how can this be?

After the attacks of September 11, 2001, Congress greatly expanded pre-existing law in order to prevent terrorists from taking advantage of our immigration system. These laws include the rules relating to "material support" of terrorism, which former BIA Board Member Juan Osuna has called "breathtaking in...scope." *See Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006) (Acting Vice Chairman Osuna, concurring). Judge Osuna continues—

Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization. This includes organizations that the United States Government has not thought of as terrorist organizations because their activities coincide with our foreign policy objectives.

And anyone who provides any type of support to these "terrorists" is barred from obtaining asylum or most other immigration benefits. This is called the material support bar.

The problem is that under these [rules](#), lots of people meet the definition of a terrorist or a person who provided material support to a terrorist. And it's not just people like the shop owners from Mosul. Under our existing law, George Washington would be considered a terrorist. He led an armed rebellion against Great Britain. Ditto for the other founding fathers. Betsy Ross gave material support by sewing a flag for the rebels. There are more modern examples, of course, such as Nobel-prize winning author and Holocaust survivor Elie Wiesel, who was interned in a Nazi slave labor camp where he provided—you guessed it—material support to the Germans. And then there's Senator John McCain, who gave material support to the North Vietnamese by participating in a propaganda video (after being tortured while a prisoner of war). Indeed, even Luke Skywalker would be considered a terrorist under the current rules since he participated in armed resistance against the Empire.

Maybe the picture I am painting is a bit too bleak. While there is no statutory exception for the material support bar, the Secretary of State and the Secretary of Homeland Security have the authority to waive certain Terrorism-Related Inadmissibility Grounds (TRIG). In that vein, DHS has issued [group-based exemptions](#) that allow people involved with certain "terrorist" groups to obtain status in the U.S. It is also possible to receive an [individual exemption](#) through a Byzantine (and sometimes infinite) [process](#).

One government entity that does not have the authority to grant a TRIG exemption is the Department of Justice (DOJ). This is significant because the Immigration Courts are part of the DOJ. Thus, Immigration Judges cannot grant an asylum case where the applicant is subject to TRIG, even when the material support was provided under duress. In a depressing, but not particularly surprising decision, *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016), the Board of Immigration Appeals confirmed that there is no implied duress exception to the material support bar—

[A]bsent a waiver [from the Secretary of State or the Secretary of Homeland Security], an alien who affords material support to a terrorist organization is inadmissible and statutorily barred from establishing eligibility for asylum and for withholding of removal under the Act and the Convention Against Torture, even if such support was provided under duress.

The problem is that a non-citizen can only get an exemption *after* he is ordered removed from the United States, and even then, there is no particular procedure to follow to [request an exemption](#). It seems the best an applicant (or his attorney) can do is to contact the DHS Office of the Chief Counsel (the prosecutor in Immigration Court) and request consideration for an exemption. An exemption is only available if asylum would have been granted *but for* the TRIG issue. In other words, the applicant needs to show that if it wasn't for the TRIG problem, the Immigration Judge would have granted him asylum (helpful hint to lawyers: if your client is barred from asylum solely due to TRIG, try to get the judge to state that explicitly in her decision; this will help when applying to DHS for an exemption). If the Secretary of Homeland Security grants the exemption, the applicant then needs to re-open his court case in order to receive asylum. Legend has it that DHS does sometimes grant [exemptions](#), so it certainly is worth a try, but my guess is that this is a sloooooow process.

Blocking terrorists and their supporters from the U.S. is obviously an important goal—it protects our country and it protects our immigration and asylum system. However, the material support bar is much too broad. It fails to distinguish between terrorists and their victims. Worse, it treats victims as if they were terrorists. The ruling mentioned above from the BIA underlines this sad fact. It also illustrates why the law needs to be changed. As we continue to work for immigration reform, I hope we will keep in mind those who have been victimized by terrorists and victimized a second time by our overly broad anti-terrorism law.

What to Do If You Are Stopped by ICE

While the Biden Administration has de-emphasized interior enforcement, it remains important to know your rights. What should you do if ICE (Immigration and Customs Enforcement) comes looking for you? Or if you get caught up in a raid?

Before we answer those questions, I want to note that people who have pending asylum cases, or who have cases in Immigration Court, are rarely targeted for arrest by ICE. The agency's main targets are people who already have removal orders and people who have criminal issues (including very minor criminal issues). However, ICE also makes "collateral" arrests if they encounter other "illegals" in the course of pursuing their target. But unless you have already been ordered removed or you have criminal issues, it is unlikely that you will ever have to deal with ICE. That said, it never hurts to take precautions and to be prepared. So how do you do that?

First, a couple general rules to keep in mind. If you are stopped by ICE or the police, do not run away or resist. Keep your hands where the officers can see them. Be aware that in [some states](#), you are required to give your name to law enforcement. Do not lie about your immigration status or present false documents. Trying to lie your way out of a situation rarely works and is more likely to cause additional problems. The better approach is to inform the officers that you wish to remain silent and that you wish to contact a lawyer and/or your family. As you probably know, in the U.S., you have the right to remain silent, and anything you say to ICE or the police can be used against you in court. So the less you say, the better.

If the officers want to search you, you have a right to say no. However, if the officers have probable cause (for example, they suspect that you committed a crime and are carrying a weapon), they can search you. If ICE or the police want to search you, you can repeat that you do not consent to the search, but do not resist.

Non-citizens in the U.S. are required to carry proof of immigration status at all times (Green Card, work permit, asylum receipt, passport and visa, etc.). If an ICE officer asks for your immigration papers, you are required to produce your documents. If you do not have your papers with you, you can inform the officer that you wish to remain silent or that you wish to call an attorney. You also have a right to call your country's consulate in the U.S. (though for asylum seekers who fear harm from the home government, this may not be a great idea). You might also scan your immigration papers or take pictures of them and keep them on your phone or in your email. That way, even if you do not have the originals, you can at least produce copies. In addition, non-citizens in the U.S. illegally (and who do not have an application pending) can be subject to [expedited removal](#) if they have been in the U.S. for less than two years. So make sure to carry proof (or have it on your phone or in your email) that you have been in the country for more than two years. If you have been in the U.S. for less than two years, do not admit that. Stay silent and ask to speak to a lawyer.

One common way people get detained is during a traffic stop. If you are stopped for a traffic violation, the police officer can require you to produce your driver's license, proof of insurance, and vehicle registration. Once the police have your information, they often check for outstanding arrest warrants. In some jurisdictions, they also check for immigration warrants and can detain people with outstanding criminal or immigration issues.

It is less common for ICE to come to your home, but if that happens, you do not have to let them into your house unless they have a warrant signed by a judge. You can ask to see the officers' ID and any warrant. Also, be aware that sometimes ICE officers will try to [trick you](#) into leaving your house or allowing them to enter. If ICE officers or the police force their way into your house, do not resist. Tell them that you do not consent to them entering your home, and that you wish to remain silent and contact a lawyer.

While it is probably unlikely that you will ever be detained by ICE, it is a good idea to have a plan in place just in case. What will you do about your children or other people that you take care of? Who will assist them? If you take medicine, make sure that someone can get it for you (including a copy of the prescription). What about bank accounts, vehicles, and property? You need to have someone to take care of your affairs in the event that you are detained, and that person needs to know what to do in case of an emergency.

In addition, keep your immigration and other legal papers somewhere where your family or friends can access them. Also, make sure your family members know or can find your Alien number. If you have a lawyer, your family members should have the lawyer's contact information.

You can find more information (in many different languages) about encounters with ICE and the police at the ACLU “[Know Your Rights](#)” webpage.

Finally, if you are detained, you may be eligible for release on your own recognizance, meaning you are released and required to report back to ICE or an Immigration Court at some point in the future. Or you may be eligible for release on a bond, meaning you pay money as a “guarantee” that you will appear for any future court date or for removal from the country. If ICE refuses to release you or set a bond, you can ask an Immigration Judge to do that. Depending on the circumstances, judges sometimes do not have the authority to release you. But in my experience, asylum seekers are almost always released unless they have criminal issues.

In short, while it is not impossible that a person with a pending asylum case will be detained by ICE, it is rare. Nevertheless, it’s a wise idea to have a plan in place and to be aware of your rights. That way, you will be ready for any eventuality.

DHS Is Your Friend on Facebook, Whether You “Like” It or Not

Following the December 2, 2015 terrorist attack in San Bernardino, California, where the husband-and-wife perpetrators had purportedly become radicalized via the internet, Congress requested that the Department of Homeland Security (DHS) take steps to better investigate the social media accounts of immigrant applicants (the husband was an American-born U.S. citizen of Pakistani decent; his wife was a lawful permanent resident from Pakistan). In response, DHS established a task force and several pilot programs to expand social media screening of people seeking immigration benefits and U.S. visas. DHS also approved creation of a Social Media Center of Excellence, which would conduct social media background checks for the various DHS departments. The Center of Excellence would “set standards for social media use in relevant DHS operations while ensuring privacy and civil rights and civil liberties protections.”

In 2017, the DHS Office of Inspector General released a (clumsily) redacted report detailing the efficacy of DHS’s efforts and making suggestions. Due to the incomplete redaction job, it seems likely that the pilot program focused on refugees and perhaps asylum seekers, but the plan is to expand the program to cover all types of immigrants.

The goal of the pilot program was to help develop policies and processes for the standardized use of social media department wide. “USCIS had previously used social media in a limited capacity, but had no experience using it as a large-scale screening tool.” The pilot program relied on manual and automated searches of social media accounts to “determine whether useful information for adjudicating refugee applications could be obtained.” It seems that the ability of DHS to investigate social media accounts was limited by technology: at the time the pilot program was launched in 2016, “neither the private sector nor the U.S. Government possessed the capabilities for large-scale social media screening.”

In one portion of the pilot program, applicants were asked to “voluntarily” give their social media usernames. USCIS then “assessed identified accounts to determine whether the refugees were linked to derogatory social media information that could impact their eligibility for immigration benefits or admissibility into the United States.”

DHS has also been looking into social media, email, and other computer files of people entering or leaving the United States, including U.S. citizens, and this inquiry is far from voluntary. There have been numerous [reports](#) of DHS Customs and Border Protection (CBP) agents demanding passwords for cell phones and computers. The number of people subject to such searches increased significantly at the end of the Obama Administration, and apparently

increased further under President Trump. Anecdotal [evidence](#) suggests that the large majority of people targeted for these searches were Muslim.

All this means that DHS may be looking at your accounts on Facebook, Twitter, LinkedIn, Instagram, etc. to determine whether you pose a threat and (possibly) to assess your credibility. They might also gain access to your email and other information stored on your computer or your cell phone. This data could then be used to evaluate your eligibility for immigration benefits, including asylum.

On the one hand, it seems reasonable that DHS would want to look into social media and other on-line material. After all, it is well-known that terrorists rely on the internet to spread their messages, and as DHS notes, “As the threat landscape changes, so does CBP.” Also, most immigration benefits are discretionary, meaning that even if you qualify for them, the U.S. Government can deny them in the exercise of discretion. Therefore, if DHS “requests” certain information as part of the application process, and the applicant fails to provide it, DHS can potentially deny the benefit as a matter of discretion.

On the other hand, the inter-connectivity of the on-line world could yield evidence of relationships that do not actually exist. For example, one [study](#) estimates that Facebook users (all 1.6 billion of them) are connected to each other by 3.57 degrees of separation. That means there are—on average—only 3.57 people between you and Osama bin Laden (assuming he still maintains a Facebook page from the afterworld). But of course, it is worse than that, since there are many terrorist suspects on Facebook, not just one (Osama bin Laden). If you are from a terrorist-producing country, it’s likely that suspected terrorists are separated from you by less than 3.57 degrees of separation. Presumably, DHS would take these metrics into account when reviewing on-line data, but you can see the problem—your on-line profile may indicate you have a relationship with someone with whom you have no relationship at all.

So what can you do to protect yourself?

First, don’t be paranoid. It’s nothing new for DHS or other government agencies to search your on-line profile. Since everything posted on-line is, at least in a sense, public, you should be discrete about what you post, and you should be aware that anyone—including the U.S. Government—could be reading it.

What’s more problematic is when CBP seizes electronic devices at the border and then reviews emails and other confidential information. This is extremely intrusive and an invasion of privacy. There is also an argument that it violates the Fourth Amendment right to be free of unlawful searches, but generally, people coming and going from the U.S. have less protection than people in the interior (though I imagine that as CBP steps up the practice, we will see lawsuits that further define Fourth Amendment rights at the border). Knowing that you could be subject to such a search at least enables you to prepare yourself. Don’t travel with devices if you don’t want them searched. Be careful what you store on your devices and in the cloud.

Also, if you think you have problematic on-line relationships or derogatory on-line information, be prepared to explain yourself and present evidence if the issue comes up.

On-line information can affect an asylum or immigration case in more subtle ways. For example, if you state in your application that you attended a protest on a particular date, make sure you got the date correct—DHS may be able to find out the date of the protest, and if your account of events does not match the on-line information, it could affect your credibility. The same is true for more personal information. For instance, if your asylum application indicates you attended high school from 1984 to 1987, those dates should match any available information on the internet. Mostly, this simply requires that you take care to accurately complete your

immigration forms, so that there are no inconsistencies with data available on-line.

Again, it's not really news that DHS is reviewing social media and other on-line information. It does appear that such practices are becoming more common, but as long as applicants are aware of what is happening, they can prepare for it.

Disingenuous State Department Report Seeks to Block Refugee Women

When the Department of State (DOS) released its [Country Reports on Human Rights Practices](#) for 2017—the first report issued under the Trump Administration—it became clear that the DOS had joined our government's effort to block asylum seekers by any means necessary, including undermining their claims by lying about conditions in the home countries. Subsequent reports—for 2018 and 2019—confirmed the government's efforts.

Let's start with a bit about the Reports themselves. Each year, the State Department issues a human rights report for every country in the world. Information in these Reports is gleaned from U.S. diplomats "in country," and from other sources. The U.S. Government uses the Reports in various ways, including to evaluate asylum cases. So when a particular Report indicates that country conditions are safe, it becomes more difficult for asylum seekers from that country to succeed with their claims.

There have always been issues with these Reports. From the point of view of advocates like me, the Reports sometimes minimize a country's human rights problems. When that happens, we can submit other evidence—NGO reports, expert witness reports, news articles—to show that our clients face danger despite the optimistic picture painted by the DOS Report. But the fact is, whatever other evidence we submit, the DOS Report carries a lot of weight. It's certainly not impossible to win an asylum case where the Report is not supportive, but it is more difficult. I imagine that's doubly true for *pro se* asylum applicants, who might not be aware of the Report, and might not submit country condition information to overcome it.

That's why the DOS Reports from 2017 onward are so disappointing, especially with regard to certain populations. The group I am concerned with here is female asylum seekers from the Northern Triangle (El Salvador, Guatemala, and Honduras). Countries in the Northern Triangle are very dangerous for women. As a result, many women from this region have come to the United States in search of protection.

Over the past two decades, the U.S. Government has grudgingly [recognized](#) that some such women meet the definition of "refugee." But even so, it is still very difficult for most such women—especially if they are unrepresented—to navigate the convoluted path to asylum.

When President Trump came into office, his Administration initiated a multi-pronged attack to make it even more difficult for women from the Northern Triangle to obtain asylum. The DOS Reports, which undercut the factual basis for such claims by whitewashing the dangerous conditions faced by women in Central America, was just one part of that attack.

Looking at some basic statistics, it's obvious that something is up. The below chart compares the number of words in the "Women" portions of the 2016 and 2017 DOS Reports for Northern Triangle countries. In each case, the length of the Women's section has been dramatically reduced—

Country	2016 Report	2017 Report	% Reduction
El Salvador	1364	423	69%
Guatemala	1212	283	77%
Honduras	1235	365	70%

As you can see, the “Women” sections of the 2017 Reports are more than 2/3 shorter than in the 2016 Reports (the last Reports completed under the Obama Administration). But numbers alone tell only part of the story. Let’s look at some of what the DOS has eliminated from the newer Reports in the sub-section called “Rape and Domestic Violence” (and, by the way, DOS has entirely eliminated the portion of the Reports devoted to “Reproductive Rights,” but that’s a story for another day). The Report for Honduras is typical, and so we’ll use that as an example. The 2017 Report for Honduras states—

The law criminalizes all forms of rape of men or women, including spousal rape. The government considers rape a crime of public concern, and the state prosecutes rapists even if victims do not press charges. The penalties for rape range from three to nine years’ imprisonment, and the courts enforced these penalties.

Sounds pretty good, aye? The government of Honduras seems to be prosecuting rapists, including spouse-rapists, and the penalties for rape are significant. But here are a few lines from the 2016 Report that didn’t make it into the newer version—

Violence against women and impunity for perpetrators continued to be a serious problem.... Rape was a serious and pervasive societal problem. The law criminalizes all forms of rape, including spousal rape. The government considers rape a crime of public concern, and the state prosecutes rapists even if victims do not press charges. Prosecutors treat accusations of spousal rape somewhat differently, however, and evaluate such charges on a case-by-case basis.... Violence between domestic and intimate partners continued to be widespread.... In March 2015 the UN special rapporteur on violence against women expressed concern that most women in the country remained marginalized, discriminated against, and at high risk of being subjected to human rights violations, including violence and violations of their sexual and reproductive rights....

Basically, what we have is this: the 2017 Report is not a human rights report at all. Rather, it is a report on the state of the law in Honduras. Of course, when the law is not enforced and

persecutors enjoy impunity (as indicated in the 2016 Reports), laws on the books are not so relevant. And it's really quite a bit worse than what I've indicated here, since the 2016 (and earlier) Reports already minimized the violent environment in Honduras. For this reason, in our cases, we often rely on the more honest U.S. [Travel Advisory](#) and the [OSAC Crime & Safety Report](#), both created by DOS for U.S. citizens traveling abroad.

The DOS Reports have made it more difficult for asylum seekers to win their cases. At a minimum, people now need to supplement their applications with evidence to overcome the rosy picture painted by the DOS Reports, and for those asylum seekers who are unable to obtain such evidence, the likelihood of a successful outcome is further reduced.

What bothered me most about the Trump Administration's efforts to block asylum seekers was not that they were making it more difficult to obtain protection—they were elected on a restrictionist platform and they did what they said they would do. What bothers me most is the blatant dishonesty of the Administration and the State Department. If you want to reject female asylum seekers, reject them honestly. Don't pretend that they are economic migrants and that you are returning them to safe places. At least have the decency to tell them—and the American people—that you are returning them to countries where they face extreme danger and death.

Frankly, there was nothing too surprising about the Trump-era DOS Reports. President Trump made his views on refugees and on women quite clear. But what's so sad is that the Reports represent further evidence that the Administration's lies have infected yet another esteemed government institution. Not only are these Reports bad for asylum seekers, but they are also bad for the State Department, which became complicit in the Trump Administration's mendacity. Hopefully, the Biden Administration will rectify the situation, and at least produce country reports that reflect an honest assessment of the human rights situation around the world.

On the Morality of Deporting Criminals

In 2019, National Public Radio [reported](#) on the Trump Administration's efforts to deport Vietnamese refugees with criminal convictions. Until that time, Vietnam only accepted deportees who entered the United States after 1995, but the Trump Administration convinced Vietnam to accept at least some of its nationals who were previously protected under a 2008 agreement. By August 2020, about 30 people had been removed from the U.S. to Vietnam. But that may be only the beginning. The new policy could ultimately affect more than 7,000 refugees and immigrants, some of whom have been living in the United States for over 40 years. Not surprisingly, this issue has stoked severe anxiety in segments of the Vietnamese-American community.

The 2019 NPR piece focuses on an Amerasian man named Vu, who was ordered deported due to his 2001 convictions for larceny and assault. The convictions have since been vacated, but the deportation order apparently remains. Amerasians are children of American soldiers and Vietnamese women. They face severe persecution and discrimination in Vietnam, and Vu still fears return to his native land. If Vietnam ultimately agrees to accept large numbers of returnees, Vu could be deported to his birth country. "I think about it often and I don't want to be deported," Vu says, "I wouldn't be able to see my children. I would lose everything. I would miss most being around my kids."

Legally, people like Mr. Vu, who have a removal order, can be deported (assuming their country will accept them, and assuming they cannot come up with a new defense against deportation). But what about morally? When—if ever—is it morally acceptable to deport criminals?

For me at least, this is a difficult question to answer. As a starting point, I must note that it is not easy to apply morality to any aspect of the immigration system. There certainly is a moral component written into the Immigration and Nationality Act (INA). For example, to receive asylum and many other immigration benefits, an applicant must show (among other things) that he deserves relief as a matter of discretion. “Good” people deserve a favorable exercise of discretion; “bad” people do not. The problem is that the definition of “good” and “bad” in this situation bears only a passing relationship to morality, as we might normally imagine it, and so referencing the “moral component” of the INA only gets us so far.

Another problem exists with regard to how the INA delineates gradations of criminal conduct. You would think that the worse your conduct, the more likely you are to be deported, but that ain’t necessarily so. Crimes that might seem more worthy of deportation are sometimes less likely to result in immigration consequences. Put another way, under U.S. immigration law, you might be better off killing your mother than possessing cocaine.

The point is, it is very difficult to understand how morality applies to non-citizens with criminal convictions, at least when speaking in the abstract. It is easier—at least in my opinion—to approach the problem by looking at a specific case and working from there. With this in mind, let’s look at the example of Mr. Vu from the NPR piece.

First off, Mr. Vu’s case is quite sympathetic. His crimes occurred a long time ago, the convictions were vacated, he has U.S.-citizen children, and if deported, he faces persecution. Also, Mr. Vu might argue that his prior crimes were a consequence of his difficult upbringing (and few people have had a more difficult time than Amerasians during the post-war era in Vietnam). In addition, Mr. Vu has been in the United States for many years, and so perhaps America is more “responsible” than Vietnam for setting him on a criminal path. Finally, as an Amerasian, the child of a U.S. serviceman and a Vietnamese woman, Mr. Vu would not even exist if the U.S. hadn’t been present in Vietnam, and so this might also constitute a reason that we—and not Vietnam—are responsible for him.

On the other hand, Mr. Vu committed some serious crimes (larceny and assault), which harmed other people. He would likely have been deported in 2001 (per an Immigration Judge’s order) but was able to remain here only because Vietnam was not accepting its nationals for repatriation at that time. Further, as a sovereign nation, we have a right to determine who gets to stay in our country, and Mr. Vu violated that covenant. Worse, Mr. Vu likely came to the U.S. through a program to assist Amerasians. If so, we brought him to our country, only to have him turn around and slap us in the face by committing crimes. Finally, if we give Mr. Vu a pass, won’t that send a signal to other people that they can come to our country, commit crimes, and avoid the immigration consequences?

As I see it, there are legitimate reasons to deport Mr. Vu, and legitimate reasons to allow him to stay. Of course, making a moral determination in his case—or any case—hinges on how we balance the competing interests. The all-or-nothing nature of our immigration system compounds the challenge of reaching a fair conclusion: either Mr. Vu gets deported, or he gets to stay. There is no middle ground.

Though I know where I stand on the case, I am not so sure that there is a correct answer here. Maybe it depends on one’s individual moral code. For what it’s worth, if we could somehow rate criminal-immigration cases, I think Mr. Vu would land on the more sympathetic side of the continuum. So if you believe Mr. Vu should be deported, there are probably few non-citizen criminals who you believe deserve to remain in the U.S.

So is it morally right to deport Mr. Vu? Or any person with a criminal conviction?

For me, the answer to these questions is tied to the immigration system in general. I have seen far too many examples where non-citizens and their families are severely harmed for seemingly arbitrary reasons. If we had a more fair, more just, and more rational immigration system, I would have less of a problem with deporting criminals. But given the system that we are stuck with, it is difficult for me to morally justify most deportations. That is doubly true in a case like Mr. Vu's, where his prior bad behavior has apparently been long overshadowed by his current equities. To deport Mr. Vu and break up his family seems cruel and pointless. But sadly, that is often exactly what we get from our immigration system.

I hope that the Biden Administration will abandon the plan to remove Vietnamese refugees, especially Amerasians. But if it persists, and if Vietnam agrees, I hope that Mr. Vu—and others like him—will fight to remain here. He has been here for decades, his family is here, and this is his home. Despite his criminal acts, I believe he belongs here. To send him away would be immoral.

Chapter 6: Interpreters and Translators

Advice from a Court Interpreter

Without interpreters, the Immigration Court system could not operate. One of the best interpreters I've worked with is Maria Raquel McFadden. Here, Ms. McFadden offers some advice on how best to utilize an interpreter:

Many people who appear for interviews before the Asylum Office or Immigration Court speak little or no English. Often, they have never used the services of an interpreter before. Being aware of the function of an interpreter can help make the process smoother.

The interpreter's role is to remove the language barrier to the extent possible, so that the access to justice for a person with limited or no English skills is the same as that of similarly situated English speakers for whom no such barrier exists.

When talking through an interpreter, people should speak directly to each other. The interpreter serves merely as a bridge for communication. Interviews and conversations should flow as if the interviewer/judge, lawyer(s), and the asylum applicant are the only ones participating. Experienced interpreters know to use only the third person when referring to themselves.

In court, it is the job of the interpreter to interpret the questions asked into the applicant's language and interpret the answers into English. At an interview, the interpreter will likewise interpret all questions and answers given.

Unfortunately, applicants can't always obtain a professional interpreter, and even among professionals, some interpreters are better than others. Also, it's necessary that both lawyers and clients learn how best to use an interpreter to ensure a clean record. Here are some tips to keep in mind—

- Before the interview, the asylum seeker and interpreter should talk to each other to make certain that they speak the same dialect and/or understand each other.
- Try to speak in short, clear sentences. This will help because it can be difficult for an interpreter to accurately interpret more than a few sentences at a time.
- Look at and speak directly to the person to whom you are responding. Do not address the interpreter.
- If you do not understand the interpreter, notify the judge/interviewing officer immediately.
- Remember that the interpreter must keep all the information he/she learns during the interview/hearing confidential and may not share it with anyone.

One should bear in mind that when an asylum applicant goes before a judge, the court will provide an interpreter. However, applicants must provide their own interpreter when interviewing before USCIS or the Asylum Office (due to the coronavirus, in mid-2020 the Asylum Offices started providing interpreters for many languages). When hiring an interpreter,

one should take into account that a person closely related to the asylum-seeker may not interpret for them. It is better to have a neutral/disinterested party. The interpreter must take his/her government issued ID and be prepared to stay the entire duration of the interview. Sometimes, appointments are delayed, and all parties should be prepared for long waits.

By taking all the above factors into consideration, the asylum interview/hearing can be more manageable when working with an interpreter.

Telephonic Interpreters

Since the coronavirus pandemic, the Asylum Offices have been trying to minimize the number of people attending interviews in person. For this reason, they have begun to provide telephonic interpreters for interviews. Check your interview notice to see whether you need to bring an interpreter or whether the Asylum Office will provide one by phone.

Pre-pandemic (and hopefully post-pandemic), asylum applicants were required to provide their own interpreter at the interview. Usually this was either a friend, a volunteer, or a paid professional. To ensure that the interpretation was accurate (and that there was no funny business going on in the translation), USCIS required a professional interpreter to monitor the interview by phone.

This means that under either pandemic or post-pandemic conditions, applicants who cannot do the asylum interview in English will be required to deal with interpreters present by phone. Who are these mysterious telephonic interpreters?

One is Maria Raquel McFadden, interpreter extraordinaire, who works in the Washington, DC area and beyond. Here are her thoughts on telephonic interpretation—

One of the most challenging tasks for an interpreter is telephonic interpretation. While court interpreters aspire to be unobtrusive in order to allow each party to have their say, being able to observe or signal the speakers can make communication flow much more easily. Interpreting by phone, however, might require the interpreter to more frequently interrupt the conversation.

Prior to the coronavirus, telephonic interpreters were rarely used to interpret the actual proceedings at the Asylum Office; rather, they served as monitors. The role of these interpreter-monitors is to ensure the quality and accuracy of the on-site interpreter. Oftentimes, the person brought to the interview to serve as an interpreter is not a professional. While such a person might be aware of and adhere to the interpreter code of ethics, their ability to interpret is sometimes not sufficient to ensure an accurate rendition. This could damage the credibility of the asylum applicant and deprive her of the chance to tell her story.

At times, the monitor might “challenge” the interpretation, meaning that the monitor does not agree with how the interpreter rendered a word or phrase. This could cause the on-site interpreter to become flustered and become defensive. If he/she feels that their interpretation is correct, they should state so to the officer and not directly to the monitor. Each interpreter has the right to stand by their interpretation and it is up to the officer to settle the matter.

Being a monitor is not an easy task and most interpreters take the job seriously. If you feel that the monitor is being unnecessarily disruptive and combative, this issue should be addressed with the Asylum Officer. There is no need to talk to the monitor interpreter.

Since the coronavirus pandemic, the Asylum Office is now providing telephonic interpreters for most languages, and you can no longer bring your own interpreter to the interview. This new

policy raises a few concerns. Probably the primary concern is whether asylum applicants will be comfortable with their interpreters. Will a woman who has been the victim of gender-based violence be comfortable if her interpreter is a man? I have heard anecdotally (and I believe it) that Asylum Officers are sensitive to this issue and will check with the applicant before starting the interview. If you prefer a male or female interpreter, you might ask in advance by emailing the [Asylum Office](#) before your interview. My sense is that the Asylum Office will do its best to accommodate such requests.

Another concern is that telephonic interpreters cannot as easily understand the applicant (or the Asylum Officer) and may not be able to convey emotion or nuance as well as they might if they were present in person. While I suspect that this is true, I think it is unlikely that missing such subtleties will make a difference in the outcome. Also, given the pandemic and the need for social distancing, it seems to me that this is a reasonable adjustment.

If you have a telephonic interpreter or an interpreter-monitor, please keep the following points in mind—

- Keep your voice loud and clear. While this is important when working with an on-site interpreter as well, it is even more important over the phone.
- Don't shuffle papers as you speak; you might as well stop talking because the interpreter will not be able to hear you.
- Try not to talk over other people. The interpreter can only interpret for one person at a time. Over the phone, it will be impossible for the interpreter to understand what is being said if people talk over each other. This could result in a statement by the applicant going unheard by the Asylum Officer—with potentially disastrous consequences.
- Wait for the interpreter to finish interpreting before making another statement or asking a question.
- If you don't hear or can't understand the interpreter, speak up!

By keeping this short list of pointers in mind, the process will go more smoothly for all involved.

Translating Documents for Your Asylum Case

The word “translation” is derived from “trans,” meaning “across” two languages, and “elation,” meaning “to make your lawyer happy.” Or something like that. The point is, if your translations are accurate, you are more likely to win your case and so you—and your lawyer—will be happy.

But many asylum seekers are unable (or unwilling) to pay for professional translations, which can be quite costly. Instead, they do the translations themselves, or they use a friend who speaks “good English” (technically, anyone who claims to speak “good English” does not speak English very well). The problem faced by these non-professionals is that translating documents is not as easy as it looks.

I ran into this problem in one of my cases, when a keen-eyed DHS attorney discovered that my client's translations were incorrect. The client had submitted several translated documents when he applied for asylum at the Asylum Office (using a different lawyer). These documents included a newspaper article, a police report, and several witness letters. The quality of the translations was poor, and so we asked the client to obtain better translations. Unfortunately, the new translator embellished some of the translations. Instead of translating the documents literally, he tried to include what the writer meant (or what the translator believed the writer meant). This problem is all too common. Sometimes, I catch it, and other times, I don't. In this particular case, the DHS attorney caught the inconsistency, which—to state the obvious—was not great for our case.

Poor translations can cause real problems for asylum cases. I have at least one case where an inaccurate translation resulted in the case being denied by the Asylum Office and referred to Immigration Court.

So how do you ensure that your translations are correct? And what happens if you can't afford a professional translator?

First, any document that is not in English must be translated into English. For each such document, you must submit a copy of the original document (in the foreign language), an English translation, and a certificate of translation (see Appendix III).

Second, the translation should be accurate. This seems like a no-brainer, but in my experience, it is not. When used in a legal setting, "accurate" means that the translator should—as much as possible—literally change each and every word of the original document into the equivalent English word, conveying the concepts and ideas appropriately. Some words are not easy to translate from one language to the next. Other words have symbolic, cultural or idiomatic meanings that may differ from their literal meaning (the word "jihad" is a good example). In that case, the word would be translated literally, and a footnote could be included to indicate the meaning or cultural significance of the word. The footnote should clearly indicate that it is not part of the translation (for example, it could say, "Translator's note:" and then include the explanation). Other times, the original document is vague or unclear. In that case, the translator should again literally translate the words, but can include an explanatory note. Sometimes, documents contain illegible words. For them, the translator can include a bracketed statement indicating that the text is [illegible].

Third, while it is not required, I strongly prefer that the translated text look similar to the original (or sometimes, like a mirror image of the original, if it is a right-to-left language like Arabic). So bold or underlined words in the original should be bold or underlined in English. If the original text has different paragraphs, the English should follow a similar format. If some words in the original are centered or shifted to one side or to a corner of the page, the translation should do the same.

Fourth, every word of the document should be translated. For documents where that is not possible (like a newspaper where you are only interested in using one article on the page), the translator should clearly indicate what portions of the document are being translated. In this case, I prefer to highlight the original document to make clear which parts are being translated. Also, for news articles, it is important to include (in the original language and in English) the name of the newspaper, the date, the title of the article, and the author, if any. Certain documents contain a lot of unnecessary boilerplate verbiage (I'm thinking of you, Salvadoran birth certificates), and so a summary translation might be more appropriate. If you use a summary translation, you need to clearly indicate that it is a summary, not a literal translation. Whether all judges and Asylum

Officers will accept summary translations, I do not know, but we use them now and again (usually for birth or marriage certificates), and we have not had any problems.

Finally, countries sometimes use different calendars and even different clocks. In this situation, I think the best practice is to translate the date or time literally, and then include an explanatory note. For example, if a Hebrew document was written on the second day of the month of Elul in the year 5777 of the Jewish calendar, the English translation would look like this: “2 Elul 5777 [August 24, 2017].” Some translators include only the date in the American system (and not “2 Elul 5777”), and I have never had a judge or Asylum Officer reject that, but I still think the better practice is the literal translation + explanatory note.

A related issue is letters from people who do not speak English, including the asylum applicants themselves. If a person does not speak English, but submits an English letter or affidavit, there must be a “certificate of interpretation stating that the affidavit or declaration has been read to the person in a language that the person understands and that he or she understood it before signing.” “The [certificate](#) must also state that the interpreter is competent to translate the language of the document, and that the interpretation was true and accurate to the best of the interpreter’s abilities.”

Lastly, many asylum seekers speak English and can translate documents themselves. This is fine. However, a person should not sign a certificate of translation for her own case. Thus, if you translate your own documents, find a friend who speaks both languages fluently to review the documents and sign the certificate of translation.

Accurate translations can enhance credibility and help you win your case. So either find (and pay) a competent translator or—if you do it yourself or use a friend—take the time to ensure that the translations are accurate and complete. Otherwise, documents that might help your case could end up doing more harm than good.

Chapter 7: Travel and Returning Home

Advance Parole: Overseas Travel for Asylum Seekers

When government scientists invented Advance Parole (AP), they were not thinking about asylum seekers. Even today, if you look at the instructions to [form I-131](#), the form used to apply for AP, you'll find nary a word about asylum seekers (though asylees—people already granted asylum—can apply for a Refugee Travel Document using the same form). But fear not: people who have filed affirmatively for asylum and who are waiting for their interview can [file for AP](#) in order to travel abroad and return while their case is pending.

First, a brief word about asylum seekers who are not eligible to travel and return using AP. People who are in removal proceedings (i.e., in Immigration Court) cannot leave the U.S. and return, even if they have AP. If you are in removal proceedings, it means the government is trying to deport you, and if you leave, you are considered to have deported yourself. Thus, even if you apply for AP and receive the travel document, if you leave the United States, you will be deported, and thus barred from return. And yes, I am sure that there is a story about your third cousin's best friend who was in Immigration Court, and who left and returned using AP. To that, I say: talk to your cousin's friend's lawyer (and if you learn something, let me know!). My opinion is that if you are in removal proceedings and you leave the U.S., there is a good chance that either you won't get back here at all, or you will be detained upon arrival.

Another group that may be ineligible to travel using AP are J-1 visa holders subject to the pesky two-year home residency requirement. There are more people like this than you might imagine, and for such people, I recommend you talk to a lawyer about AP. Asylum—if granted—basically “erases” the home residency requirement, but it is unclear (at least to me) whether this will work for purposes of AP while the asylum application is still pending.

Also, one group of people that was once ineligible for AP is now eligible: people who have six months or more of “unlawful presence” in the United States. Each day a person remains in the U.S. after her period of stay ends, she accrues one day of unlawful presence (but you stop accruing unlawful presence when you file for asylum). If she accrues six months of unlawful presence and leaves, she is barred from returning for three years. If she has one year or more of unlawful presence and then leaves, she cannot return for 10 years. Prior to 2012, if a person had six or more months of unlawful presence and left, she could not return to the U.S., even with AP. However, a decision by the Board of Immigration Appeals changed that rule, and so now, even if you have [unlawful presence](#), you can leave the U.S. and return using Advance Parole. Thank you BIA!

There might be other people who are also ineligible to travel—people with criminal convictions or prior removal/deportation orders, for example. If you are not sure, talk to a lawyer before applying for AP or traveling.

Next, let's talk about what AP is and is not. If you get AP, you will receive a piece of paper with your photo on it. This paper works like a U.S. visa. It allows you to board the plane (or boat, if, like me, you hate flying), and pass through customs once you arrive back in the U.S. at a port of entry. AP is not a passport or a Refugee Travel Document. You cannot use it to go to other countries or as a form of ID. If you travel with AP, you also need a passport. Keep in mind that traveling with a passport from a country where you fear persecution can raise questions at

the asylum interview about why you would “avail” yourself of the protection of your country by using its passport. You should be prepared to respond to such questions, with evidence, during your interview.

How do you apply for AP? Use [form I-131](#). This one magic form can be used for all sorts of different applications: AP, Refugee Travel Document, DACA, humanitarian parole. If you are applying for AP, complete only the portions of the form that apply to Advance Parole. You need to include evidence of a pending asylum case (receipts, biometrics notice), two passport-size photos, a copy of your passport or other government-issued photo ID (like an EAD card), and the filing fee.

Also, you need to demonstrate a “[humanitarian need](#)” for the travel. It is not enough that you simply want to travel. A humanitarian reason might be that you are traveling to receive medical treatment or going to visit a seriously ill relative. It might also be because you are attending a funeral for a close relative. You can also apply for AP based on your need to travel for work or education, though I would not feel particularly optimistic that USCIS would approve such an application.

To demonstrate a humanitarian need for AP, you need to provide a written explanation for the travel. You also need to provide evidence: a letter from the doctor, in the case of medical travel, or a death certificate if you are traveling for a funeral. If you are trying to travel for work or education, you need a letter from your job or school, plus an explanation of why the travel is “humanitarian.” In addition, if you are traveling to visit a sick relative, provide proof of the relationship, such as birth or marriage certificates connecting you to your relative.

On the form I-131, you need to state the dates of proposed travel. Don’t make the date too soon, or USCIS will not be able to process the paperwork before your travel date, and then they will send a request for evidence asking you to explain whether you still plan to travel since your departure date passed before AP was approved.

We like to include two travel dates when we file for AP: the first about six months in the future and the second about a year in the future. The hope is that USCIS will issue the document for the entire period between the two dates. Otherwise, you may end up with an AP document that is only valid for a short period of time.

Also, it may be possible to expedite a request for AP, or even to get AP on an emergency basis, though you can bet that the bureaucrats at USCIS will not make the process easy.

Finally, and this is important, if you are an asylum seeker and you use AP to visit your home country, it will very likely cause your asylum case to be denied. Indeed, unless you can demonstrate “compelling reasons” for returning to your country, your asylum application will be deemed abandoned by the return trip.

So there you have it. Most lawyers—including this one—discourage our clients from traveling with AP. There is always a risk when you leave the U.S. You might have trouble boarding a return flight. You could be detained upon arrival in the United States. You might be blocked by a political or pandemic-related travel ban. But so far (knock on wood), we have not had any problems for our clients who travel using AP. I do think it is better to stay in the country while your asylum application is pending, but given the long waits, some people must travel. If so, at least AP gives most people that option.

You Can Go Home Again (Sort of): Visiting Your Home Country After a Grant of Asylum

“If I am granted asylum, can I return to my home country?” I hear this question a lot.

The skeptic would argue that no legitimate asylum seeker should ever return home. Indeed, they might argue, asylum is reserved for people who cannot return due to the danger of persecution, and anyone willing to go back did not need asylum in the first place. I think this is wrong.

Many of my clients face long-term threats in their countries. For instance, I have clients from Afghanistan who have been threatened by the Taliban. These clients could return briefly to Afghanistan and remain relatively safe. However, to live there for any length of time would be extremely dangerous. Even where the threat comes from the government, clients can sometimes safely visit home for short periods of time. I’ve had Ethiopian clients who were wanted by their government, but who were able to return for a few weeks before the government realized that they were in the country. Ethiopia—like many developing countries—is not as adept at tracking people as the United States, and so it is possible to keep a low profile and avoid trouble, at least for a time.

And of course, there are valid reasons to return home. Most of my clients have left family members behind. Others have businesses or properties. Still others are political activists who wish to return home to promote democracy and human rights. There are all sorts of reasons people want to go to their home countries—when balanced against the danger, some reasons are better than others (and some people are more willing than others to take risks).

But what are the legal implications of a return trip for people with asylum? And does the calculus change if the person has a Green Card or is a U.S. citizen?

For an asylee (a person granted asylum), the U.S. Government can [terminate asylum status](#) if it determines that the person has “voluntarily availed himself or herself of the protection of the country of nationality or last habitual residence by returning to such country.” This means that asylum can be terminated if the person placed herself under the protection of her home government by returning to her country (or even by using the passport from her home country to travel to a third country). USCIS can also terminate asylum status if it determines that the person is no longer a refugee (for example, if country conditions have changed and it is now safe to return home) or if it determines that asylum was obtained fraudulently. A return trip to the home country could trigger one (or more) of these bases for termination.

Even with a Green Card, USCIS could terminate asylum if it believes that you obtained your status through fraud, and a return trip could trigger that suspicion.

If you don’t run into trouble when you return to the U.S. from your trip, you could have problems at the time you file for citizenship. When you complete the naturalization form (the N-400), you need to list all the countries you visited, and so the government will know whether you went home (and if you omit your travels from the form, you run the risk that the government will know about them from its own sources and then deny your case—or worse—due to the misrepresentation).

For U.S. citizens who originally obtained their status based on asylum, the risk of a return trip is much less—but it is not zero. If the return trip causes the U.S. Government to believe that asylum was obtained fraudulently, it could institute de-naturalization proceedings. I have heard of the U.S. Government de-naturalizing citizens based on fraud, so it can happen, but all the cases I know about involved aggravating factors, like criminal convictions or human rights abuses. Nevertheless, if USCIS knows about a fraud, it certainly could take action.

So how do you protect yourself if you have to travel back to your home country?

First, it is worthwhile to consult an attorney before you go. Don’t go unless there is a very

important reason for the trip. Also, keep the trip as short as possible. The less time you are in your country, the better. In addition, you should collect and save evidence about the trip home. If you went to visit a sick relative, get a letter from the doctor. If you returned home for only a short time, keep evidence about the length of your trip—passport stamps and plane tickets, for example. If you hid in your house and never went out, get some letters from family members who can attest to this. In other words, try to obtain evidence that you did not re-avail yourself of the protection of your home government and that you had a compelling reason to return home. That way, if USCIS ever asks for such evidence, you will be ready.

The safest course of action is to never return home after a grant of asylum. However, in life, this is not always possible. If you do have to go back, you should consult a lawyer and take steps to minimize the likelihood that your trip will impact your immigration status in the U.S.

Obtaining a Visa When You Fear Persecution – or – Raoul Wallenberg Lives! (Maybe)

Raoul Wallenberg was a Swedish diplomat assigned to his country's mission in Nazi-occupied Hungary. He arrived at his station in 1944, when tens of thousands of Jews were being deported to death camps.

Using his cover as a diplomat, Mr. Wallenberg saved thousands of Jews from deportation. He gave them Swedish identity documents (of questionable legality), which protected them from deportation. He also rented various properties that became part of the Swedish mission, and which were thus protected by diplomatic immunity. The buildings ultimately housed (and protected) almost 10,000 people. Mr. Wallenberg used all the means at his disposal—legal and illegal—to save lives. All told, he is credited with saving over 100,000 men, women, and children.

I was reminded of Raoul Wallenberg when I heard the story of how one of my clients came to the United States.

The client is a young man from Syria. A pro-government militia arrested him and his friends. They were accused of involvement in anti-regime activities and taken to prison. My client was lucky enough to be recognized by one of the guards, who intervened and had him released. My client's friends were not so lucky. They were ultimately released, but not before suffering severe torture.

My client made his way to another country and applied for a U.S. visitor visa. As my client related the story, it was clear that the consular officer thought the client might seek asylum in the United States, and he questioned the client about whether he faced any threats in Syria. Although he obviously had suspicions, the officer issued the visa, and now the client is seeking asylum.

Consular officers are supposed to deny visitor visas to applicants that they think have an intent to immigrate (an intent to seek asylum is considered an immigration intent). My suspicion here is that the consular officer correctly surmised that the client had immigration intent, but he issued the visa anyway. Was this, perhaps, a Wallenberg-esque move? Did the officer issue the visa precisely because he knew the endangered client could (and likely would) seek asylum in the U.S. and thus escape danger in Syria?

Obviously, I have no idea what was in the consular officer's mind, but it is interesting to consider his situation. When a Syrian or an Iraqi or an Afghan applies for a visitor visa (which is a non-immigrant visa), there is a decent chance that the visa applicant will travel to the U.S. and

seek asylum. The consular officer's job is to prevent that from happening; to anticipate who is an immigration risk and to deny a visa to that person. But what if denying the visa might result in the person's death?

It is easy to say that the consular officer should just do his job and deny the visa, but at the end of the day, the officer has to live with himself and his decision. For me at least, it would be difficult to meet a person who is likely fleeing for his life, and to then deny him a path to safety. Also, if it were me, I would feel that I could accomplish something positive and life-affirming by issuing the visa and helping the person come to the United States.

But of course, the visa system is designed to do more than just block intending immigrants from gaining entry into the U.S. It is also designed to block terrorists and criminals. This is not an issue that Raoul Wallenberg had to deal with. In Mr. Wallenberg's case, he was not giving out valid travel documents. He was just giving out passes that the German and Hungarian authorities generally respected. This prevented the Nazis from murdering the people who held the passes, but no one was traveling to Sweden (or anywhere else) on Mr. Wallenberg's passes. There was no danger that Nazi agents would use the passes to infiltrate other countries or cause other sorts of harm.

In the case of a (hypothetical) modern-day Raoul Wallenberg who gives out visas to people fleeing persecution, the danger of helping a terrorist or criminal would have to be balanced with the desire to save lives. I don't envy the consular officers who—whether they like it or not—have to make life-or-death decisions where their desire to help must be tempered by their duty to protect the United States and follow the law. But in the end, I can't help thinking that sometimes, to do the right thing, you have to break the rules—and follow the Raouls.

Asylum Seekers and the Right to Illegal Entry

Do people fleeing persecution have a “right” to illegally enter the United States? A report from Harvard Law School about changes in Canadian asylum policy got me thinking about this question.

The report, *Bordering on Failure: Canada-US Border Policy and the Politics of Refugee Exclusion*, concludes that recent changes to Canadian refugee and border policy have made it more difficult for legitimate asylum seekers to find refuge in Canada.

The recent changes include the Multiple Borders Strategy (MBS), the goal of which is to “push the border out” and to “intercept improperly documented persons as far away from Canada’s territorial borders as possible.” Canada “enacts measures that deter and deflect the arrival of asylum seekers at...countries of origin, visa screening points, airline check in points, points of initial embarkation, transit areas, points of final embarkation, and points of final arrival.”

How do they do this? Canada has 63 liaison officers in 49 “strategic locations around the world.” The officers “train and work with airlines, local immigration authorities, and local law enforcement agencies to identify improperly documented persons, including some asylum seekers, and block them from boarding Canada-bound boats or planes.” The officers intercepted 73,000 people between 2001 and 2012. Another part of the MBS is to sanction airlines and shipping companies that allow improperly documented people to arrive in Canada. The Canadians have also imposed stricter visa requirements on people from refugee source countries when refugee arrivals from those countries increase.

In short, Canada is doing more to block people from illegally entering the country. So what's

wrong with that?

The Harvard report raises a few points. For one, some of those people blocked from arriving in Canada are refugees (though we don't know how many). The liaison officers and the carriers do not consider whether a person qualifies for asylum; they block anyone with improper documentation. Another problem is that by tightening security, some asylum seekers will resort to other means of gaining entry into Canada—human smuggling, for example. This puts the asylum seekers at risk of harm. The report concludes that by “closing its borders to asylum seekers, Canada is setting a poor example for other nations, and contributing to the deterioration of refugee protection around the world.”

Aside from criticizing the (probable) negative impact of the MBS on asylum seekers, Harvard offers little in the way of solutions. Should Canada loosen its entry requirements? Should liaison officers allow people with fraudulent documents to go to Canada if those people express a fear of persecution? Should Canada get rid of the liaison officers, so it is easier to enter Canada improperly? Should it eliminate carrier fines, so that airlines will be encouraged to allow anyone to fly into the country, even if they do not have permission to enter?

The basic problem, it seems to me, is that refugees who are rich enough to qualify for a visa or to hire a competent smuggler, will likely get in. Ditto for those clever enough to obtain fraudulent travel documents. Poor people, less educated people, people who are not resourceful enough, will not get in. Tightening or loosening the border (or even “pushing out” the border) will, as the Harvard report points out, exclude people in “arbitrary and unprincipled ways,” but this impact is tiny compared to the basic—and very arbitrary—distinction between the rich, the educated, and the lucky, who will probably get in, and the poor, the uneducated, and the unlucky, who will probably be excluded. Thus, even if Canada had not implemented any of the new restrictive changes, the asylum seekers who manage to reach Canada are able to get there because of factors (such as wealth) that are completely unrelated to the merits of their asylum claims. Given that the ability of potential asylum seekers to enter Canada is completely arbitrary anyway, why should it matter if Canada imposes another layer of arbitrariness on those seeking admission? In other words, why should it matter if an arbitrary portion of an arbitrary group is blocked from seeking asylum?

Or, to return to our initial question in a more specific way: do those asylum seekers lucky enough to have the ability to reach a safe country have a “right” to travel to that country to seek asylum? If you accept the basic premise of sovereignty of nations (and there are very good reasons not to), it is difficult to answer that question in the affirmative. But to answer that question in the negative would invalidate much of international law and practice related to protecting refugees.

Perhaps the key to resolving this dilemma is to recognize that most countries—including Canada and the United States—have given up some of their sovereignty when they voluntarily entered into treaties protecting refugees. Nevertheless, the Harvard report highlights an odd reality: people who are smart enough, rich enough or sneaky enough to evade border security and gain entry into a safe country have a right to seek asylum in that country. But those who are unable to reach a safe country—even if the reason for their failure is that the safe country managed to prevent their entry—do not have a right to seek asylum in that country.

So I guess the answer to the initial question is a qualified yes (or perhaps a qualified no, if you are a glass-is-half-empty sort of person): asylum seekers have a right to illegally enter the United States, but only if they manage to get in. Or, to paraphrase Robert Anton Wilson, “rights” are what you can get away with.

Chapter 8: Working with a Lawyer

Do I Really Need an Asylum Lawyer?

Asking a lawyer whether you need a lawyer for your asylum case is kind of like asking a pastry chef whether you should have dessert. My answer: of course you should hire a lawyer, and have a double helping of Windsor Torte while you're at it.

A lawyer can help you prepare and present your case and increase the likelihood of a successful outcome. However, there are some people who need a lawyer more than others, and if your resources are limited, you will have to decide how best to prioritize your needs.

So how do we know that a lawyer actually improves the chances for success? And who *really* needs a lawyer, anyway?

First, there has been at least one statistical analysis of how lawyers impact asylum cases, and the result is pretty definitive: lawyers matter. A study of asylum decisions in Immigration Court by [TRAC Immigration](#), a non-profit that collects statistical data on asylum cases, found that in FY2020, on average, asylum applicants with a lawyer won about 31.1% of their cases. Asylum applicants without a lawyer won only about 17.7% of their cases. That's a big difference, but there are a few caveats to these numbers.

For one thing, the cases reviewed in the study were in court. Such cases are adversarial, and can be procedurally complex, as compared to cases before the Asylum Office. Thus, it is harder for an unrepresented applicant in court to win his case. Also, some applicants receive *pro bono* (free) legal assistance. However, it is more difficult to get a *pro bono* attorney if you have a weak or meritless case (or if you have criminal convictions). This creates a vicious cycle, where applicants with difficult cases are less likely to receive legal representation, and it probably skews the statistics and exaggerates the benefits of having a lawyer. Even considering these factors, the success rate for represented applicants is significantly higher than for unrepresented applicants, and so it seems clear that competent representation increases the likelihood that an asylum application will be granted.

But if you are like many asylum seekers, you have limited resources. Attorneys can be expensive, and *pro bono* representation can be difficult to secure. So who really needs an attorney, and who can get by without one?

If your case is before an Immigration Court, it is best to have a lawyer. Most judges will pressure you to get a lawyer, and they will usually give you an extension of time to find an attorney. Court cases are adversarial, which means that if the DHS attorney (the prosecutor) aggressively opposes relief, it can be very difficult—even for an applicant with a strong case—to effectively present his case, avoid any pitfalls, and obtain a grant.

For applicants whose cases are before the Asylum Office, the situation is less clear-cut. Asylum Office cases are (supposedly) non-adversarial. The procedural requirements are generally (but not always) less stringent. Many people prepare their cases and attend the asylum interview without the help of a lawyer (some use paid “translators,” with mixed degrees of success), and there are many examples of pro se (unrepresented) applicants who receive asylum. There are, however, some red flags, which, if present, militate in favor of hiring an attorney.

Asylum applications may be denied if they are not filed within one year of the applicant’s arrival in the U.S. There are exceptions to this rule, but if you are filing for asylum more than a

year after you've come to the United States, it is a good idea to have an attorney.

Asylum applications can also be denied if the applicant has been convicted of a crime, or if the applicant "persecuted" others in her home country (or elsewhere). If you've been convicted of a crime, or if you fall into a category where the U.S. Government might suspect you of persecuting others (such as police officers, members of the military, members or supporters of armed groups), you should have a lawyer.

In addition, people who provided "material support" to terrorists are barred from asylum. Unfortunately, that covers a broad range of activities (see Chapter 4). So if you've given money or any type of support to a terrorist group—even if you did it under duress—you need a lawyer. Doctors who treated combatants fall into this category.

Other issues that might require the help of an attorney include travel back to your home country (especially after an instance of persecution) or living in a third country before coming to the United States. Also, people who entered at the Mexican border are potentially barred from asylum, and so if you came to the U.S. through Mexico, you should talk to a lawyer.

Finally, to win asylum, the applicant must show that she faces persecution "on account of" race, religion, nationality, political opinion or particular social group. If you do not obviously fit into one of these categories, it is helpful to have an attorney, who can make a legal argument that your case falls into a protected category, and that you are thus eligible for asylum.

Even if there are no obvious issues in your case, a lawyer's advice can be helpful. Sometimes, there are problems in a case that are not apparent until a lawyer reviews it. You are far better off identifying and addressing such issues before they become a problem. For those who cannot afford an attorney, or who choose to do their case pro se, it is possible to win. But some cases are more difficult to win than others, and—especially for these problem cases—the help of a competent attorney can make all the difference.

How Much Should I Pay for an Asylum Lawyer?

Lawyers can be skittish when it comes to discussing fees. Speaking for myself, I don't much care for the money-side of the business. We're not trained to deal with client payments in law school, and the guidance we receive afterwards—from the bar association, for example—is related more to complying with lawyer-trust-account rules than to determining how much to charge.

In the field of asylum law, attorney fees vary widely. Within my little community, for a case at the Asylum Office, I've heard about lawyers charging anywhere from \$900 to \$10,000 (or more). For asylum cases in court, prices are usually higher. Sometimes these fees are flat fees, meaning you pay a set amount for the entire case. Other times, fees are hourly, meaning you pay for the lawyer's time—the more time the lawyer spends on your case, the more you pay.

In my office, as of 2021, we charged a flat fee of \$5,500 for most affirmative cases, which is fairly competitive with those few attorneys in Washington, DC whose main practice area is asylum. In 2021, our fee for defensive cases was usually about \$8,500. What's ironic here is that lawyers who do not specialize in asylum—and who consequently have less experience in this area of practice—are actually able to charge more for each case. (I remember telling one such lawyer about my fee and she burst out laughing; I took that as a sign that I should raise my rates.) In our firm, the bread-and-butter cases are asylum, and so we need to do a lot of such cases. Thus, we have to keep the prices down. If our main practice area was business immigration, for example, we could charge more for each asylum case, since we would not need to do a large

number of such cases to make a living.

So how do you know what is a fair fee for an asylum case? And what exactly do you get in exchange for giving money to an attorney?

The first question is difficult to answer. Hiring an attorney is not like buying a new car. Whether you buy the car from one dealership or another, it's the same car. With a lawyer, you are paying for his work. Some lawyers are brilliant, honest, and hardworking; others are poorly trained, lazy, and dishonest. Paying more money for a lawyer does not mean that you are hiring a better advocate. In fact, as far as I can tell, there is little relationship between the amount of the fee and the quality of the service. Indeed, lawyers who charge higher fees for asylum are sometimes more interested in earning money than in helping their clients.

I suppose the first thing you'd have to know to decide whether an attorney's fee is fair is the quality of the service she provides. There are certain things a good attorney should do. For example, at the initial meeting, a good attorney will listen to your story and try to evaluate the strengths and weaknesses of your case; she won't sugarcoat the case in an effort to get your business. Also at the initial meeting, a good attorney will make sure you understand the asylum process, the problem of delay, and the possible results in your case. She should also explore any alternatives to asylum that might be available to you.

Once you start working on the substance of the case, a good attorney will help you put together your application, write your affidavit with you, and advise you about what supporting evidence you should obtain. This point is crucial: the affidavit (or declaration) is the heart of your case, and an asylum applicant may not know what information is legally relevant to include in that document. If the attorney does not spend significant time helping you prepare the affidavit, she is not doing her job. Without a properly prepared affidavit, the odds of success go way down.

Also, a good attorney should prepare you for your interview or trial by discussing possible questions and answers, and by helping you think through answers to problematic portions of your story. A good attorney should be relatively easy to reach; if you call and leave a message, she should call you back (pet peeve alert: if you call and don't leave a message, the attorney may not know that you've called, and will not call you back—so leave a message!). If your lawyer is not providing these services, she is not doing her job, and whether her price is a lot or a little, it is too high.

A final point, and this is key: a good attorney will never encourage you to lie or agree to represent you if you tell him that you want to lie to the U.S. Government. Any attorney who does that is untrustworthy and dangerous. If they are willing to lie to the government, you can bet that they will lie to you.

If your attorney is providing all the essential services, if you feel comfortable with the attorney, and if you can afford the fee, whatever it is, you are probably getting a fair deal. Maybe that is a cop-out answer, but as I've said, it is quite difficult to place a monetary value on a lawyer's services.

I truly believe that there is little relationship between price and quality among asylum lawyers. If you find an attorney that you like, but his price is too high, then look for another attorney who is more affordable. Good, reasonably priced lawyers are out there. But remember too that these cases are a lot of work. Most asylum lawyers who are dedicated to the field don't expect to get rich, but we do need to make a living. And you do need to pay a fair price for their work.

How to Find a Free Asylum Attorney

As we've seen, attorney fees for an asylum case are all over the map. The larger immigration firms typically charge in the ten-thousand-dollar range. "Low bono" lawyers—and I include myself in this group—charge a few thousand dollars for an asylum case. But what if you do not have any money for a lawyer, and even a "low bono" fee is too much? The options then are to do the case yourself (usually not a great idea) or to find a *pro bono* attorney.

Pro bono (short for *pro bono publico*) is a Latin phrase meaning "for the public good." In the legal context, it basically means that the lawyer does the work without charging the client any money.

There are different types of *pro bono* attorneys. The major categories are lawyers who work for charities, attorneys who work for law school clinics, and private attorneys who volunteer their time. There are advantages and disadvantages to each type of *pro bono* attorney, and strategies for finding an attorney in each category are a bit different.

I suspect that most asylum seekers who find a *pro bono* attorney do so through a charitable organization. You can find a fairly comprehensive list of such organizations on the [Executive Office for Immigration Review website](#) (EOIR is the government agency that administers the nation's Immigration Courts). The list is organized by state, which is helpful. If you do not see your location, click on a nearby state and you should find charities that serve your area. The [American Immigration Lawyers Association](#) (an association of private and non-profit attorneys) maintains a similar, and probably more comprehensive, list. Many of the organizations on these lists are free. Some charge a nominal fee (though in certain instances, I have heard about "nominal fees" ranging into the thousands of dollars, but this is the exception, not the norm). Also, most charitable organizations will not take a case where they believe the asylum seeker has the ability to pay for a lawyer.

The main disadvantage of using a charitable organization is that they are very busy, and they may not have the capacity to take your case. Also, if you need your case done in a hurry, they may not be able to accommodate you. Indeed, the reason lawyers like me exist is because the charitable organizations do not have the resources to help everyone. If you are able to obtain representation from a charity, they will either do the case in-house, or they will find you a volunteer attorney who will work under their supervision. Many of these volunteer attorneys do not specialize in asylum. However, the non-profits are adept at training and supervising their volunteer lawyers, and in most cases, you will get excellent representation.

So how do you get one of these charities to take your case? It often is not easy, and you may need to call/email/visit a number of organizations before you find one that can help you. But if you are persistent, you may be able to obtain representation. If one organization cannot help you, ask whether they can recommend another to try. It can feel like a full-time job to find a *pro bono* lawyer, but those applicants who make the effort are often able to obtain representation.

Law school legal clinics provide another type of *pro bono* representation. Many law schools have clinical programs where a law professor supervises law students in real-life cases. The students do the actual work on the case. To find a clinic, start with the Law Professors Blog Network, which maintains a list of [law school immigration clinics](#). Also, you might try Googling "Law School Immigration Clinic" + the name of your city. Again, these clinics receive many requests for assistance, and they have limited capacity, so it is often difficult to get one to represent you.

If you are represented by a law school clinic, you will work mostly with the students—after

all, the primary purpose of the clinic is to provide a learning experience for the students. The obvious question is whether law students have the ability to adequately represent asylum applicants in court or in the Asylum Office. My observation is that what the students lack in experience, they make up for in enthusiasm and energy. Also, the supervision at clinics (at least the ones I have seen) tends to be excellent. I do not know of any studies on this, but I expect that the success rate of clinical students is comparable to the success rate of practicing attorneys. One issue for clinics is that their cases must be scheduled according to the academic calendar, which can sometimes cause additional delays (though sometimes, it can make things faster instead).

Finally, many law firms have *pro bono* programs where the firm will represent individuals free of charge. Most firms get their *pro bono* clients from charitable organizations, but they can take on individual cases directly. If you know someone at a law firm (or if you know someone who knows someone), you might want to ask about this. If the attorney is not familiar with asylum law, she can likely partner with a non-profit organization, which will supervise her (the non-profits usually love to get new volunteer attorneys and are happy to help).

It is often difficult to find *pro bono* representation because resources are stretched thin. But if you persevere, it is possible to find a free attorney. And having an attorney can make a big difference in the outcome of your case.

Do Immigration Lawyers Suck?

According to the EOIR (the Executive Office for Immigration Review) almost 400 immigration attorneys were seriously disciplined between 2000 and 2010. What I mean by “seriously disciplined” is suspended or expelled from the practice of law. The list does not include attorneys who have been subjected to lesser punishments, such as “reprimands” or “admonishments,” whatever those are.

During those years, there were around 10,000 attorney-members of AILA, the American Immigration Lawyers Association, but it is unclear how many other attorneys practice immigration law. Assuming (and it is a big assumption) that AILA represents 50% of all immigration attorneys, there are about 20,000 immigration attorneys nationwide. If 400 of them had been suspended, that means that about 2% of all immigration attorneys have been seriously disciplined.

Depending on your point of view, maybe 2% is a lot, or maybe it is a little. Call me a pessimist, but if I hire someone to assist me with one of the most important endeavors in my life, and there is a 2% chance that that person is a crook, I would feel a bit uneasy. If 2% of pilots were incompetent, I doubt many people would fly.

But my guess is that the problems are worse than the numbers reveal. For one thing, it’s not easy to get suspended or expelled from the practice of law. I once filed a bar complaint against an attorney for lying to my client, stealing his money, and getting him ordered deported (the complaint was a required part of the process to get the case reopened). We had all sorts of documentation proving this attorney’s incompetence and maliciousness. The Bar Association found that she had violated the Rules of Professional Conduct but declined to punish her because there were “special circumstances.” Ironically, the “special circumstances” were that she had already been punished for destroying the cases of two other people. So, in other words, she was saved from punishment by her own prior bad acts. It’s ridiculous, but it helps illustrate how difficult it is to get suspended. Nevertheless, 400 of my fellow immigration attorneys have managed to do so.

Another problem is that immigrants—particularly illegal immigrants—are unlikely to report bad attorneys. Many immigrants do not speak English and are not familiar with their rights. They do not know how to report attorneys. Also, they might be afraid to report attorneys.

For these reasons, my guess is that the 400 attorneys on the EOIR list represent only a portion of the incompetent and/or dishonest immigration attorneys who are practicing law today. Of course, the vast majority of immigration attorneys are caring, competent, and honest. Most attorneys I know have worked long hours for little or no pay to help clients in need. Immigration law is usually not the most lucrative field, and most attorneys practice in this area because they want to help people fleeing persecution or reuniting with family or making a better life. I do think we have a responsibility to report bad conduct when we see it, and to encourage people who have been harmed to file complaints where appropriate. Bar associations should also be more aggressive in enforcing the rules. In this way, we can protect our clients and improve the profession.

How to Hire an Immigration Lawyer Who Won't Rip You Off

While there are many bad immigration lawyers, there are also many excellent ones. The question is, for an immigrant unfamiliar with the American legal system, how can you distinguish between the good and the bad? In other words, how do you find a lawyer who will assist you, and not just take your money? Below are some hints that might be helpful.

Bar complaints: Complaints against lawyers are often a matter of public record. So you can contact the local bar association (a mandatory organization for all lawyers) to ask whether a potential attorney is a member of the bar and whether she has any disciplinary actions. You can also look on the [list of disciplined attorneys](#) provided by the Executive Office for Immigration Review (EOIR). In some cases, you can also Google the attorney's name, which may reveal whether she has been subject to any disciplinary action. Sometimes, good attorneys are disciplined, but if an attorney has gotten into trouble with the Bar, it would be helpful to know why.

Referral from non-profits: Most areas of the country have [non-profit organizations](#) that help immigrants. While these organizations are often unable to take cases (due to limited capacity), they usually have referral lists of attorneys. I would generally trust the local non-profits for recommendations, as they know the lawyers and their reputations.

Referrals from friends: Most people who hire me were referred by an existing or former client. However, from the immigrant's point of view, I do not think that this is the best way to find a lawyer. There's a saying, that a million monkeys with a million typewriters, typing for a million years will eventually write a novel. It is the same with bad immigration lawyers. Once in a while, they actually win a case (usually through no fault of their own). The lucky client then refers other people to the attorney. I suppose a recommendation from a friend is better than nothing, but it would not be my preferred way to find a lawyer.

Instinct: If you meet with an attorney, and you don't feel comfortable, you should probably keep looking. Also, be aware of lawyers trying too hard to get your business, or who sugarcoat your situation or "guarantee" you success. Any lawyer who promises to win your case is a

lawyer to be avoided. Lawyers can—and should—promise to try their best, but we do not make the decisions, and so we cannot assure a successful outcome. Lawyers who over-promise will often under-deliver. A good lawyer should listen to you, evaluate your case, discuss strengths and weaknesses, and realistically talk with you about the likelihood of success. She should also explore different immigration options that might work for you. If you have doubts about an attorney, nothing prevents you from looking elsewhere. As they say, there are plenty of sharks in the sea.

Honesty: A lawyer should be honest with you, and honest with the government. Any lawyer who encourages you to lie is a lawyer who cannot be trusted. If you tell a lawyer that you plan to lie on your case, and the lawyer agrees to assist you with the lie, the lawyer cannot be trusted. In my experience, any lawyer who is willing to lie to the fact finder is also willing to lie to his client. And, by the way, most adjudicators know which lawyers are the bad ones, and may treat those lawyers' clients with extra scrutiny. It is best to stay as far away from these unscrupulous attorneys as possible.

Written Contract: Finally, if you hire a lawyer, she should give you a written agreement that lays out the terms of your relationships. Lawyers are required to have written contracts with their clients. The lawyer should give you a copy of this contract. If you have questions about the contract, the lawyer should answer those questions. A lawyer who refuses to give you a signed, written contract, is a lawyer who should be avoided.

One source I don't recommend is on-line lawyer reviews on websites such as Avvo, Google Reviews or Yelp. These reviews are a good measure of a lawyer's ability to promote herself online, but they are otherwise pretty useless. I can't tell you how many times on-line reviewing companies have solicited me for money or awards (presumably so my ratings would go up) or how often my fellow attorneys have offered to give me a positive review in exchange for me giving them a positive review. In my opinion, these review sites are basically a scam, and certainly not an effective way to find a decent lawyer.

Hiring an attorney can be tricky, especially for someone who is unfamiliar with the American legal system. Given that the quality of lawyers varies so much, it is worthwhile to spend some time investigating a lawyer before you hire him. That is the best way to protect yourself and (hopefully) ensure that you receive the legal assistance that you need.

My Attorney Sucks. Now What?

It's not always easy to find a decent immigration lawyer, especially for people who are new to the country, who don't speak much English, and who don't really know what to expect from an attorney. What do you do if you've hired an attorney and have now lost confidence in him?

Before you take action, you should think carefully about whether the attorney really is failing at her job. Attorneys are busy, and we are not always as responsive to our clients as they might want us to be. We also have to prioritize our cases based on government deadlines, and so some clients' cases get put on the back burner until we can work on them. In addition, clients often make "small" requests that are not so easy to accommodate: can you write a letter about my status for my job, school or landlord? Can you help me with the DMV or with the Social Security Office? Lawyers may not have the time or expertise to assist with all such requests, and

they may charge extra for tasks that are outside the contract. Aside from all this, the asylum system is a mess. Cases move slowly or not at all, cases get lost, the government makes mistakes. Much of this is outside the attorney's control, and so blaming a lawyer for systematic failures is not fair. In short, be aware that lawyers often can't give you everything you want, when you want it, and that there is much that is outside our control.

That said, lawyers are required to communicate in a timely manner with our clients. We are required to be honest with them (and with the government). We are required to do our work competently and on-time. These are requirements of the bar association—they are not optional. If we fail to fulfill these duties, we can rightly be punished. If a lawyer never gets back to you or fails to keep you updated about the case, if he changes the terms of the contract after you've signed it, or if he is dishonest with you or with the government, that is a problem. If the lawyer is unprepared for a hearing in court or at the Asylum Office, or if the quality of the lawyer's work is poor, that is also a problem. If the lawyer refuses to give you a copy of the case to review before it is filed, or a copy of the case after it is filed, that is a problem too.

So let's say your lawyer really is failing you, what can you do?

First, you may want to talk to the lawyer and explain your concerns. It would also be a good idea to put your concerns in writing (maybe in an email). If you are calling your lawyer, and he is not responding, keep notes about the dates and times you called. If the lawyer tells you something orally, write it down and email it to the lawyer to confirm that this is what he said. In other words, document all your interactions (or attempted interactions) with the lawyer. When a lawyer knows he is being watched carefully, he is more likely to behave properly.

Second, get a copy of your complete file from your attorney. Lawyers are required—again, this is not optional—to give our clients a copy of the complete file. Even if you owe the lawyer money, she is required to give you a copy of the file. She cannot “hold your file hostage” until you pay any outstanding fees (lawyers can, however, charge a reasonable copying fee for the file). Lawyers—including me—don’t love this rule, as it seems unfair to give a client her file when she owes us money. Nevertheless, it is the rule, and lawyers who fail to turn over a file can face discipline. If the lawyer refuses to give you the file, you can report that lawyer to the bar association, as discussed below.

Third, find another attorney to review your case and evaluate whether you are receiving proper representation. A second opinion can clarify whether your current attorney is doing her job, or whether it is time to find someone new.

If you do switch attorneys, you will need to get a copy of your complete file from attorney #1, so you can give it to attorney #2. The new lawyer should be able to assist with this if necessary. Also, it is a good idea to get a copy of the file from the government, especially if you do not trust attorney #1 to give you everything that he submitted (see Freedom of Information Act in Appendix I).

Also, you may be entitled to a partial refund from attorney #1, depending on the contract and on how much work the lawyer has already done for you. Some attorney contracts are “hourly,” meaning you pay for each hour (or minute) the attorney spends on your case. For such contracts, you usually submit a retainer (a lump sum payment) that the attorney “draws down” when he works on the case. So if the attorney charges \$200 per hour, and works on your case for four hours, your bill is \$800. If you gave that attorney a \$1,500 retainer, you would be entitled to a refund of \$700, which represents the “unearned” portion of the retainer fee.

Most immigration attorneys I know, including me, have “flat fee” contracts, which means that you pay a certain fee for the case. For example, we might charge \$4,000 for an affirmative

asylum case. Even in flat fee contracts, however, we are required to account for our time. This means if a client pays me \$4,000 for a flat-fee case, and then fires me before I complete the case, the client would be entitled to a refund of any unearned fees. My flat-fee contract indicates that my time is billed at \$300 per hour, meaning if I worked for five hours on the case, I would get to keep \$1,500 and I would have to refund the remaining \$2,500.

If you fire your attorney, you can ask for an accounting of her time and a refund of unearned fees. This means, she would have to tell you about each task she worked on and how long it took. This accounting is not optional—it is required. And if the accounting seems suspicious (why did it take you three hours to write an email?), you can challenge it.

In practical terms, it is usually not so easy to get a refund, and most attorneys can justify their fees. Often, it is easier for the client to just move on. However, if you feel you were ripped off, you can and probably should pursue a refund.

Further, if your attorney was dishonest, or damaged your case, or failed to properly account for her fees, you can file a bar complaint against her. Bar complaints are also sometimes required to reopen a closed case. What is a bar complaint? All attorneys must be members of a bar association. This is an organization that monitors attorney conduct and provides training and services for lawyers and the public. Each state has its own bar association. The attorney's contract, letterhead, website, and business card should all list which state bar association(s) he belongs to (hint: If an attorney does not make this information available, he is best avoided). If you Google “bar association” + the state, you should find the bar association website, which should have information about making a bar complaint. Once the complaint is filed, the bar association should investigate the attorney's conduct (some bar associations are better about this than others) and, if appropriate, punish the lawyer. This punishment can range from an “admonishment” (basically, a public statement that most lawyers would find embarrassing) to disbarment, wherein the lawyer would no longer be able to practice law.

Of course, most attorneys would rather avoid having to deal with a bar complaint, so we try to follow the rules. If your lawyer is doing something wrong—not giving you your file, for example—the threat of a bar complaint might cause her to shape up.

So there you have it. In some ways, lawyers have more power than their clients, particularly immigrant clients, who tend to be less familiar with “the system” than native-born people. But clients are not powerless. You should not feel trapped in an attorney-client relationship that is not working. If your lawyer sucks, take action. Fire him. Move on. These cases are important and often life changing. Don't let a bad lawyer destroy your opportunity to remain in the United States.

What Your Lawyer Doesn't Know Can Hurt You

Talking to my fellow attorneys, it never ceases to amaze us the information that clients seem to “forget” to share with their lawyer—from the fact that they are awaiting trial for criminal charges to changes in domicile that can cause the case to change venue (move to another location) at the last minute.

The failure to share crucial information with your lawyer is akin to not telling your doctor about a clotting problem before surgery. Imagine the complications that would arise in the operating room!

Not having all the facts can be worse than being lied to (which seasoned professionals can often spot a mile away) since it makes the lawyer look unprepared and negates all the work and

effort she might have put into the case. As the saying goes, “Forewarned is forearmed.” If a lawyer knows what the issues are, she can prepare accordingly and present the best possible case.

Perhaps what’s even more shocking is the fact that clients often “forget” to mention facts that can help their attorney build a stronger case and present a more convincing argument. There are even times when information not shared might have opened the door to more options when it comes to relief before the court or USCIS. When presented too late, this information is of no help to the applicant.

Here is a list of information that you should always share with your attorney, but which routinely seems to be overlooked—

- Arrests: No matter when or where they took place. Whether you live on the East Coast or the West, in the United States or some other country, arrests that happened *anywhere* should be shared with your lawyer. DUI and DWI should always be mentioned. Even if you were not convicted and someone told you the case would be expunged.
- Convictions: Once again, no matter when or where these happened. All of the above information regarding arrests applies here, only more so.
- Stays in a third country (a country that is not your home country and that is not the United States) no matter what the length.
- Previous applications that you might have filed before USCIS (including INS), the State Department (for a visa), the Asylum Office or the Immigration Court.
- If you have ever given false information on a visa application or any immigration form, tell your lawyer! The government has this information already (because you gave it to the government). If your lawyer does not have the information, he will be at a disadvantage.
- Witnesses: The availability or absence of witnesses might be crucial to a case.
- Medical Conditions: Whether they are yours, or those of a family member or a witness.
- The names of *all* people living in your house and their relationship to you.
- The immigration status of all your relatives living in the United States. If you have relatives who previously lived here and left, you should tell your attorney about them as well.

In short, the more you tell your lawyer, the more he can help you with your case. Finally, remember that everything you tell your attorney is confidential—the attorney is not allowed to reveal this information to anyone, including the U.S. Government, without your permission. By giving your attorney all the information, you increase your chances for a successful outcome in your case.

Hurry Up and Lose My Case

If you ask my clients their number one complaint about me, it’s that they think I take too

long to prepare and file their affirmative asylum cases. Conversely, if you ask me my number one complaint about my clients, it's that they are always pushing me to file their cases as quickly as possible. Since I am writing this, and my clients are not, I can tell you unequivocally that I am right and they are wrong. Here's why—

First and foremost, it takes time to properly prepare and file an asylum case. Even in a very strong case—and especially in a case with a lot of evidence—it is important to make sure that all the letters and documents are consistent, translations are correct, and dates, which often use a different calendar, are properly converted into the Western calendar. Also, dates in the asylum form must match the dates in the affidavit, and passports, visas, and other documents have to match the client's chronology as she remembers it. You would be surprised how often there are problems with dates, chronologies, and translations. In fact, it is the rare case that does not involve my staff or me finding major mistakes in the documents. While this is usually the result of carelessness on the part of the client or a witness, such errors can be fatal to an asylum case, where inconsistencies are often seen as evidence of fraud. There is simply no way around it, it takes time to review all this and put together a consistent and well-crafted application.

Second, any asylum attorney who is any good will probably be busy, especially if his prices are reasonable. Indeed, the only way to keep prices reasonable is to do these cases in bulk. Therefore, if you expect to pay a reasonable price for your case, you can probably expect to wait a bit to have it filed. In our office, it typically takes one to two months to prepare and file an affirmative asylum case. Although the cases do not need to be completely finished when we file (because we can submit supplemental material prior to the interview), they need to be mostly done. Why? Because the timing of interviews is unpredictable. The interview may not occur for months or years after we file the application, but it might occur in four or five weeks. So if the case is not near completion at the time we file, we may not have time to properly finish it and review everything before the interview.

Finally, attorneys—you may be shocked to learn—are human. And humans make mistakes. When we rush, we tend to make more mistakes, and mistakes sometimes cause clients to lose their cases. When we have time to prepare a case, think about the facts and the law, strategize about how to resolve problems (and most cases have problems of one sort or another), research country conditions, and carefully review all the evidence, we minimize the chances for mistakes and maximize the odds of winning.

There are, of course, very legitimate reasons for wanting to file a case quickly—separation from family, stress, uncertainty, fear of being out of status, inability to work. Probably the most legitimate reason to file quickly is to meet the one-year asylum filing deadline. But as long as there is not a one-year issue, it is far better to take a few extra weeks to file a case correctly than to rush. In my humble (and correct) opinion, if you prioritize speed over winning, you are misplacing your priorities. If you lose your case, it will likely be referred to an Immigration Judge, which can easily take several years to resolve.

So take a breath. Relax. And take the time to do your case right. Going a bit slower at the beginning may save you a lot of time and trouble in the end.

Lawyers Can Help, Even When They Can't Help

It happens two or three times each week. Someone contacts me for help with an immigration issue and after talking to the person for a few minutes, it becomes clear that there is nothing to be done. The person does not qualify for adjustment of status, Cancellation of Removal, asylum or

any other form of relief. Besides commiserating, what's a lawyer to do in this situation? I suppose you could sing them a verse of "Shana na na, na na na na, hey hey, goodbye" and show them the door. But probably the more responsible course is to give the person some advice about where they stand. Here are some issues I usually discuss with these unfortunate souls—

- I often tell them that since—contrary to popular belief—I am not infallible, they might want to speak to other lawyers. However, I caution them that some lawyers will take advantage of people in their situation and charge money when there is no way to help. I suggest that if another lawyer offers to help them, they can ask what the lawyer will do, and then call me and tell me. I won't charge them anything, but I will tell them whether I think the lawyer is trying to rip them off. I figure this is a win-win. Either the person will avoid a potential scam, or I will learn about a new form of relief.
- I advise people about the consequences of remaining in the U.S. illegally. Such people face detention and deportation. I tell them that a traffic stop or any type of criminal arrest can result in an ICE detainer. Once detained, it is very unlikely that the person will be released before being deported, so it is important to have someone to look out for family members and property in case of an arrest.
- If the person is already in proceedings, I discuss voluntary departure or VD. To qualify for VD, you need a travel document and you must have the ability to pay for your ticket. Also, you can't have any disqualifying criminal or immigration issues. In addition, you must be willing to leave the country. For people who leave the U.S. with VD, it is somewhat easier to return to the country, and at least in most cases, there is no legal bar to returning. In most cases, people who do not receive VD are ordered deported, and this comes with a 10-year bar to returning (and possibly other negative immigration consequences).
- Finally, I often have to explain away false rumors. It seems that every time there is a policy change, desperate people are led to believe that it is some type of amnesty. Those responsible for these rumors include unscrupulous lawyers and *notarios*, who hope to make money from naive immigrants. I explain that there has been no major change in the law and that there is no amnesty.

Although we can't always help our clients resolve their immigration problems, at least we can educate them about their situation and help them avoid scams.

Dear Client: I am Not Your Mommy

Some clients just don't get it. No matter how often you tell them what evidence they need for their case, they bring you *bupkis*.

Generally, when I start an asylum case, I ask the client to give me the general story about why he needs asylum. I then prepare a detailed list of documents that he should get: letters from witnesses, school records, work records, medical reports, police reports, etc., etc. I explain to the client why he needs to get these documents, and why, under the REAL ID Act, he should try to get the documents even when he thinks he will not be able to obtain them. I make analogies to

help the client understand (evidence is like the foundation upon which a house—i.e., your case—is built). I make them sign a document indicating that it is their responsibility to obtain the evidence on the list, and that if they don't get the evidence, they could lose their case. I also try to give them a reasonable deadline by which they should give the evidence to me.

Is all this excessive? You would think so. You would think that a person who fears persecution in her homeland and who shells out a pretty penny for attorney's fees would be motivated to do everything possible to win her case.

Many clients do, in fact, make diligent efforts to get evidence in their cases. It is surprising, however, the number of asylum seekers who do nothing or very little to help themselves. Such clients greatly reduce their chances for a successful outcome.

What can be done about these slacker-clients? One possibility, of course, is to do nothing. If the client does not care enough about his case to collect evidence, maybe it is best to prepare the case with the available evidence and let the chips fall where they may. This does not seem like a very satisfactory solution, though. For one thing, there may be a legitimate reason why the client is not cooperating. Perhaps he does not understand what is needed or why such evidence is important. Maybe he is afraid or embarrassed to ask friends or relatives to help him with his case. Maybe he fears that the people sending evidence will be endangered. Some of these problems might be offset by carefully explaining why documents are needed and that all such communications are confidential. For obvious reasons, however, many asylum seekers are mistrustful of government workers (including lawyers, who often seem like government workers), and getting them to trust you—and getting them to trust “the system”—requires patience.

Another way to encourage clients to gather evidence is to nag them. “Nagging” or, more politely, “repeatedly reminding” clients to get evidence may work, but it takes time to stay on top of each client’s case. Most lawyers don’t have a lot of extra time to chase after their clients. I find that giving the client a checklist of needed documents is helpful. When it comes time to remind them about gathering evidence, I always refer them to this list. It helps me remember their case as well. Some lawyers make their clients sign the checklist. That way, if the case is unsuccessful, the client cannot complain that the lawyer failed to advise her about the need for evidence.

Asylum seekers are not always the easiest clients. As lawyers, we need to use our limited time efficiently. That means informing the clients about the need for documents, giving the clients a deadline, and periodically reminding them about what is needed. For those clients who don’t make an effort to get documents, a bit of cajoling, threatening, and/or nagging from the attorney might encourage them to gather needed evidence. And that could make the difference between a successful case and a denial.

Lawyers vs. Clients

Presenting an asylum case to an Immigration Judge or an Asylum Officer can be tricky business. There are an infinite number of ways to tell the story: how much detail to include, what to keep out, how to deal with derogatory facts. Not surprisingly, sometimes lawyers and their clients have different ideas about how the case should look. So what happens when lawyers and clients disagree?

First, we should acknowledge that there are areas where the lawyer’s interest and the client’s interest are in harmony, and other areas where those interests diverge. For example, both the

lawyer and the client want to win the case. They both would like to finish the case as quickly as possible. They both want a good relationship with the other.

There are also areas where the lawyer's and the client's interests differ. The lawyer often wants to do less work on the case, while the client wants the lawyer to do more work. The lawyer has to deal with many cases, but the client wants her case, and her phone calls and emails, to receive the highest priority. The lawyer has her own ideas about how the case should be presented; the client may have a different idea. For attorneys in private practice (like yours truly), the lawyer wants to charge more money; the client wants to pay less. A good (i.e., ethical) attorney generally puts his own interests behind those of his client, but only to an extent, and when discussing "lawyers vs. clients," it is helpful to acknowledge that there are inherent tensions in the relationship.

Here, though, I am less interested in the tension related to workloads and fees, and more interested in conflicts that arise between the attorney and her client with regards to strategy—how to present the case. But that conflict does not exist in a vacuum. Rather, it must be viewed in the context of all the other tensions inherent in the relationship, and—to make matters worse—it exists in the stressful environment of an asylum case, which can have life-changing implications for the client and her family. All this, we must keep in mind.

But what to do when the lawyer and the client cannot agree?

It happens to me periodically that I have a client who has his or her own idea about how a case should be presented, and that idea conflicts with what I think best. It is perhaps one of the downsides of experience, but the more cases I do, the less patience I have for clients who question my judgment. The problem with this attitude, of course, is that I am sometimes wrong, and if my experience blinds me to that fact, I am clearly disserving my client. For this reason, I try to practice humility and always carefully consider the client's viewpoint. As the old prayer goes: "Lord, give me patience, and give it to me right now!"

Sometimes, however, the client is simply wrong about something: a "friend" told the client to hide her trip to Iran from the U.S. Government; a person who is still legally married but separated wants to claim that he is single on an immigration form; someone with a criminal conviction wants to explain to the judge that "it wasn't my fault!" In cases like these, the lawyer needs to explain the problem, and usually the client understands (the U.S. Government probably already knows about the trip to Iran, so trying to hide it is a mistake; even though you are separated, you need to indicate "married" unless the marriage is terminated by death or divorce; the judge wants to hear you take responsibility for the crime, apologize, and explain how you will not repeat the same mistake).

Other situations are more subtle: the client wants to add too much irrelevant information to her asylum affidavit, for example. In a situation like this, I explain my point of view (the fact finder will become frustrated if they get bogged down in unimportant details and it will distract from the thrust of the case) and usually the client agrees. If not, as far as I am concerned, it's the client's case and ultimately, it's his decision to make. My concern is that the client's decision is made knowingly (maybe this is why lawyers are called "counselors" and not "deciders").

In cases where the client and I cannot agree, and where I think the client's decision will negatively affect the outcome of the case, I write down my position and make the client sign it. It's rare that I have to do this, but I want to have a record of what happened in case the client decides to blame me for losing the case (the technical term for this is CYA – "cover your ass"). Also, if I make the client sign such a document, it helps underscore the seriousness of the client's decision, and hopefully dissuades him from harming his case.

My feeling is that it is better to avoid a conflict with the client before it begins. So what can be done to minimize conflicts related to case presentation?

The most obvious solution is communication, and this is primarily the lawyer's responsibility. As lawyers, we need to be transparent about what we do. If we over-sell our services, and promise the client the moon and the stars, we really can't complain when the client expects us to deliver. It's the same with case presentation. The client needs to understand the lawyer's role, and what the lawyer can and cannot do (we can't help a client lie, for example). I find it helpful to show potential clients examples of my work, so they have an idea how their case will look at the end of the process. I also outline how we will prepare the case, what we need from the client, what my assistants will do, and what I will do. I also try to give them an idea about what we don't know—primarily, how long the case will take, given the very long backlogs. To paraphrase the old ad, a well-educated client is our best customer.

For many—if not most—asylum seekers, the process is stressful and scary. They are separated from loved ones and living with great uncertainty. As lawyers, we absorb some of that stress. By communicating effectively with our clients, we can reduce their stress and our own, and we maximize the chances for a successful outcome in their case.

The Seven Habits of Highly Annoying Clients

We've spent some time dissing immigration lawyers, so I suppose it's only fair to discuss some things that immigration lawyers don't like about our asylum-seeker clients. Of course, none of these bad habits apply to any of my clients (so please don't fire me). With that important caveat, here are the seven habits of highly annoying clients—

7 – Negotiate the Price: Yes, I understand that many people come from countries where it is standard procedure to negotiate the price of everything you buy. But in the U.S., negotiating the price is not the norm, and lawyers really don't like doing it. Most of us charge a fair price, and some of us charge too little. (I sometimes hear complaints about this from my wife and kids, who keep bugging me to buy them things like food and clothing—the nerve.) While lawyers who specialize in asylum don't expect to get rich, we don't want to feel that we're being taken advantage of either. It's difficult to do your best work when your client is not fairly compensating you for your time. On this point, lawyers also don't like it when clients fail to pay or pay late. To do an asylum case correctly requires a lot of time and hard work. When a client pays too little or doesn't pay at all, it becomes more difficult to make the effort to help the client.

6 – Change Phone Numbers Without Telling the Lawyer: It's understandable that clients who are new and relatively unsettled in the U.S. would move and would change their phone numbers. What's frustrating is when they change their contact information but don't tell their lawyer. I always ask my clients for an "emergency contact;" not so much for emergencies (we need to file your form I-730 – stat!), but to have someone else to contact if my client disappears. Remember—if your lawyer can't find you, she can't help you with your case.

5 – Failure to Cooperate: I tend to give my clients a lot of homework. I want them to get their work and school records, police reports, letters from friends and family, etc., etc. Most clients do their best to get these documents, as they understand that it will greatly help their

cases. But some clients just can't be bothered. Not only does this make it more difficult to win the case, it makes it more difficult to represent the client with any enthusiasm—if you don't care about your case, why should your attorney?

4 – Bringing Documents Late: I suppose this is a sub-category of “Failure to Cooperate,” but it deserves its own mention. Immigration Courts and Asylum Offices have deadlines for submitting documents. If you give a document to your lawyer at the last minute, he may not have time to properly review that document—to ensure that it is consistent with the rest of your case, for example—before submitting it. Submitting an inconsistent document could jeopardize your case. Also, for a lawyer to organize and submit documents in a professional manner takes time. If we receive documents late, it is more difficult for us to do our job. Ultimately, of course, this is bad for the client.

3 – “No Shows” and “Dropping By”: You should be able to contact your lawyer when you need him. But you do not have a right to stop by any time you want without an appointment. Lawyers have busy schedules and multiple deadlines. The more we can organize our days, the better. When a client shows up without an appointment, it interrupts our schedules and potentially disrupts our day. If you want to see your lawyer, please call in advance and make an appointment. The flip side of this is when clients make an appointment and then don’t show up without calling. It’s common courtesy to call if you can’t attend an appointment, and it makes sense to treat your attorney—the person who is working on a case that might profoundly affect your life—with respect.

2 – Late to Court or Late to an Interview: Even worse than missing appointments with your lawyer is missing your appointment with the Immigration Judge or the Asylum Officer. This will potentially cause you to lose your case and be deported. It is also a problem for the lawyer, who often has to cover for you or appear at a second hearing (if you are lucky enough to be rescheduled and not simply denied).

1 – Don’t Keep Asking, “Is My Case Done Yet?”: Once an asylum case is filed, lawyers can only do so much to make it go faster—and by “so much,” I mean basically nothing. Bugging your lawyer about whether there is a decision yet in your case is like asking him whether the Messiah is coming soon: we can pray for it, but that’s about all. So please be patient. If lawyers could issue Green Cards, we would work a lot less and make a lot more.

And there you have it. If you are a person seeking asylum and you have a lawyer, try to avoid these bad habits. Remember, a happy lawyer will do better work, and you will have a better chance to win your case. And, to all those clients who don’t have any bad habits, from all us lawyers—Thank you!

When Lawyers Lie

In 2016, Detroit-area immigration lawyer David Wenger was [sentenced to 18 months in prison](#) for counseling his client to lie to the Immigration Court.

Mr. Wenger’s client was a 45-year-old Albanian citizen who has lived in the U.S. since he was

six months old. The client's family, including his daughter, live in the United States as well. Apparently, the client landed in removal proceedings due to a 2013 controlled-substance conviction, but the source of Mr. Wenger's troubles stemmed from the client's decades-old conviction for criminal sexual misconduct.

It seems that Mr. Wenger feared that if the Immigration Judge became aware of the sexual misconduct conviction, the client would have been deported. Having witnessed the tragedy of deportation many times, and particularly the pain it causes to the children of the deported, Mr. Wenger took matters into his own hands and tried to cover up the old conviction. It didn't work.

As a result, Mr. Wenger went to jail and the client—while still in the United States—faces an uncertain future.

Mr. Wenger's tale caused some buzz among my fellow immigration lawyers. Mostly, it is described as "sad," and certainly there is an undercurrent of sympathy for a man whose advocacy crossed a line that we, as lawyers, are trained to approach. I've known criminal defense lawyers, for example, who say that if you don't go to jail for contempt once in a while, you're not doing your job. And certainly, there is an element of truth to this: when you are advocating for an individual against The Man, you have to use all the tools at your disposal and push the limits of the law to protect your client. That is our job—and our duty—as lawyers. But such zealous advocacy has inherent risks, as Mr. Wenger's story reminds us.

I suppose I understand Mr. Wenger's motivation to lie. But I do not understand how he thought he might get away with it in this particular case. The U.S. Government keeps records of criminal convictions, and the DHS attorney in the case would likely have known about the old conviction. So even if you are not morally opposed to lying, I don't see the point of lying about something that the government knows already.

The temptations faced by Mr. Wenger are amplified in my practice area—asylum—where the U.S. Government rarely has independent evidence about the problems faced by asylum seekers overseas, and significant portions of most such cases depend on the client's own testimony. I've encountered this myself a few times when clients have asked me to help them lie ("Would my case be stronger if I said X?"). How to handle such a request?

The easy answer, I suppose, is to tell the client to take a hike. That is not my approach. I am sympathetic to people fleeing persecution who do not understand the asylum system, and who think that lying is the only way to find safety (and who often come from places where lying to the government is necessary for survival). In many cases, such people need to be educated about the U.S. asylum system. When a client asks me to lie, I explain that as an attorney, I cannot misrepresent the truth. I also explain why lying will likely not help achieve the client's goal, and how we can present the actual case in a way that will succeed. Hopefully, this is enough to convince the client to tell the truth.

For individual clients, of course, this type of honesty sometimes has its drawbacks: cases may be lost, people may be deported—possibly to their deaths, and families will be separated. Some lawyers find this price too high. If you believe your client will be deported to his death and you can save him by lying, perhaps the lie is justified. Mr. Wenger, no doubt, felt that he was doing the right thing for his Albanian client (though a review of Mr. Wenger's [disciplinary record](#) reveals that he has not always served the best interests of his clients). And there are certainly attorneys who believe that the ends justify the means. But I am not one of them.

When all is said and done, I will not lie for a client or encourage my clients to lie. I don't think it is effective, and even if we get away with it in one case, I fear that it would hurt my credibility as a lawyer—and thus my ability to be an effective advocate—in all my other cases. I also feel

that it damages the system, which hurts honest applicants.

In the final analysis, even if we ignore his other disciplinary issues, it is difficult for me to feel too sorry for Mr. Wenger. While a lawyer's zealous representation of his client is admirable, the willingness to cheat corrodes our immigration system and ultimately harms the very people that lawyers like Mr. Wenger purport to help. For me, even the argument that lying is a necessary form of civil disobedience in an unjust system falls flat. Civil disobedience is about sitting at the lunch counter; not stealing the food.

Despite all the imperfections of the immigration system, our primary job as lawyers is to work within that system to assist our clients. We also have a role to play in criticizing and improving the system. But when lawyers lie, we fail as both advocates and as reformers.

Chapter 9: Asylum Office

What to Expect When You're Expecting an Asylum Interview

So, you've decided to file for asylum. Let's talk about what happens on your journey as an affirmative asylum seeker.

Once you mail in the I-589 asylum form, you should receive a receipt in about three or four weeks. After that, you and any dependent family members will be scheduled for a biometric appointment, where the government will take your fingerprints and your photo. For the biometric appointment, each person should bring their appointment letter and a photo ID, usually a passport.

Next, you will have an interview. Some Asylum Offices are faster than others, so in some cases, you will only wait a few weeks or months for your interview; in other cases, you may wait years. If you do not receive an interview within about 90 days of filing, you can be pretty confident that your case is in the backlog. Currently, there are well over 350,000 cases in the affirmative asylum backlog, and the large majority of new cases seem to end up in the backlog.

Why does one applicant land in the backlog while another receives an interview relatively quickly? My understanding from talking to my local Asylum Office Director is that it is completely dependent on luck. It does not matter what country you come from, or how strong your case is. It does not matter whether or not you have a lawyer. The Asylum Office staff determines how many interview slots they have for a given day, and a computer randomly chooses which cases, from the pool of newly filed LIFO cases, will be interviewed.

If you end up in the backlog, how long will you wait? No one knows. The government does not know. The people working at the Asylum Office do not know. And I certainly don't know. The basic reason for the backlog is that there are too many asylum cases and too few Asylum Officers. The Asylum Division has been trying to "staff up" for some time, and they are having some success. As more Officers come online, we might see progress on the backlog. Also, between the lingering effects of the Trump Administration and the ongoing pandemic, it has become harder for foreigners—including asylum seekers—to reach the U.S. If there are fewer asylum seekers, we could also see progress on the backlog. But of course, the coronavirus pandemic has reduced the capacity of Asylum Offices to interview applicants, and this has aggravated the problem. Overall, despite the government's best efforts, the backlog has [continued to grow](#).

If your case falls into the backlog, there are a few things you can do. You can try to expedite the case (see Chapter 4). This is not easy, and even people with a strong reason to expedite are often rejected. The best reasons to expedite are where the applicant has a health problem or there is family separation, especially if the family members are unsafe. Even if you do not have a strong reason to expedite, you can still try—once in a while, applicants get lucky. Also, some offices have a short list. This is usually a long list of people who have agreed to accept an interview on short notice if there happens to be an opening. Putting your name on the short list will not necessarily get you a faster interview, but it might. You can contact your [local office](#) to find out whether they have a short list. If you put your name on the short list, make sure that all the evidence is submitted, so you are ready to go in case you get called. Attempting to expedite or put your name on the short list will never make your case slower—either it will be faster or

there will be no effect.

If you do not get an interview, or if you do get an interview and there is no decision, you may be eligible for an [employment authorization document](#) (EAD), which allows you to work legally in the United States. You cannot file for your EAD immediately. Instead, you have to wait 150 days after the I-589 form is received by the government (the “received” date is listed on your receipt; also, check the EAD instructions, as the 150-day waiting period has been altered several times). Do not file before the 150th day, or the EAD application could be rejected as filed too early. Also, if you cause a delay in your case (by missing a government appointment, for example), or if you have certain criminal convictions, entered the U.S. illegally or filed for asylum after one year in the United States, you may be ineligible for the EAD. Check the EAD instructions for more information. If you do not have an EAD, you cannot work lawfully in the U.S. Even the receipt for the initial EAD does not allow you to work. People who work unlawfully are not precluded from receiving asylum, but unauthorized employment could block you from other immigration benefits. When you file for the EAD, you can request a Social Security card on the same form.

Once you have an EAD, it is valid for two years. You can renew an expiring EAD up to 180 days before the old card expires. When you receive your receipt to renew, your old EAD will be extended by 180 days. Renewals can take a while, so it is a good idea to file the renewal soon after you are eligible.

While your case is pending, you can apply for Advance Parole (AP), so you can travel outside the United States and return (see Chapter 7). USCIS does not always approve AP, and sometimes, they only grant it for a short period of time, but if you have it, it acts like a U.S. visa. You still need to use your passport to travel, and this can create issues for asylum seekers, especially those who fear harm from the same government that issued the passport. And of course, asylum seekers should not return to the country of feared persecution, as that could kibosh your asylum case.

Also, while your case is pending, if you move, you need to file a form to change your address using [form AR-11](#). Depending where you move, this could cause your case to be transferred to a different Asylum Office. If the case moves to a new office, it should not cause additional delay and should be treated the same as if it were originally filed in the new office.

What if you do get an interview, but there is no decision? The most common reason for post-interview delay is the security background check, but there could be other reasons as well (see Chapter 4). You can contact the [Asylum Office](#) directly to ask about the delay, or you can ask your [Congressperson](#) or [Senator](#) to do that for you. You can also seek assistance from the [DHS Ombudsman’s office](#), which can sometimes help with delayed cases. None of these approaches seems very effective to me, but there is no harm in trying. If all else fails, you might consider a [mandamus lawsuit](#). This is where you sue the Asylum Office and ask a federal judge to force them to issue a decision.

In the end, you will either be granted asylum, or your application will be rejected. If you are rejected, there are two choices: if you are no longer in lawful status in the U.S., you will be referred to an Immigration Judge, who will review your case and issue a new, independent decision. If you are still lawfully present in the U.S., you will receive a Notice of Intent to Deny, be given an opportunity to respond, and if the Asylum Office still cannot approve the case, they will issue a final denial. In that case, you are expected to leave the U.S. when your lawful period of stay ends, but you can re-file asylum (the process is different—check the [I-589 instructions](#)) or you can seek other ways to remain here.

So that is the affirmative asylum process in a nutshell. The system is a mess, and it is helpful to know that before you begin. Perhaps this knowledge will make the process a bit easier to endure.

The Asylum Interview

After you file affirmatively for asylum, you will wait for weeks, months or years, and then finally, you will have an interview. What happens at this interview? And how do you prepare for it?

The interview is a (supposedly) non-confrontational conversation between the asylum applicant and an Asylum Officer. It takes place in an office, not a courtroom. You can bring an attorney and/or an interpreter with you to the interview. However, since the advent of the coronavirus pandemic, the Asylum Offices have been supplying interpreters for most languages, and you are not permitted to bring your own interpreter to the interview. For some interviews, an Asylum Office supervisor or trainee is also present.

Before the interview, when you arrive at the Asylum Office, you need to check in. This consists of giving the interview notice to a receptionist, who will take your photo and fingerprints, and give you a paper to read. The paper reminds you of your obligation to tell the truth and lets you know about your right to have an interpreter at the interview. Do not sign the paper—you will sign it later when you are in the presence of the Asylum Officer.

For the duration of the pandemic, Asylum Officers, applicants, and attorneys will not share the same room during the interview. Due to the requirements of social distancing, each person has his own room, and the parties communicate using video conferencing equipment.

The interview itself is divided into a few parts.

First, the Asylum Officer will explain and administer the oath, which is a promise to tell the truth. If you have an interpreter, the Asylum Officer will also make her take an oath. For people using an in-person interpreter, the Asylum Officer will call another interpreter on the phone, and this person will monitor the accuracy of the interpretation. If the interpreter you bring makes a mistake, the telephone interpreter will correct it. While the pandemic persists, the Asylum Office will supply its own telephonic interpreter for most languages, and so disagreements between interpreters is not an issue. If there is an interpreter present by phone, remember to speak loudly and clearly, so that person can hear you.

After the oath, the officer will review your form I-589 and give you an opportunity to make any corrections or updates. It is important to review the form yourself before you go to the interview, so you are ready to make corrections and updates when the time comes. If there are many changes to the form, you may want to write those down, as it may be easier to show the changes to the officer rather than have to try to remember everything. Also, the officers often ask about how your application was prepared. What they really want to know is whether you have submitted your own story, or whether someone (such as your lawyer) made up a fake story to help you win asylum.

Once the form is corrected, you will reach the most important part of the interview, where the officer asks about why you need asylum in the United States. A few points to keep in mind here

- First, if the officer asks you a question that you do not understand, do not answer the question. Instead, ask for clarification. The officer is typing what you say, thinking about his

next question, and reading your file, all at the same time, so he may well ask you a poorly worded question. It is not a problem—and indeed, it is common—for an applicant to ask the officer to clarify a question. Do not be afraid to do that.

- Second, if you do not know the answer to a question, or do not remember the answer, do not guess. Just say, “I don’t know” or “I don’t remember.” If you guess, and your answer is different from your documents (or different from other information that the Asylum Officer has), it may cause the officer to believe you are not telling the truth, which could result in your case being denied.

Obviously, it is better if you know and remember the facts of your case, so make sure to review your statement and evidence before the interview.

Also, there are certain questions that the officers usually ask, and you should be prepared for them—

- Why do you fear returning to your country? If you or a family member has been harmed in the past, describe what happened.
- If you face harm from a terrorist group or other non-governmental actor, can your home government protect you?
- Is there somewhere in your country where you can live safely?
- Did you pass through any third countries when you came to the United States? What countries have you visited in your life and why did you visit those countries? What other countries have you lived in, and what immigration status did you have in each country?
- If you are a member of a political party, the officer might test your knowledge of the party by asking about its leaders or history. If you are seeking asylum based on religious persecution, the officer might ask you about the tenets of your religion.
- For people who served in the military or police, the officer might ask about the nature of your service, and whether you might have engaged in persecution of others.
- If you ever had any interactions with a terrorist or insurgent group, the officer will ask about that. This includes being stopped at a non-government check point. Keep in mind that if you paid money to insurgents or terrorists at a check point, or for any reason, it could bar you from receiving asylum (see Chapter 5).
- If you left your country and then returned, the officer may want to know why you returned home at that time, but do not want to go back now.
- Also, the officer will have a copy of any prior visa applications (possibly including applications made to other countries or to the United Nations) or any other documentation you submitted in an immigration matter, so you should be prepared for questions about prior applications.

Of course, depending on your case, the questions will vary, and that is why it is so important to review your case before the interview and think about the types of issues that might come up

(and if you have a lawyer, she should think about and work through these issues with you).

Usually near the end of the interview, the officer will ask you the “bar questions,” which everyone must answer, even dependent children: have you committed a crime or been arrested? Are you a terrorist? Did you ever have military training? etc. If you answer affirmatively to any of these questions, they could potentially bar you from receiving asylum.

Sometimes at the end of the interview, the officer will ask whether you have anything else to add. If the officer covered all the major issues, I recommend to my clients that they simply thank the officer and end the interview. Some people want to give a long statement about their desperate situation or their family members’ problems. In my opinion, such statements are not helpful, and could end up causing more problems than they solve.

The officer will also interview any dependent asylum applicants. Usually, this is short and simply consists of the officer asking the “bar questions,” but the officer could ask substantive questions about your case, so your dependents should be familiar with your story (or be prepared to explain why they are not familiar with your story).

Finally, the officer will instruct you about the next steps—the officer will not give you a decision on the day of the interview. Either you will be required to return to the Asylum Office to pick up your decision (usually in two weeks), or they will send the decision by mail (which could take days, months or years). I always caution my clients that, even if the officer tells you to return in two weeks, it is very common for pick-up decisions to be canceled and turned into mail-out decisions. In other words, until you have the decision in your hand, you have to remain patient, and you cannot make any plans.

The whole interview process can take an hour, but more often, it takes a few hours. On occasion, it takes many hours, and sometimes the officer will ask you to return another day for more questions.

So what do you do to prepare for the interview? First, make sure you have submitted all your documents and evidence in advance, according to the rules of your local Asylum Office. Most Asylum Offices require that all documents be submitted at least one week prior to the interview, but local rules may vary. Second, review your statement and evidence before the interview. Think about what issues may come up, and how you want to respond to those issues. Bring with you to the interview your current and expired passport(s) and any original documents you have. If you have dependent family members as part of your application, they need to attend the interview too and bring their original identity documents. Dress in a respectful manner. Be on time or early.

The interview is a key part of your asylum case. If you know what to expect and are prepared to address the issues—especially any difficult issues—you will greatly improve your chances for a successful outcome.

NOIDs (Notice of Intent to Deny) and Asylum Denials

If your case is not approved at the Asylum Office, there are two possible negative outcomes: denials and referrals.

Denials occur only if you are “in status,” meaning you have some other type of non-immigrant status aside from the pending asylum case. Under the old system (that existed from December 2014 to January 2018), where cases were interviewed in the order received, very few applicants were “in status” by the time of their asylum decision. This is because the cases took years, and very few non-immigrant visas allow a non-citizen to remain lawfully in the U.S. for that long

(some exceptions might be the F, J, and H1b visas).

Now, under the new system of last-in, first-out (which is pretty much the same as the pre-December 2014 system), some newly filed cases receive decisions more quickly, and so more applicants are “in status” when they receive a decision.

If the decision is “yes,” then you receive asylum with all the accompanying benefits. But if the decision is “no” and you are still “in status,” the Asylum Office will give you a letter, called a Notice of Intent to Deny or NOID. The NOID provides a fairly detailed explanation of why your case is being denied, and it gives you 16 days to file a response. In the response, you can include new evidence and explain why the Asylum Office should grant your case.

My experience with NOIDs is that the Asylum Office pays attention to the responses. I’d guess that we were successful in getting asylum for about 50% of the people who came to us with such letters. The lesson here is that if you get a NOID, you should do your best to respond. In some cases, it may be impossible to get the Asylum Office to reverse its decision. But as they say, you’ve got to play to win, so if you get a NOID, make sure to respond—you may turn an “intent to deny” into a grant.

If you respond to the NOID and the Asylum Office still decides to deny your application (and assuming your status did not expire in the interim), you will receive a final denial. This means that your asylum case is now over, and you can remain in the United States until your period of lawful stay ends. At that point, you are supposed to leave or seek some other status.

The problem for many asylum seekers, however, is that they do not want to return home (they are asylum seekers, after all). Even though the Asylum Office has denied their case, they want an opportunity to present the case to an Immigration Judge. This makes sense, as many cases denied at the Asylum Office are granted in court. As discussed in Chapter 10 (spoiler alert!), asylum cases denied by the Asylum Office are referred to Immigration Court if the applicant is out of status. But if you are denied and you are “in status,” what can you do?

If you received a final denial in your asylum case and you want to go to court, you have to re-apply for asylum at the Asylum Office. The procedure for a second application is different than for a first. Essentially, you submit a new application directly to the local Asylum Office, rather than file with a USCIS Service Center (initial asylum applications are sent to the Service Centers).

In theory, for a second application, the Asylum Office will only consider events that occurred after the first application. In other words, they typically will not revisit the first asylum application. Instead, you need to present something new if you want them to grant your case. It’s pretty rare that some new evidence arises between a first and second asylum application, and so the second application is likely to be denied. If the second application is denied, and you are now out of status, your case will be referred to an Immigration Judge, who will look at both your asylum applications.

Given this cumbersome system of having to file a second case, some applicants prefer to file for asylum when their status is expired or close to expiring (but keep in mind the one-year filing deadline--see Chapter 2). These applicants do not want to leave the U.S., and they prefer to go directly to court if their case is denied. This is certainly a reasonable plan. However, I do think it is important to consider the pros and cons of this approach.

On the plus side, if your denial arrives after your status has expired, you will go from the Asylum Office directly to court, so your case may move a bit faster. In court, you will have a chance to present your claim to an Immigration Judge. On the negative side, if you are out of status when your case is denied, you will not receive a NOID, and so you will only have a vague

idea about the reason for the denial (when a case is referred directly to Immigration Court, the Asylum Office does not give a detailed explanation of the reasons). Finally, in contrast to a NOI, you will not have an opportunity to rebut the Asylum Office's reasons for denying your case, which means you lose an opportunity to win the case after the NOI is issued. For me, there is no correct answer here. The time frame of when you choose to apply depends on which path you prefer.

For Asylum Seekers, Filing on Time Is (Almost) Half the Battle

If you look at the most recent [statistics](#) from the Asylum Division, the likelihood of being granted asylum at the Asylum Office is only about 27%, nation-wide. However, if you remove people from the mix who filed late, or who failed to appear for their interviews, the situation is better: nearly half of such cases (49%) were approved.

The obvious lesson here is this: if you want to win asylum, file your application within one year of arriving in the United States and show up for your interview.

That's the nation-wide picture, but when we look at data for the various Asylum Offices, things become less clear. Different Asylum Offices have very different denial rates for one-year bar cases (asylum seekers are required to file for asylum within one year of arriving in the United States or to meet an exception to the one-year rule; otherwise, they are barred from receiving asylum). The table below shows the likelihood that a particular Asylum Office will deny (or more politely, "refer") an application for failure to timely file (the chart excludes cases where the applicant failed to appear for an interview):

Asylum Office	Percentage of Cases Referred to Court for Failing to File Within One Year of Arrival
Arlington	34.2%
Boston	52.9%
Chicago	13.2%
Houston	13.8%
Los Angeles	16.8%
Miami	40.3%
Newark	33.9%
New York	53.6%
New Orleans	27.3%
San Francisco	20.6%
United States	30.6%

Why should the different offices be so different in terms of late-filing referrals? It seems to me that there are two possible explanations, broadly speaking: either the Asylum Offices are responsible for the disparity, or the asylum seekers themselves are responsible.

The first possibility is that certain Asylum Offices are more aggressive than others about enforcing the one-year bar. I know this is the case with Immigration Judges. I am thinking of two IJs in my local court (two of my favorite IJs, by the way). I have presented several one-year bar cases to these judges. One almost invariably denies the asylum application based on the late filing (though in my cases, he granted other, lesser relief); the other looks to the “spirit” of the rule, and as long as the applicant did not have a bad intention (for example, to commit fraud), he usually excuses the late filing. It’s easier to see how this could happen with individual judges, rather than as an office-wide policy, but I suppose this is one possible explanation for the variability between Asylum Offices. If this is the correct explanation, then it makes sense for late filers to choose more friendly offices, such as Chicago or Houston, to file their cases (meaning, such people would have to live in the jurisdiction of these offices).

The other possible explanation is that the different offices are receiving different types of

cases. Maybe asylum seekers in New York are too busy or too ill-informed to file their cases on time, while those in Houston have more free time, or are just more conscientious. To me, this seems a bit far-fetched (though I guess New Yorkers *are* pretty busy). Or maybe it has to do with the different populations served by each office. Maybe—for example—Chinese applicants are more likely to file within one year of arrival, since the Chinese community is well aware of the one-year rule. In contrast, perhaps Central American applicants tend to arrive in the U.S. without an initial intention to seek asylum, but then decide later that they cannot return home, and in this way, they run afoul of the one-year bar. If LA has more Chinese applicants and New York has more Central Americans, perhaps this could explain the disparity. If (and it is a big if) this explanation is correct, then it really doesn't matter where you apply for asylum, as the different Asylum Offices are not responsible for the uneven one-year-bar denial rates.

A third, hybrid explanation is that some Asylum Offices are cherry-picking their cases and interviewing more one-year bar cases than timely-filed cases. We know, for example, that the Asylum Offices sent letters to asylum applicants who filed after 10 years in the U.S. and offered them an option to skip the interview and go directly to Immigration Court. If some offices, and not others, are deliberately selecting late-filed cases to interview, that could explain the disparity.

Frankly, I do not have much confidence in any of these explanations. But the disparity does exist, and the fact is, some Asylum Offices are significantly more likely than others to deny asylum based on the one-year bar. So what can you do with this data? Does it mean that if you are filing after the one-year deadline, you should avoid Boston and New York, and instead file in Chicago, Houston or LA?

Given that it is difficult to draw a firm conclusion from the data, and given the severe consequences of filing late, the simple answer is to avoid the problem altogether by filing your asylum application on time. For those who miss the one-year deadline, it is important to prepare an explanation (with evidence) about why you filed late. This advice applies regardless of which office has your case. But I suppose the question here is: if you are filing late, should you move to a jurisdiction with an “easier” Asylum Office? And remember, if you want your case heard by a certain office, you have to live within the [jurisdiction of that office](#).

I hate giving advice about where a person should live, but looking at the available data, it is impossible to say that a late filer is not better off in one of the “easier” offices, like Chicago, Houston, LA or San Francisco. Obviously, there are other factors to consider—most people have to live where they have family support or a job. Also, in some instances, the one-year bar is easily overcome (for people who are still in lawful status, for example) and so there is no reason to worry about which office has your case. But for those with more difficult one-year bar issues, it may make sense to “forum shop” and move someplace with an Asylum Office that is less likely to deny a late-filed application.

New Data Shows that Most (But Not All) Asylum Offices Are Getting Tougher

In the fall of 2019, the Asylum Division cancelled its regular quarterly stakeholder engagement meeting and postponed the release of data about the various Asylum Offices. When the information was released months later, the news was generally bad (who would have guessed?), but the data contained some bright spots and surprises—as well as a few mysteries. Here, we’ll take a look at the news from our nation’s Asylum Offices.

First, the data. The Asylum Division released [statistics](#) for FY2019, which ended on September 30, 2019. The data shows that despite the Trump Administration’s hostility towards

asylum seekers, many people continue to seek protection in the United States—through the fiscal year, a total of 82,807 new affirmative asylum applications were filed (and remember that some of these cases include dependents, so I imagine the total number of people filing for asylum in FY2019 is well over 100,000). Case completions are still not keeping up with new filings, and the overall asylum backlog continues to grow: From 323,389 at the beginning of the fiscal year, to 339,836 at the end. Throughout the year, the number one source country for new asylum cases was Venezuela. China was number two for most of the year, followed by Guatemala, Honduras, El Salvador, and Mexico.

In terms of grant rates, the news was fairly negative, but not uniformly so. As an arbitrary baseline, I will use a [post](#) I did in February 2016 about Asylum Office data from the second half of FY2015 (April to September 2015). I calculated the percentage of cases granted at each Asylum Office. In crunching the numbers, I discounted cases that were denied because the applicant failed to appear for an interview, but I included cases that were denied solely because the applicant failed to meet the one-year asylum filing deadline. I've made the same calculations for the period April to September 2019 and compared the grant rates for both time periods in the chart below.

Asylum Office	Approval Rate (%) FY2015	Approval Rate (%) FY2019
Arlington, VA	51.8	26.5
Boston, MA	N/A	21.0
Chicago, IL	38.3	34.5
Houston, TX	27.6	33.6 (38.0)
Los Angeles, CA	50.7	43.1
Miami, FL	37.7	17.6
Newark, NJ	35.8	30.1 (29.0)
New York, NY	22.6	8.6
New Orleans, LA	N/A	51.1
San Francisco, CA	76.5	60.3

Whenever a lawyer does math: Beware!

As I mentioned, I did not include “no shows” in my data. For this reason, government statistics about the asylum grant rate will be lower than my numbers, since they include people who failed to appear for their interviews. If I had included “no-shows,” the FY2019 grant rate in Arlington would be only 19.5% (instead of 26.5%, as shown in the chart). The New York grant rate would drop to a paltry 7.1%, and the grant rate in San Francisco—the “best” asylum office—would fall to a still-respectable 54.0%. Arguably, it makes sense to include “no shows,” since some people may not appear due to no fault of their own. However, I chose to leave them out, since I suspect most have either found other relief or have left the country, and I don’t think it is useful to evaluate Asylum Offices based on denials where the applicant never appeared for an interview.

One problem with my comparison is that there are more asylum offices today than there were in 2015. The two new offices are Boston and New Orleans. The Boston office was previously a sub-office of Newark, and the New Orleans office was part of the Houston office (though in truth, I am not sure whether all of New Orleans’s jurisdiction was covered by Houston, or whether some was covered by Arlington). To account for this, the first numbers listed for Houston and Newark for FY2019 is the percentage of cases granted in that office. The numbers in parenthesis for Houston and Newark include cases that would have been within the jurisdictions of those offices in FY2015 (i.e., the New Orleans cases are included with Houston and the Boston cases with Newark). Thus, the parentheticals are useful only for comparison with the FY2015 numbers; if you are just interested in the percentage of cases granted in Houston and Newark in FY2019, look only at the first number.

As you can see, there is an overall decline in the grant rate at most offices. In some cases, this decline is quite significant. One office—Houston—bucked the trend and actually granted a higher percentage of cases than in FY2015.

But perhaps things are not quite as bad as they appear. The numbers in the chart above include cases denied solely because the applicant failed to file asylum on time (remember that you are barred from asylum unless you file within one year of arriving in the U.S. or you meet an exception to that rule). In the chart below, I factored out cases that were denied solely because they were untimely (the Asylum Offices have been identifying late-filed cases and interviewing them; unless the applicant overcomes the one-year bar, the case is referred to Immigration Court without considering the merits of the asylum claim; since they are interviewing many such cases, this is pushing overall denial rates up). Comparing the two fiscal years in chart two, the decline in grant rates is much less severe. Indeed, three offices granted a higher percentage of timely-filed cases in FY2019 than in 2015.

Asylum Office	Approval Rate (%) FY2015	Approval Rate (%) FY2019
Arlington, VA	54.6	46.5
Boston, MA	N/A	29.6
Chicago, IL	40.4	43.5
Houston, TX	29.1	38.0 (43.6)
Los Angeles, CA	52.5	56.8
Miami, FL	38.6	22.5
Newark, NJ	45.9	45.5 (44.2)
New York, NY	31.0	19.2
New Orleans, LA	N/A	64.5
San Francisco, CA	82.1	67.4

The same chart, but here, I have removed one-year bar denials (reminder: Beware!!).

So what's happening here? Why did grant rates generally decline? Why did some offices improve? What does all this mean for asylum seekers?

First of all, these numbers must be taken with a big grain of salt (and not just because I am an incompetent mathematician). A lot is going on at each Asylum Office. Different offices have different types of cases, including different source countries, greater or fewer numbers of unaccompanied alien children (UAC) cases, and different policies in terms of interviewing untimely applicants. As a result, some offices may be interviewing more "difficult" cases, while other offices are interviewing more "easy" cases. Offices that interview many Central American cases, or many UAC cases, for instance, will likely have lower grant rates than other offices. This is because Central American cases and UAC cases are more likely to be denied than many other types of asylum cases. Also, some offices are more aggressive than others in terms of identifying and interviewing untimely asylum cases. Offices that interview more late-filed cases will likely have a higher denial rate than offices that interview fewer late-filed cases.

Despite all this, it is fairly clear that the overall trend is negative. One obvious reason for this is a series of precedential cases and policy changes during the Trump Administration that have made it more difficult for certain asylum seekers, particularly victims of domestic violence and people who fear harm from Central American gangs. In addition—and I think this is probably less of a factor—the leadership at DHS and DOJ has repeatedly expressed hostility towards asylum seekers and encouraged the rank-and-file to identify and deny fraudulent applications.

Finally, it's possible that the negative trend is worse than what the numbers above reflect. In FY2015, the Asylum Division gave priority to UAC cases. Since such cases are more likely to be denied, interviewing more of them may have pushed the overall grant rates down. In FY2019,

UAC cases were not given priority, meaning that (probably) fewer UACs were interviewed. All things being equal, fewer UAC cases should mean a higher overall approval rate, but that is not what happened at most Asylum Offices. This may mean that more non-UAC cases are being denied today than in FY2015.

As you can see, there are a lot of moving parts, and a lot is going on behind these numbers. In one important sense, though, things have not changed much in the last four years. Strong cases still usually win; weak cases often fail. For asylum seekers (and their lawyers), we can only control so much of the process. Submitting a case that is well prepared, consistent, and supported by evidence will maximize your chances of success. And as the numbers above show, success is still possible even in these difficult times.

Chapter 10: Immigration Court and the Board of immigration appeals

From Asylum Office to Immigration Court and Beyond

There are different ways to land in Immigration Court. One common scenario for asylum seekers is when the Asylum Office denies your case and you are no longer “in status.” If that happens, you will be referred to Immigration Court. When you get the denial (which they politely call a “referral”), it will contain a short letter with a (usually) boilerplate explanation about why the case was not granted. Along with the letter, you will receive a Notice to Appear (NTA), which explains why the U.S. Government believes it can deport you. If you have dependent family members, each of them should also receive an NTA (assuming they are all out of status).

Other ways to end up in Immigration Court include being caught by ICE when you are out of status, committing a crime, and arriving at the U.S. border (or an airport) without a valid entry document. In each case, you will receive a Notice to Appear.

The NTA contains allegations and charges. The allegations set the stage for the case, and usually begin: (1) You are not a citizen or national of the United States; (2) You are a citizen and national of [your country]; (3) You entered the United States on [date and place], and then they state why you are removable. Often, the non-citizen is removable because she remained in the United States longer than permitted. Other times, the non-citizen entered the U.S. unlawfully (without being inspected and admitted at the point of entry) or fraudulently (using a fake passport, for example). Some people are removable due to criminal convictions or other immigration violations. You should read the NTA carefully to make sure all of the allegations are correct.

The NTA also contains one or more charges. The charges indicate the section of the law (the Immigration and Nationality Act or INA) that the government can use to deport you. One common charge is under INA § 237(a)(1)(B), where the person is removable for having “remained in the United States for a time longer than permitted.” Other charges could relate to an unlawful or fraudulent entry, or to a criminal conviction.

Finally, the NTA will tell you where to go to Immigration Court and when to go. However, it is very common for court dates to change. If this happens, you will receive a notice in the mail with the new hearing date. It is important to keep your address updated with the [Immigration Court](#). Use [form EOIR-33](#), and don’t forget to send an extra copy to the [DHS Office of the Chief Counsel](#) (the prosecutor).

Also, you can call the Immigration Court phone system to check the status of your case and learn whether you have an upcoming hearing. The phone number is 800-898-7180. It is a computer, not a person. Once it answers, follow the instructions and enter your Alien number. After the computer spells your name and you confirm, you can push 1 for your next court date. I recommend you call once a week, just in case you don’t receive the written notice (if you miss your court date, the judge will likely order you deported). You can also check your case status [online](#).

The wait time for the first court date depends on the court and the judge—it could take a few weeks or a few months (or sometimes longer).

Prior to the Individual Hearing, you must attend a biometric appointment, where the government takes your fingerprints and photo. If your case was referred from the Asylum Office to the court, this will have already been done. However, if your case was not at the Asylum Office, you have to request a biometric appointment (even if you attended a biometric appointment for an EAD card, you still need to arrange another [appointment](#) for your asylum case). If you fail to make this request and attend the fingerprint appointment, the judge could order you deported for not completing your biometrics.

Also, if your case was at the Asylum Office, it is a good idea to request a copy of your file by filing a [Freedom of Information Act](#) (FOIA) request. You will likely not receive a copy of the entire file from the government (they often omit the Asylum Officer's notes), but it will be helpful to have as much information as possible about your case, so you can avoid inconsistencies between your Asylum Office case and your court case. It can take six months to get a copy of your file, and so it is a good idea to file the FOIA well before your Individual Hearing.

Once you are scheduled for court, you will be assigned a judge. The 800-number and the online system will tell you the name of your judge. You can learn more about your judge at TRAC Immigration, a website that publishes data about [Immigration Judge grant rates](#) (information is not available for newer judges).

The first hearing is called a Master Calendar Hearing (MCH). Many people attend this hearing, and you have to wait your turn to talk to the judge. When it is your turn, if you have a lawyer, the Immigration Judge (IJ) will take "pleadings." This is when you (through your attorney) admit or deny the allegations and charges in the NTA. After that, the IJ will usually schedule you for an Individual Hearing (also called a Merits Hearing).

If you do not have an attorney with you at the MCH, the IJ will usually give you a continuance to find an attorney. If that happens, you will be scheduled for another MCH. In general, the IJs really want you to find a lawyer, as it makes their job easier and it significantly increases the likelihood that your case will be approved. If you do not get a lawyer, you will need to litigate the case yourself.

For most referred asylum applicants, the NTA is correct and the person will admit the allegations, concede the charges of removability, and request asylum, Withholding of Removal, and relief under the United Nations Convention Against Torture. However, in some cases, the NTA is not correct. Also, some applicants can seek other relief, such as Cancellation of Removal or adjustment of status based on a family relationship (or something else). One job of the attorney is to explore what types of relief you might be eligible for.

Also, at the MCH, the IJ will ask you to designate a country of removal. In other words, the IJ wants to know where to send you if you lose your case. For most asylum applicants, we decline to designate a country of removal. The DHS attorney (the prosecutor) will usually designate your country of citizenship.

If you admit the allegations, concede the charge(s), and indicate what relief you are seeking, the IJ will usually schedule you for an Individual Hearing, which is your trial. If you decline to accept the first Individual Hearing date the IJ offers you, or if you take a continuance to find a lawyer, it could prevent you from obtaining a work permit if you don't already have one. If you think this could be a problem in your case, ask your lawyer. If you do not have a lawyer, ask the IJ.

The wait time between the MCH and the Individual Hearing varies by court and by judge. It might be a few days or weeks for a detained non-citizen, or it could be several years for a person

who is not detained.

The Individual Hearing is your trial. It is where you present evidence, and where you and your witnesses testify. Some cases require more than one Individual Hearing. At the end of the Individual Hearing, the IJ will usually make a decision—give you asylum, give you some other type of relief, or order you deported. If the IJ cannot decide the case on the spot, she will either send the decision by mail or give you a date to return to hear her decision.

If you lose your Individual Hearing, you can appeal to the Board of Immigration Appeals (BIA). If you win your asylum case, DHS can appeal (thankfully, this is not so common). You do not appear in-person for the appeal. Instead, you (or hopefully, your lawyer) will submit a brief, which is a written argument explaining why you should have won the case, and the BIA will read it and make a decision. Either the BIA will dismiss the appeal, meaning the IJ's decision was correct and will remain in force, or it can alter or reverse the IJ's decision. In the latter instance, the case will normally be returned to the IJ to correct the error and issue a new decision.

An appeal with the BIA typically takes between six months and two years, but it depends on the case.

If you lose at the BIA, you can file a Petition for Review with the appropriate federal appellate court, and if you lose there, you can try to go to the U.S. Supreme Court. Very, very few cases make it that far. Also, if you lose at the BIA, whether or not you go to federal court, you are no longer eligible for a work permit based on a pending asylum case, and you can be deported. (Typically, ICE will not deport someone with a pending federal case, but they have the legal authority to do so unless the federal court issues an order "staying" removal.) For the vast majority of non-citizens, if you lose at the federal appellate level, that is the end of the line.

In my experience, it is a bit easier to win an asylum case in Immigration Court as compared to the Asylum Office. But it is much more difficult to win at the BIA, and even more difficult to win at the federal appellate level (though some federal appeals courts are better than others).

So this is the basic process that most cases follow if they are denied at the Asylum Office. There are some exceptions and different paths (most notably Motions to Reopen and/or Reconsider), but the majority of applicants will follow this process. If your case is rejected by the Asylum Office, it becomes even more important to have a lawyer assist you if you can afford one or find one for free (see Chapter 8). And remember, losing at the Asylum Office is frustrating and upsetting, but it is by no means the end of the road. Keep fighting, and hopefully, you will have a good result in the end.

Want to Lose Your Asylum Hearing in Immigration Court? Then Don't Prepare in Advance

The key to winning an asylum case in Immigration Court is preparation. I'd venture that the majority of asylum cases are won or lost before the applicant arrives in court for the final hearing. If the case and the applicant are well prepared, the chances for success are greatly improved. If the case and the applicant are not well prepared, the likelihood of winning is much reduced. So how do you prepare for an asylum hearing in Immigration Court?

First, you have to determine whether you are eligible for any relief. If you fear harm in your country on account of your race, religion, nationality, political opinion or your membership in a particular social group, you may be eligible for asylum or Withholding of Removal. If you fear

torture, you could be eligible for relief under the United Nations Convention Against Torture. Besides these types of humanitarian protection, there are a number of other applications that might help you avoid deportation: Cancellation of Removal, adjustment of status based on a family relationship or a job, a T or U visa for certain victims of crimes, the semi-mythical S visa for certain cooperating witnesses, the Special Immigrant Juvenile visa, to name the most common. How do you know what relief you might be eligible for? Your best bet is to talk to a lawyer, but you can also do your own research.

Assuming you qualify for relief, you normally inform the Immigration Judge about the type of relief sought and submit all necessary forms at the Master Calendar Hearing (MCH). In many cases, if you do not submit all applications for relief in advance of the Individual Hearing, you forfeit those opportunities for relief. Be aware that some applications for relief require a fee (asylum does not require a fee), and so make sure to [pay the fee](#) well in advance of the Individual Hearing. In addition, all applicants must attend a biometric (fingerprint) appointment. If your case was referred from the Asylum Office to the court, this will have been done automatically (at the Asylum Office stage of the process). However, if you did not attend a biometric appointment for the asylum case, you must make arrangements for such an appointment by [contacting USCIS](#) (note that if you attended a biometric appointment for an EAD, that will not be accepted for purposes of an asylum case in court). This should also be done well in advance of the Individual Hearing, and be aware that if you forget to do your biometrics (which is easy), it could result in the case being delayed or denied.

If you previously had a case with USCIS or the Asylum Office, it is a good idea to get a copy of your file from the government under the [Freedom of Information Act](#). This will help you prepare your court case and hopefully help you avoid making inconsistent statements between your prior case(s) and your Immigration Court case.

If you move while your case is pending, you are required to submit a [change of address form](#) with the court and the DHS attorney's office (the prosecutors).

As the Individual Hearing approaches, you need to file all the necessary documents with the [Immigration Court](#). This includes all evidence, a witness list, and a legal brief. The documents must be filed on time. The default rule (from the [Immigration Court Practice Manual](#)) is that evidence should be filed at least 15 days prior to the Individual Hearing, but some judges have their own rules and require documents earlier than that (the judge should inform you about this at the MCH). You must file one copy of all your evidence with the court and one copy with the local [DHS attorney's office](#).

The evidence normally consists of the I-589 asylum form (and/or forms for any other applications for relief), an affidavit, and supporting documents. Any documents not in English must be properly translated (see Chapter 6 and Appendix III). You can read more about what evidence is helpful in Chapter 2.

Courts also require a witness list, which is a list of people who will come to court to provide testimony in your case. Anyone who plans to appear as a witness must provide a letter indicating what they know about your situation. There are benefits and risks to any witness, and you need to think carefully about whether a particular witness will be helpful for your case (and of course, if you have a lawyer, the lawyer should explore this with you). All witnesses need to be prepared for their testimony, just as the applicant herself needs to be prepared.

Also, for most cases, it is a good idea to submit a brief detailing the legal theory of the case. This is especially important where the case involves a particular social group or PSG (under precedential case law, applicants are required to specifically articulate any PSG). Even in cases

where PSG is not an issue, it is important to explain the legal posture of the case and any issues that may be relevant (one-year filing bar, nexus, persecutor bar, firm resettlement, criminal issues, etc.).

In addition, if your case was referred to court by the Asylum Office, you should think about why. Are there inconsistencies or errors that need to be addressed? Maybe this requires a new affidavit or additional evidence. Did you fail to show that you suffered past persecution or that you have a well-founded fear of future persecution? Maybe you need more evidence or a stronger legal argument. While the Immigration Judge reviews the case de novo (meaning, the IJ makes her own decision), remember that the Asylum Officer's notes can be admitted to impeach (attack) your credibility. As you prepare for court, you should think about what was said and submitted at the asylum interview and determine whether that requires any additional evidence or testimony.

As the Court date approaches, it is important to practice for the hearing. How do you want to present your case? What questions might be asked of you? What are the weak points in the case and how will you discuss those? It is very important to think about these issues in advance. Judges and DHS Attorneys are good at finding weaknesses in a case and asking about them, and failure to prepare ahead of time may result in the case being denied. In our office, we do two practice sessions with the client—the first about a week before the trial and the second a day or two before (this practice session is as much for the attorney's benefit as the client's).

Finally, prior to the hearing, it is a good idea to talk to the DHS Attorney (normally, your lawyer does this). It is not always easy to reach these attorneys, and they often do not return calls. However, at the beginning of the hearing, it is common for the judge to ask whether the parties have talked, and so it is helpful to at least have tried to communicate with the government lawyer. Assuming you can talk to the lawyer in advance, you can potentially narrow the issues and have a better sense of what to expect at the hearing.

So that's about it for preparation. Next, we will discuss what happens at the Individual Hearing.

What Happens at an Asylum Hearing in Immigration Court?

The culmination of the Immigration Court process is the Individual Hearing, where the Immigration Judge (IJ) usually decides whether the applicant gets asylum, some other relief, or is ordered deported from our country. For asylum seekers, the Individual Hearing can be stressful and frightening. Here, we will discuss what to expect at that hearing.

Before we get to the substance of what happens at the Individual Hearing, I should mention that there are detained and non-detained hearings. A detained hearing is similar to a non-detained hearing in terms of the order of events, but sometimes the IJ and the applicant are in different locations, and so cases are done by video (non-detained cases can also be done by video, especially since the advent of the coronavirus pandemic, but it is less common). These video hearings can be more difficult to litigate, in terms of looking at documents, hearing each other talk, reading non-verbal cues, empathizing with the applicant, etc. Preparing for detained hearings is more difficult, as it is very challenging to gather evidence and get ready for your case when you are in jail.

Also, of course, different IJs have different styles (in Immigration Court, IJs decide the case—there are no juries). Some IJs ask a lot of questions; others ask no questions. Some are professional and respectful. Others, not so much. It is helpful to know something about your IJ

before the court hearing, so you can have an idea about what to expect. Statistics about asylum grant rates for many IJs can be found at [TRAC Immigration](#).

Finally, it is important to understand that many cases are won or lost before the trial even begins, and so how well the case is prepared will likely affect how the Individual Hearing proceeds (see the previous article, above).

As for the Individual Hearing itself, it begins when the IJ arrives in court. Everyone stands up for the judge. Once everyone sits, the hearing usually begins with a conversation between the IJ and the lawyers (assuming the non-citizen has a lawyer). During this discussion, the parties may try to narrow the issues that need to be discussed. Perhaps there are some areas of agreement, and it is helpful to know this in advance. Also, in some cases, the IJ will not need to hear testimony about the entire case—maybe the applicant will only need to testify about part of her story.

At the beginning of the hearing, the IJ will ask what “relief” you are seeking. This can be asylum, Withholding of Removal, relief under the Torture Convention, Cancellation of Removal, Adjustment of Status, Voluntary Departure, and/or something else. The IJ will also mark the evidence and hear any objections. So if you submitted evidence, and the DHS attorney objects to that evidence, the judge must decide whether or not to admit that evidence into the record, and how much “weight” to give to that piece of evidence (some evidence is considered more reliable than other evidence and hence receives more “weight” in terms of how much it influences the IJ’s decision). At this time, the IJ will also ask whether there are any changes to the form I-589. You can update your form and make any corrections. Once the form is updated, the IJ will have you sign the form under penalty of perjury. You will also be “sworn in” under the penalty of perjury. This is basically a promise to tell the truth, and if it is found that you are not telling the truth, there are potential immigration and criminal consequences. If there is an interpreter in your case, the interpreter will also be sworn in.

If you have brought any witnesses to court, they will typically be asked to wait outside, so they cannot hear your testimony. That way, their testimony can be compared to your testimony. If there are inconsistencies between your witness and you, it could cause the IJ to think you are not telling the truth. For this reason, it is important that the witnesses are prepared in advance, and that you and your witnesses are on the same page. Keep in mind that different people may have different memories of the same event, and even if they are both telling the truth, there is still a risk that the two accounts will not be consistent. For this reason, it is important to go over each person’s testimony prior to the court hearing.

Normally, the “respondent” (the non-citizen who is the subject of the court proceeding) testifies first. This usually begins with your attorney asking questions. If you do not have an attorney, the judge will probably ask questions first. This is called the “direct examination,” and usually involves you telling your whole story. Once the testimony is done, the DHS attorney asks questions. This is called “cross examination.” During cross exam, the DHS attorney will often try to test your credibility. There are different ways to do this: asking about prior inconsistencies in other applications (including any visa applications), at the Asylum Office, or during the credible fear interview; asking about testimony that seems implausible or inconsistent with country conditions; asking about documents or evidence that seem fraudulent. Hopefully, as you prepare your case, you will think about some possible areas for cross examination and how you might respond. Afterwards, your attorney has an opportunity to ask some additional questions, based on what happened during cross examination. This is called “re-direct.” The IJ can interject with questions at any time.

During your testimony (and for your witnesses' testimony), remember that if you do not understand a question, ask for clarification. Do not answer a question that you do not understand. If you do not know the answer to a question, or if you do not remember the answer, just say that you don't know or you don't remember; don't guess. If you need a moment to collect your thoughts, ask for that. If you need a break, ask for that too. If you have an interpreter and there is a problem with the interpretation, don't be afraid to raise that issue as well (especially if you do not have a lawyer or your lawyer does not understand the language). Also, on cross exam, the DHS attorney often asks yes-or-no questions and might insist on a yes-or-no answer (sometimes, the IJ will do this as well). If you cannot answer the question using a yes or no, try to explain that. If you feel that you have no choice but to answer yes or no, you should at least alert the IJ that you have more to say. On re-direct, you will have an opportunity to elaborate on your answer. Remember to always be polite and don't lose your cool.

After your testimony is finished, it will be your witnesses' turn. Sometimes, the IJ will accept a "proffer" of a witness's testimony (assuming both your lawyer and DHS agree). This means that the IJ will accept the testimony as recounted in the witness's letter (witnesses are generally required to submit a statement in advance of trial), and that the witness will not actually need to testify. A proffer can be beneficial to your case, since it eliminates the possibility of inconsistent testimony, but it can also be a disadvantage, since the IJ will not hear the witness's testimony, which would presumably support your asylum claim.

After all the testimony is done, most—but not all—IJs allow the lawyers to make closing arguments. This is an opportunity for the lawyers to explain why they think you should win (or, for the DHS lawyer, lose) your case. Some IJs prefer to have a discussion at the end of testimony, to see whether there is agreement about resolution of the case.

Finally, the IJ will either make an oral decision, reserve decision for later, or inform the parties about the next step (in some cases, the IJ needs more information from the parties before she can make a decision). In the majority of cases, the IJ issues an oral decision that same day.

If you do not like the IJ's decision, you can "reserve" appeal. If the DHS attorney does not like the IJ's decision, DHS can reserve appeal. If you (or DHS) reserve appeal, you have 30 days to file the appeal using [form EOIR-26](#). The IJ should give you the deadline for the appeal. If you or DHS appeal, the appeal will be resolved by the Board of Immigration Appeals. But that is a story for another day.

What Not to Wear in Court

From a friend, who observes court hearings, but prefers to remain anonymous:

Imagine showing up to one of the most important meetings of your life, wearing a top so revealing that there is eminent risk of "wardrobe malfunction," or with pants hanging so low it's a miracle that you didn't trip when you entered the room.

While many people have learned much about courtroom etiquette from television—such as standing up when the judge enters the courtroom—one element that seems to be lacking is the need to dress appropriately.

Though there is no official dress code in Immigration Court or at the Asylum Office, keep the following guidelines in mind in order to make a positive impression on the decision-maker—

- Hats, caps, bandanas or any head dress should not be worn unless they form part of one's

religious or customary cultural attire. Women should avoid wearing tube tops, tank tops, halter tops, tops with exposed midriffs, short shorts, miniskirts or any other revealing clothing. Men should avoid wearing sleeveless muscle shirts or undershirts. Clothing should not have obscene or profane language or illustrations, nor should one wear gang-related attire. Clothing must cover all undergarments for both men and women. It is also best to avoid wearing sports jerseys and brand promotional t-shirts.

- When it comes to shoes, avoid wearing flip flops (no matter how expensive they are) and no one should come to court in bare feet (you'd be surprised).
- Avoid wearing heavy perfumes, as someone might be allergic, causing the hearing or interview to be postponed when that person becomes ill.
- It is a good idea to also remember that during summer, most buildings have central air and can be very cold, if not down-right freezing. Hearings, interviews, and even the wait for either can be very lengthy. Carrying a sweater or jacket is a wise move, as this item can be removed if the court/interview room is warm.

One of the best ways to think about what you should wear is to ask yourself: is this something I would wear to my church, mosque, synagogue, temple or other place of worship? If you can wear it there, chances are, you can wear it to court. And while fashion consultant might not be part of an attorney's formal job description, it would be good for the client to be reminded that dressing neatly and properly for court is an important part of the courtroom etiquette.

Dressing properly for court is a way to show one's respect to the court and the proceedings; this same courtesy should be extended to USCIS officers. After all, in the end, it is you who benefits.

Witnesses: The Triumph or Tragedy of an Asylum Case

I once almost lost an asylum case, thanks to a witness who had flown in from Cameroon especially for the occasion.

I felt that our case was pretty strong—my client was a political activist who had been arrested several times in his country. The case was well documented, and my client seemed credible. Even the government attorney indicated that we should get it over with quickly—a sure sign that she anticipated a grant. Then, basically out of nowhere, the witness starts babbling about the time he and my client were arrested together in Cameroon. My client had never mentioned this arrest to me, nor had the witness told me about it during our preparation session. In Immigration Court, attorneys are not permitted to strangle their own witnesses, so there was nothing I could do but watch my case go down the drain. Fortunately, during re-direct, I was able to elicit some explanation from the witness. Then we had my client return to the stand to further clarify. In the end, the judge granted relief, but a strong case was nearly sunk by a witness with a big mouth.

All this raises the question: do the benefits of witnesses outweigh the risks? On the one hand, the REAL ID Act requires us to submit reasonably available evidence, so if a witness is available and we do not bring her to court, the Immigration Judge (IJ) could use that to support a denial. On the other hand, it is difficult to hold the respondent responsible for a witness who fails to appear, and a well-supported case will likely be granted even when there is no witness.

Nevertheless, I tend to bring witnesses to court if I have them. For one thing (and perhaps this is naive), I feel a certain duty to present my case, for better or worse. If the IJ and the DHS attorney see that we are presenting everything we have, and being as open as possible, I believe that we are more likely to win the case. Also, I feel it makes me a more credible lawyer, and thus helps my clients over the long run. In addition (and again, possibly naively), I believe I can usually prepare the witness for cross-examination and anticipate questions that the DHS attorney might ask. When the respondent and her witness testify consistently about details of an event (especially when those details have not been presented previously in the written statements), it is strong evidence of their veracity. Finally, I tend to believe (maybe yet again naively) that my clients are telling me the truth when they describe the basis for their asylum claims. If the client is telling the truth, a well-prepared witness should only help the case. If the client is lying about his claim, and inconsistent testimony exposes the lie, the client really only has himself to blame.

Of course, even in a completely *bona fide* case, an ill-prepared or foolish witness can tank an asylum claim. That is why I am very wary of witnesses who can corroborate large portions of a respondent's story. The more the witness knows about a respondent's story, the more opportunities exist for the DHS attorney (or the IJ) to ask detailed questions about information not in the written statement and that we did not discuss during trial preparation. (The idea is to ask questions that the witnesses are not prepared for, and then compare the answers to make sure the testimony is consistent.) Such questions can be confusing to witnesses who—despite repeated reminders not to do so—sometimes guess at the answers. A better witness is a person with first-hand knowledge of one small part of the case. Such a person is less likely to face a broad range of questions from the DHS attorney.

Despite the risks, I feel that a well-prepared witness can go a long way towards winning an asylum case. I can think of several cases that were won by credible witnesses. Each case is different, and there are good arguments for avoiding the risks inherent in using a witness. Despite the risks, I will continue to favor the use of witnesses in my cases.

Pleading the Fifth—or—When to Keep Your Mouth Shut

The Fifth Amendment to the U.S. Constitution states that a person cannot be compelled to testify against himself. In other words, judges cannot force a person to admit that he committed a crime. It's rare that one of my clients or witnesses needs to assert the protection of the Fifth Amendment in Immigration Court, but it happens now and again.

One such case involved an Eritrean who fled persecution in his country and made his way to the U.S. with the help of smugglers. His journey cost more than \$10,000.00, paid for by various relatives. One of the relatives came to court as a witness. During cross-examination of this witness, the trial attorney asked about sending money to my client to pay the smugglers. Not only is this a crime, but it is also a deportable offense (the witness was a lawful permanent resident).

I objected to the question on the basis that the witness was unrepresented, and if he testified about paying for a smuggler, his testimony could be used against him in a criminal prosecution (not to mention a removal proceeding). After my objection, the IJ instructed the witness about his rights under the Fifth Amendment and the witness chose to invoke his right against self-incrimination. Probably a smart move.

The situation raises a few issues. For one, what is the attorney's obligation to protect the witness? I certainly could have allowed the witness to answer DHS's question. The witness did

not know that he might face prosecution for helping his friend enter the U.S. illegally; nor did he know about his Fifth Amendment right. In this case, there was no conflict between my client's interests and the witness's, and so objecting was clearly the right thing to do. But what if the witness's testimony would have helped my client, but harmed the witness? Perhaps I would be obliged to allow the witness to testify in order to help my client—I have a duty to my client, but not to the witness. I suppose this points to the need for witnesses to have their own attorneys in court, but as a practical matter, I imagine that is pretty unlikely.

Another issue is the Immigration Judge's obligation in this situation. A quick review of the [Immigration Judge Benchbook](#) does not reveal any helpful guidance. The [Ethics and Professional Guidelines](#) are little better, though they do advise the IJ to "act in a professional manner towards all...witnesses." Based on this, one could argue that the IJ should inform a witness when he is entering dangerous territory. To the extent that IJs are not obligated to notify witnesses of potentially self-incriminating testimony, it seems to me that the Executive Office for Immigration Review (the office that oversees the Immigration Courts) should create some guidance on this point to protect witnesses in court.

Finally, does the DHS attorney have any obligation to the non-citizen? The only other time a Fifth Amendment issue came up in one of my cases, I was questioning a witness and the DHS attorney pointed out that the witness's answer might incriminate him (and no, I was not purposely out to get the witness; I didn't realize that my question had potentially dangerous consequences). DHS attorneys represent the government and should act justly. However, sometimes there are good reasons to question a witness about issues that might incriminate him. DHS attorneys need to balance their obligation to do justice with the need for information in the case. I would argue that DHS attorneys should warn witnesses when they are asking questions that might incriminate them, but my guess is, not all DHS attorneys would agree with me.

As for my case, the Respondent was granted relief under the Torture Convention (a result we were not thrilled with, but it beats a denial) and the witness did not incriminate himself. I guess that is mostly a happy ending.

Closing Argument

Sometimes a good closing argument can win an asylum case. For example, I once represented a woman from Ethiopia who had been arrested a few times in her country and faced persecution in prison. In many ways, it was a standard-issue case—the type of case that cynical judges and DHS attorneys tend not to believe. And the case was not going well—the DHS attorney had raised some legitimate questions about the plausibility of the woman's story. After her testimony, the DHS attorney and I spoke during a brief recess. We both agreed that the IJ was leaning heavily towards a denial based on implausibilities.

Closing arguments are not always my strong suit, but that day, I gave an argument that did the trick. The Immigration Judge (IJ) listened to what I said, and he granted the case.

Throughout my career, I've been fairly indifferent to closing arguments. At least one judge I practice before does not allow them, and I've generally felt that closing arguments rarely make a difference. Over the years, though, I've come to believe that once in a while, a good closing can persuade the judge, and there are a few techniques that I've found to be effective.

First and foremost, a good closing argument should address the weakest parts of your case—it is crucial not to ignore or hide from the weak points of the case. Rather, these points must be confronted directly. As your lawyer listens to the questions of the DHS attorney and the IJ, he

should gain a pretty good understanding of what they perceive as the weak points in the case. The lawyer needs to mitigate these weaknesses and explain to the IJ why they should not sink the case. For example, in my case, the IJ questioned the applicant about how her husband could work for the government and, at the same time, join an opposition political party. Using record evidence (in this instance, the State Department Country Report), I argued that several well-known opposition leaders worked for the Ethiopian government. My client also misspoke during cross-exam and gave the wrong date for her husband's arrest. I mentioned her error and pointed out that she gave the correct date during direct examination. I also noted that she quickly corrected her mistake on cross, and that this was the only inconsistency in her testimony. Of course, to effectively address the weak parts of your case, your lawyer needs to pay close attention to the IJ and the DHS attorney. Attorneys generally cannot prepare the closing in advance; it will be shaped by the testimony and questions at trial.

Second, a good closing should remind the IJ about the legal standard and show how the applicant meets that standard. In my case, the client was unable to get some evidence that the IJ wanted to see. I reminded the IJ that under the REAL ID Act, my client was only required to obtain evidence that was "reasonably available." I then explained why the missing evidence was unavailable.

Finally, your lawyer should discuss the strong points of your case. This is probably the most obvious thing to do during closing, but it is also—in my opinion—the least important. Usually, the strong points of the case are apparent. Also, asylum cases that are denied tend to be denied for lack of credibility or because the applicant does not meet the legal requirements for asylum. Findings of incredibility or ineligibility are based on the weak parts of the case. Once a client is found not credible, the strong parts of the case become irrelevant (who cares if you say you were tortured in prison if the IJ has found your testimony not credible?). That said, it is a good idea to remind the IJ about the strongest parts of your client's case.

Well, those are some thoughts on closing arguments. I still believe that in most cases, they do not make much difference. But after my experience with my Ethiopian case, I am convinced that sometimes they can turn a denial into a grant.

New Immigration Court Statistics: The Good, the Bad, and the Unknown

The latest [data](#) on asylum grant rates in Immigration Court are out, and as expected, the news is not great. Overall asylum grant rates in court continued to decline in FY2019, but the news is not all bad. Courts adjudicated a record number of asylum cases that year: 67,406, up from 42,224 in FY2018, and 19,779 in FY2015. Many cases are still being granted. Indeed, even though grant rates are down, in absolute numbers, more asylum cases are being approved than ever (this is because the total number of asylum cases adjudicated is way up). Also, the percentage of applicants represented by attorneys continues to climb (slowly). Here, we'll take a look at the newest data and what it means for asylum applicants.

Let's start with the bad news (so no one can accuse me of being an optimist). In FY2019, 69% of asylum seekers were denied asylum or other relief in Immigration Court. This continues a negative trend that began in FY2012, when the overall denial rate was at an all-time low—only about 42% of asylum applicants were denied in that glorious year. Since then, denial rates have been steadily climbing. In FY2018, the overall denial rate was 65%. Despite the general negative trend, if we break down the reasons behind the high denial rate, perhaps we can find a silver lining.

One factor affecting the overall denial rate was the large number of decisions for cases where the applicant was not represented by an attorney. For unrepresented applicants, the denial rate was 84%. Interestingly, unrepresented cases move much more quickly than represented cases: 45.3% of unrepresented cases that started in FY2019 were resolved in FY2019. In contrast, only 9.7% of represented cases that began in FY2019 have been decided. I suspect that many of the unrepresented cases are for detained applicants, as such cases tend to go much faster than non-detained cases (since the government does not like to pay for incarceration). Also, it may be that some unrepresented applicants who are recent arrivals in the U.S. have their cases adjudicated on an expedited basis.

Another major factor affecting denial rates is country of origin. Four of the top five source countries for asylum seekers are El Salvador, Guatemala, Mexico, and Honduras. Together, these countries represented about 22% of all asylum cases decided in Immigration Court in FY2019. But for various reasons (harsh U.S. laws, difficulty proving nexus), these countries tend to have higher-than-average asylum denial rates—in the range of 80% denials. So if you factor out these four countries, the overall denial rate would be lower. (If you are from one of these countries, it is very helpful to talk to a lawyer and think through the most effective way to present your case.) You can look up the success rate for people from your country at the [TRAC website](#) (this data can be broken down by court, but not by individual judge).

Other factors that contribute to the high denial rate include detained cases and one-year-bar cases, which are both harder to win than non-detained cases and cases filed on time. A final—and unexpected—factor in the high denial rate is the government shut-down of January 2019, after Congress could not agree on a budget. During that period, only detained cases were adjudicated, and since such cases are more difficult to win, the denial rate during the shutdown shot up to nearly 75%. This in turn pushed up the overall denial rate for the year.

For asylum seekers who are wondering about the likelihood of success in court, all these variables must be considered. If you are represented by an attorney, if you are not from Central America or Mexico, if you are not detained, and if you file your case on time, the overall asylum denial rate should be significantly better than 69%. So I guess that is good news, sort of.

But of course, overall denial rates are of little consequence given that grant rates vary by judge (sometimes quite dramatically). You can find the name of your [Immigration Judge](#) (IJ) online. You can also find the judge's name by calling 800-898-7180. When the machine answers, follow the instructions and enter your Alien number. You can then press "1" and hear your next court date and—hopefully—the name of your IJ. If your IJ is not listed in the system, it may mean that no one is yet assigned to the case, but you can double check by calling the [Immigration Court](#) directly and asking the receptionist whether your case has been assigned to a judge. Once you know your judge's name, you can find his or her asylum denial rate at the [TRAC website](#) (for new judges, there may be no data available).

A few points about the individual IJ data: first, it is probably best to look at the most current denial rate, since recent changes in the law have made it more difficult for asylum seekers to win their cases and may have affected the percentage of cases judges approve. Thus, the older data may be less relevant to a case today. Second, as we discussed, representation rates and country of origin affect overall grant rates. If you scroll to the bottom of the IJ's page, you can get some idea of the representation rate before that judge, as well as the source countries for asylum seekers that the judge sees. If the IJ adjudicates many unrepresented cases, and/or many cases from Central America and Mexico, this may increase that IJ's denial rate. Finally, some IJs decide large numbers of detained cases and this would also negatively affect the judge's grant

rate (I do not know of any published data listing the percentage of detained cases decided by each judge).

Having said all this, I am not sure how useful it is. Unless you move, you have no control over who will be your judge. It is better, I think, to focus on what you can control: gathering evidence and witnesses, preparing your case, and finding a competent attorney. In my experience, most IJs are fair and will listen to your case. The biggest factor in determining whether you win is usually the case itself, and the most productive thing you can do is focus on the variables you can control and present the strongest case possible.

When the Judge Is a Jerk

The vast majority of Immigration Judges, DHS attorneys, Asylum Officers, and USCIS officers are professional and respectful. But what if they are not? What do you do then?

First off, I think it is important to understand that the bad officials are a small minority. I've been to many interviews and court hearings, and I've only ever made one complaint (against a USCIS officer at a Green Card interview). In other words, at least in my experience, government officials in immigration-world are generally pretty good.

Now admittedly, I am a lawyer and I know my clients' rights and what to expect from "the system." *Pro se* (unrepresented) applicants may not receive the same level of respect. They are easier to abuse, and it is more likely that decision-makers will cut corners in cases where the applicant is unable to protect herself.

That said, I am also involved with a *pro bono* project, where we review *pro se* (unrepresented) appeals cases at the Board of Immigration Appeals. I have seen the transcripts for scores of Immigration Court cases, and I can read how the Immigration Judges and the DHS attorneys treated unrepresented applicants. While it is fairly common to see judges and DHS attorneys moving quickly through a *pro se* hearing, it is also common to see these same officials taking extra time to ensure they are properly adjudicating the case. Once in a while, I see a case where the judge steamrolled the proceedings to reach a quick decision, but that is the exception. In most cases, even those that were adjudicated quickly, the outcome seems fair, given the available evidence and testimony. (One big caveat—many of these *pro se* cases are not well developed and are lacking in evidence. This is because the cases we review are for individuals who are detained. If these people had access to a lawyer and could better prepare their cases, many—even most—would achieve a better outcome.)

While outright hostility and rule breaking seem quite rare, adjudicators can sometimes be testy, intimidating or unfriendly. What to do if you have the bad luck of encountering a hostile or impolite decision-maker?

The first thing to do is to remain calm. The demeanor of the decision-maker is often unrelated to the outcome of the case, and we have seen examples where an unfriendly officer issues a positive decision. Remember, too, that this person is not someone you will likely ever encounter again in your life. All you want from him is a favorable decision. Even if your experience at the interview is unpleasant or frightening, that won't matter much if the case is granted. If you can keep your cool, answer all the questions, remain polite, and not lose your composure, you increase the likelihood of a good result. Getting angry or arguing with the decision-maker is unlikely to get you the decision you want.

Second, make your record. This means, if you have something that you think is important to

say, you should try to say it. In other words, don't let an aggressive officer or judge intimidate you into silence. Court hearings and some USCIS interviews are recorded. Asylum Officers are supposed to write down everything you say (and if they do not write down what you say, you can complain to a supervisor). Even if you are ultimately prevented from saying something, if you indicate that you had something else to say, that exchange might be reviewed on appeal (or by a supervisor) and could result in a new trial or interview.

In making your record, you can be explicit. You can say to the judge or officer, "I think you are treating me unfairly because you are not allowing me to talk about X." Say this politely and calmly, and it might soften the decision-maker's stance. Say it aggressively, and you will likely harden the decision-maker's position. I remember one case where the DHS attorney seemed (to me at least) to be taking a very aggressive position towards my asylum-seeker client. Finally, I simply asked (politely) why DHS was so opposed to asylum in the case. The attorney explained his motivation, which helped me better understand the case, and ultimately, the client received asylum.

Third, especially if you are unrepresented, you should write down what happened after the interview or court hearing. When things go wrong, it is important to try to understand what happened, and the more information you have, the better. If you write down what happened immediately, the information is more likely to be accurate. This will be useful if you later want someone else, like a lawyer, to review the case. It is also important if you need to make a formal complaint against the decision-maker.

Finally, if you feel you were subject to unfair treatment, you can make a complaint. Different forums have different procedures for complaining. For example, if you are in an interview with an Asylum Officer, you can ask to speak with a supervisor. You do this during the interview itself by telling the Asylum Officer that you would like to speak to a supervisor. For an Immigration Court case, you would typically [contact](#) the judge's supervisor (called the [Assistant Chief Immigration Judge](#)) after the court hearing, or—more typically—you would just file an appeal to the Board of Immigration Appeals.

Periodically, I receive decisions that I think are wrong or unfair, but my clients have never been subject to treatment by an Asylum Officer or Judge that warranted a complaint. I did make a complaint once about a USCIS officer. I spoke to the officer's supervisor immediately after the interview, and then sent a written complaint directly to the supervisor. I do not know whether the officer herself was informed of the complaint (I never saw her again), but I do know that my client's case was approved in short order.

Most Immigration Judges and Asylum Officers are professional and respectful, and so, hopefully, you will never encounter an official who is treating you unfairly. But if you do, keep calm, remain respectful, and politely make the points you need to make. This is the best way to maximize your chances for a positive decision.

There Is No Such Thing as a Tough Immigration Judge

An article in the [Sun Sentinel](#) (Broward County, Florida) got me thinking about what it means to be a "tough" Immigration Judge (IJ).

The article discusses Judge Rex. J. Ford, who celebrated (if that is the right word) 20 years on the bench in April 2013. According to the *Sun Sentinel*, "In 96 percent of the 2,057 proceedings Ford completed in fiscal 2011, he ordered the person removed from the country." Judge Ford told the paper: "I follow the book and I don't get reversed." The article also noted that Judge

Ford is a registered Republican who “garnered attention in 2008 with the release of a U.S. Justice Department report that named him as playing a role in recommending the appointment of immigration judges based on their political leanings.” Judge Ford denied that he considered party affiliation in advocating for specific job candidates.

First, I suppose the *Sun Sentinel* mentions that Judge Ford is a Republican because Republicans are considered “tougher” on immigration than Democrats (this, despite the fact that President Obama deported record numbers of illegal immigrants during each year of his Administration). I can’t help but think that this is an unfortunate stereotype—at least to some extent. You could probably write a book about this issue, but for now, I will just note that Judge Ford was appointed during the Clinton Administration. Here, I am more interested in how we decide which IJs are “tough.”

The most objective measure of an IJ’s “toughness” is his asylum denial rate, which can be found at [TRAC Immigration](#), a website affiliated with Syracuse University. The toughest judges are the ones with the highest denial rates. By this measure, Judge Ford is pretty tough. Of the 256 IJs examined by TRAC in 2013, only three deported people at a higher rate than Judge Ford. Does this mean that he is tough? Or does it mean that he doesn’t know what he is doing? Or something else?

Whenever a judge’s denial rate deviates significantly from the mean, it raises a red flag. In Judge Ford’s case, his denial rate of 96.5% is much higher than the *national* average of 63.1%. But I think it is more important to compare his denial rate with the local average. Why? Because local factors significantly impact denial rates. In Judge Ford’s case, the respondents he sees are all detained (non-citizens in Immigration Court are called “respondents”). Denial rates for detained asylum seekers are much higher than rates for non-detained applicants—in part because such applicants are less likely to be represented by attorneys and have a more difficult time gathering evidence—but mostly (I think) because such people often have no valid defense to removal, and so they tend to file weak (or frivolous) asylum claims as a last-ditch attempt to remain in the United States. Also, many detained non-citizens are ineligible for asylum due to criminal convictions or the one-year asylum bar. Comparing Judge Ford to his local colleagues, his denial rate does not seem particularly unusual. The denial rate for other IJs at Miami’s Krome Detention Facility (where Judge Ford is listed on the TRAC website) is 92.1%. So while Judge Ford is probably not an “easy” judge, if he were relocated to a different court, with a non-detained docket, I bet that he would grant a lot more cases.

Speaking more generally, where an IJ with a non-detained docket denies asylum cases at a significantly higher level than his local colleagues, I don’t see that as a sign of “toughness.” I see it as a failure to properly apply the law. The Immigration and Nationality Act, the Code of Federal Regulations, and various precedent decisions from the Board of Immigration Appeals and the federal courts provide guidance to IJs about how to make decisions. They set forth how to determine if an applicant is credible (consistent testimony and submission of reasonably available evidence). They define “persecution,” nexus, and the different protected grounds. In reaching a decision, an IJ is obliged to follow these laws; he is not permitted to “go with his gut.” In my experience, most IJs do their best to follow the law. Therefore, if one IJ stands out in terms of her denial rate (whether it is too high or too low), something could be wrong.

In deciding an asylum case, it is not the IJ’s job to be tough or easy; it is her job to analyze the facts in the context of the law. Where an IJ’s denial rate differs significantly from the local average, it may be a sign that the IJ is not following the law. In such a case, the IJ’s supervisors should determine what is happening and whether additional training or some other corrective

action is necessary.

Deportation Can Mean Death, Even When the Judge Gets It Right

A 2018 article in the [Washington Post](#) discussed the case of Santos Chirino, a Honduran man who sought asylum in the United States after gang members threatened him for testifying against one of their own. Immigration Judge Thomas Snow found that Mr. Chirino did not qualify for asylum or other relief and ordered him deported. Eight months after he returned home, Mr. Chirino was shot dead at a soccer match.

Mr. Chirino's is a sad and sympathetic case. But the fact is, his story tells us nothing about whether Judge Snow made the wrong decision. In fact, our asylum system is designed so that a certain percentage of those properly ordered deported will be harmed or killed in their home countries. Let me explain.

To win asylum, an applicant must demonstrate that he faces at least a 10% chance of "persecution" (serious harm or death) in the home country (this is a simplification, but for our purposes, it works just fine). Mathematically speaking, applicants who demonstrate a 9% chance of harm should be deported. If 100 such individuals are deported, we would expect nine of them to be persecuted upon their return.

As a conservative and cautious person, I do not like these odds. If you tell me that my airplane has a 9% of crashing, there's no way I'm getting on board. I'll take the bus, thank you very much.

The situation is even more grim for people—such as Mr. Chirino—who do not qualify for asylum, but who still fear harm. Some people are ineligible for asylum because they committed crimes; others, like Mr. Chirino, are barred because they failed to file within one year of arriving in the U.S. and failed to meet an exception to that rule; still others are blocked because the harm they face is not "on account of" a protected ground (race, religion, nationality, particular social group or political opinion). Such people can apply for other, lesser, forms of relief: Withholding of Removal and relief under the Convention Against Torture (CAT). But to qualify for protection under these laws, an applicant must demonstrate that she will "more likely than not" suffer persecution or torture in the home country. In other words, she must show that the likelihood of harm is greater than 50%.

This means that under our system, applicants for Withholding or CAT who demonstrate a 49% chance of being persecuted or tortured should properly be deported. Again, if 100 such people are deported, we can expect 49 of them to be harmed. This is not very comforting for asylum applicants or their families, or for people like Judge Snow who work in the system and are tasked with enforcing the law.

There's another side to this coin, however. That's the case where the adjudicator grants relief, and then the person commits a bad act inside the United States. Fortunately, such cases are rare, and it has been pretty well demonstrated that immigration to the United States has a [neutral or positive effect](#) on crime rates (this makes sense given the strict vetting process for immigrants). But there are glaring exceptions, and these tend to get significant attention. One [case](#) involved a Salvadoran teen accused by DHS of membership in MS-13. In June of 2018, an Immigration Judge found the evidence against him insufficient and ordered him released from custody. A month later, he helped commit a brutal murder. Once again, the Immigration Judge may have made the "right" decision, but the end result was tragic.

So in a sense, Immigration Judges are caught between the Charybdis of granting relief and the

Scylla of denying. But to me, that is not really their problem. We live in an imperfect world, and we have an imperfect asylum system. Judges operate within that system and hopefully follow the law to the best of their ability. If a particular asylum seeker has demonstrated a 9% chance of harm, the judge should deport that person. That is the law, and if we don't like the law, we should try to change it.

In Mr. Chirino's case, the tragedy is compounded by the fact that his denial was likely a result of failing to meet the nonsensical one-year filing deadline. Had he filed on time or met an exception to the one-year bar, his case would have been evaluated under an easier standard, and he might have been granted relief. Again, this is a problem with the law, not the judge, and it is up to us to change laws that we do not like.

Several years ago, I was speaking with Judge Snow, whom I consider one of the best and most thoughtful judges I know. I was thinking about applying to be an Immigration Judge, and I asked him how he handles hard cases, those where his sympathies lie with the applicant, but where relief was legally unavailable. He told me that in such cases, he does his best to follow the law, even when it is difficult. That is a judge's duty, and I have little doubt that that is what Judge Snow did in the case of Santos Chirino.

I suppose all this goes to show that what works for "the system" does not necessarily work for the individual. One could argue that Mr. Chirino was an innocent martyr of our asylum system. He and many others have died or been persecuted so that our humanitarian immigration system might exist. It is important for all of us to be aware of these sacrifices, and to work towards a more perfect and just system.

On Appeal at the BIA

If you lose your case in Immigration Court, you can appeal to the Board of Immigration Appeals (BIA). Conversely, if you win your case and the DHS attorney (the prosecutor) is unhappy with that outcome, DHS can appeal. Here, we'll talk about what happens during an appeal to the BIA.

Once the Immigration Judge (IJ) makes a decision, the parties have 30 days to file an appeal to the BIA. The IJ should indicate on his decision when the appeal is due, meaning the appeal must be *received* by the BIA on or before the due date. Otherwise, the IJ's decision is final and the case is over. Appeals are filed using [Form EOIR-26](#). At the time of this writing, the fee is currently \$110 (check should be made out to "United States Department of Justice") or you can request a [fee waiver](#).

The [EOIR-26](#) is the Notice of Appeal. On the form, you must indicate the reason(s) why you are appealing. Here, you have to be specific, as indicated in the form instructions. If not, the BIA could dismiss your appeal on that basis alone. When I file an EOIR-26, I list the reasons for the appeal and I also note that we "reserve the right to raise additional arguments in our brief." Next, you have to check a box indicating whether or not you want oral argument. The BIA rarely holds oral arguments (where the attorneys come before Board Members to discuss the case), and so whether you check yes or no probably won't make much difference. But if you have a burning desire to present your case in person, check "yes" and maybe you'll be invited to Falls Church to make your case in person. The EOIR-26 also requires you to indicate whether you will file a brief. A "brief" is a legal argument explaining why the IJ's decision should be overturned. While you can file the brief and the Notice of Appeal together, it is more common to file the brief later on. Be aware that if you check "yes" to the brief, you will be required to file a brief, and if you

fail to do so, your appeal will be dismissed.

The EOIR-26 should be mailed to the BIA at the address specified in the instructions. Include with the appeal a copy of the IJ's decision. If you have a lawyer, the lawyer should include an [EOIR-27](#), appearance of counsel form. You have to send a copy of the entire packet to the [DHS attorney's office](#) (the office of the "prosecutor" who litigated your case before the IJ).

After the EOIR-26 is filed, you will receive a receipt. You are allowed to remain in the United States while the appeal is pending. You can also renew your Employment Authorization Document (EAD) while the appeal is pending.

If you indicated on the EOIR-26 that you plan to file a brief, the BIA will send a briefing schedule. How long it takes to get the briefing schedule is hard to predict. For a detained case, it may take a month or two, but for a non-detained case, it probably takes anywhere from six to 18 months. Along with the briefing schedule, you will receive a transcript of the Immigration Court case. This document contains a written transcription of everything that was said at each appearance before the IJ. Depending on the case, it is usually very helpful to have the transcript, as oral statements made in court are often relevant to the argument you will make on appeal. For this reason, we do not submit a brief when we file the EOIR-26. We wait until we have the transcript and can then submit a more complete—and hopefully more convincing—argument.

Once the briefing schedule arrives, you have 21 days to file the brief. You can ask for an additional 21 days, but you have to articulate a reason why you need more time.

The [brief](#) is the heart of the appeal. In it, you explain why the IJ erred and ask the BIA to overrule the court's decision.

Some types of IJ decisions are easier to overturn than others. If the judge denied your case based on credibility (in other words, because the IJ thinks you lied about some aspect of your claim), the BIA will only overturn the decision if it is clearly erroneous. On the other hand, if the IJ found you credible, but determined that you did not meet the legal standard for asylum, the BIA reviews the decision "de novo," meaning that the Board will make its own decision and will not defer to the reasoning of the IJ. Put another way, the standard of review for factual errors is higher than for legal errors, and so in general, it is easier to win an appeal where you are arguing that the IJ made an error in interpreting the law rather than an error assessing credibility.

All that said, it is difficult to win *any* appeal at the BIA. That has always been the case, but the situation got worse in 2019, when the Trump Administration elevated six Immigration Judges known for their high denial rates to the Board (as of this writing, the Biden Administration has not moved to reverse these personnel changes). As a result, the Board is even more unlikely to overturn an IJ's negative decision. Nevertheless, it can sometimes happen, and if you are not satisfied with the results in Immigration Court, you have the right to appeal.

After you file the brief, the wait time for a decision is unpredictable. Cases where the non-citizen is detained are faster—maybe another one to three months (on top of the time you already waited before the briefing schedule was issued). Non-detained cases are much slower and can take anywhere from six months to a year or more.

Finally, you will receive a decision. Typically, either the BIA dismisses the appeal, meaning that the IJ's decision stands, or remands the case back to the judge to remedy any errors and correct the decision (and hopefully grant relief, but this is not guaranteed and varies by case).

If you do not like the BIA's decision, you can file a petition for review to the [federal appeals court](#) with jurisdiction over your case. Filing such a petition does not stop ICE from deporting you, though you can (and should) ask the federal court to issue an order "staying" (preventing) your removal while the federal appeal is pending. Such cases are usually difficult to win, and

they are procedurally complicated. From the federal appeals court, the next—and final—step is the United States Supreme Court. Very few cases reach that level, and so usually if the BIA is not the end of the road, the federal appeals court is.

Unfortunately, the entire immigration system is legally complex, and that is particularly true of BIA cases, where legal arguments may not be apparent to a non-lawyer. If you have a case before the Board, your best bet is to find a decent lawyer to help you. You can learn more about the whole process in the [BIA Practice Manual](#). Despite all the difficulties, it is still possible to win at the BIA, and if you are not satisfied with the IJ's decision, you can appeal and seek a better result.

Chapter 11: Careers and Volunteers

Letter to a Young Immigration Lawyer

One of the perks of working in an area of law (asylum) that interests law students and young lawyers is that I periodically get to meet people seeking advice about starting a practice or finding a job doing asylum cases. It's never easy to advise people about their careers, but there are a few pieces of wisdom I've picked up over the years that I will try to pass on. So for what it's worth, here are some thoughts for up-and-coming immigration lawyers—

You can do it: This one sounds trite, so I probably should not have put it first, but I think it is the most important piece of advice I can give. It may seem difficult (or impossible) to get started in the field of asylum law, but people who persist almost always succeed. In my case, I could not find the job I wanted, so I worked at another job for a few years, put most of my income towards paying off my student loans, and then opened my own practice. I kept expecting it to fail, but so far, I'm still here. And once you get your first job in the field, it is easier to move around. I've seen many friends move between public interest jobs, private firms, academia, and the government. In other words, once you're in, you're in.

Experience in the field prior to and during law school is more important than grades, law school rankings or law journal: If you are thinking of a career in asylum law, try to gain as much experience as possible while in law school. There are many opportunities to volunteer, including at the Immigration Court or DHS (the prosecutor's office), for non-profits, and even for private attorneys. Also, publishing in law school journals or other journals (or writing a blog!) is a good way to get some experience and attention.

Try to get a clerkship: A clerkship or an internship with a court is a great way to learn how judges decide cases. And if you know what judges want, it will help you throughout your career. I clerked for the Third Circuit in Philadelphia (greatest city on Earth) and for the Immigration Court in Arlington, Virginia. Both jobs taught me a lot and made me a better lawyer.

Volunteer: One way to get your foot in the door is to volunteer with an organization that represents asylum seekers. There are many, and they are often in need of free labor. Volunteering for one of these organizations will allow you to meet people in the field, learn about paying job opportunities, and learn the skills needed to effectively represent people in court and at the asylum office. I know several people whose volunteer positions led to full time employment. I would suggest that you think strategically about where you volunteer—some organizations are better than others for purposes of networking, learning the ropes, and getting hired.

Spanish or other languages: Maybe you've heard this joke—What do you call someone who speaks two languages? Bi-lingual. What do you call someone who speaks three languages? Tri-lingual. What do you call someone who speaks one language? American. While we Americans are not known for our language aptitude, the fact is, if you speak a second (or third or fourth) language, it will help you in your asylum career. The most useful language in this regard is Spanish, but the ability to speak any additional language will make you more desirable as an

employee.

Travel: Though the coronavirus has put a crimp in many people's travel plans, if you have the opportunity to travel or live overseas, it will help you understand your clients and their experiences. Also, since most asylum advocates are themselves interested in international affairs and learning about other countries, having your own travel experiences might help you bond with others in the field, including potential employers.

Keep salary expectations realistic: Your clients are refugees for Pete's sake.

Consider opening your own practice: Starting a practice of your own may seem daunting, but it really is doable. In fact, most private immigration attorneys are solo or work for small firms. There is a lot of support available from bar associations, organizations (like AILA, the American Immigration Lawyers Association), and other attorneys. In fact, many bar associations have a person dedicated to helping lawyers start law firms. Call your bar association and ask about the resources they can offer you.

If you are thinking about a career in immigration law and asylum, I hope you will be encouraged to give it a go. It's a rewarding area of law, where you will meet interesting people and have an opportunity to make a real difference in their lives.

How Can I Help?

People sometimes ask me what they can do to help asylum seekers, refugees, and immigrants.

In fact, there are many ways to help, depending on your interests and abilities. Here, we'll discuss some ideas for how you can assist migrants hoping to make a new life in America.

Tell your story: We live in a terribly polarized political environment. Having a conversation with someone who disagrees with you—let alone changing their mind—can be challenging. But asylum seekers and refugees have a secret weapon in this regard: their stories. Most people who flee persecution have amazing stories of survival and gratitude to the United States. Hearing those stories—even for people who generally oppose immigration—can have a powerful effect. If you are an asylee, perhaps you would consider reaching out to a religious or civic organization, or a school, to tell your story. If you are an American who belongs to such a group, you might consider inviting a refugee to speak to your organization. Many immigrant advocacy groups have speakers available to tell their stories.

To effectively communicate with people who may be skeptical of immigration, it is important to meet them where they are, on their turf; not ours. Also, I think it is less effective to talk politics than it is to simply tell personal narratives. Not everyone will be persuaded, of course, but respectfully engaging with immigration skeptics, telling personal stories, and expressing gratitude for what America has to offer is, I think, the most effective way to change minds.

Volunteer with a non-profit: There are plenty of [non-profit organizations](#) that assist refugees, asylum seekers, and immigrants, and they need plenty of help. Such organizations can

be found throughout the U.S., and they provide all sorts of opportunities to volunteer: teach English or other skills, spend time assisting organizations or individual immigrants, help with job searches, resumes or job counseling. People with specialized skills can provide specialized assistance. For example, those lucky enough to be lawyers (gag!) can take a case *pro bono*, or—for a less burdensome commitment—attend a group event where you assist with immigration forms. Some asylum seekers need forensic medical exams or psychological reports for their cases and could use expert assistance. Others need mental health therapy, or assistance navigating the department of motor vehicles, the Social Security Office or school or university bureaucracies. Still others need help with housing or public benefits. Many people who are new to our country are lost, and someone familiar with “the system” can provide invaluable guidance.

Also, many faith-based institutions, such as churches, mosques, and synagogues, have programs to assist non-citizens. My synagogue, for example, has helped refugee families from Syria and Afghanistan to resettle in the Washington, DC area. Synagogue volunteers assist with babysitting and setting up the new apartments. Some religious institutions are involved in the [sanctuary movement](#), offering living space to non-citizens to help shield them from deportation (ICE generally does not enter churches to detain people). Perhaps you could encourage your church or mosque to consider joining this movement.

Get involved politically: There are numerous opportunities here too, and not just at the federal level. A lot has been happening at the local and state levels (where it is often easier to have an impact). One group that supports pro-immigrant candidates is [Immigrants List](#). A group that assists with impact litigation and public awareness is the [American Immigration Council](#). Many [local non-profits](#) are also involved in advocacy for immigrants.

Reaching out to politicians can have an impact as well. During the Obama Administration, opponents of immigration famously mailed hundreds of bricks to Congress. This was a not-so-subtle message to “build a wall.” If the other side can advocate effectively, we can too. Congress needs to know that many Americans support our humanitarian immigration system. Unless we reach out to them, our representatives will only hear half the story. You can contact your [Senators](#) and your [Representatives](#) to share your opinion. You can also contact leaders in the different [state legislatures](#). You don’t have to be a U.S. citizen to contact your representative. Anyone can do it.

Contact the media: There are many misconceptions about asylum seekers and refugees in the news. If you see an article or program that misrepresents such people, you can contact the journalists and let them know (contact information is often available on the journalist’s website). I think it is especially powerful for refugees themselves to engage in such advocacy. It is very difficult for stereotypes to survive in the face of individual truths, and so when asylum seekers and refugees tell their stories, it can be quite influential. Also, if you ask in advance, journalists will usually agree to keep identity information confidential, so you can talk to them without fear that your personal information will be made public.

Take to the streets: I’m of two minds about public protests. Sometimes, I think they are useless; other times, I think they are transformative. Of course, there are all sorts of protests from mass rallies to performance art. Such events can be inspiring and energizing for the people involved. They can also help coalesce disparate people into a unified group. Such events also send a message—to politicians and to the American public.

Hire an immigrant: It's never been easy to get a job when you're new to America. So if you have the ability to employ someone, why not consider an immigrant?

What if the intended employee does not have work authorization? Some people—such as people who have been granted asylum—are eligible to work even without the employment authorization document (the EAD card). It is obviously not legal to employ someone who is not authorized to work, but for many asylum seekers, who often wait months for their EAD, the only way to survive is to work without permission. Such people are frequently mistreated by employers. Hiring such a person comes with a risk to the employer as well as to the employee, and as a lawyer, I can't advocate for breaking the law. However, at least in my opinion, employing such people, paying them fairly, and treating them decently is an act of resistance against an immoral system.

Talk to people who disagree with you: Advocates for immigrants have struggled to convince the American public about the rightness of our cause. Speaking respectfully with people, listening empathetically and asking questions, and explaining a pro-immigrant viewpoint will not win everyone over to our side. But it might win over some. And even if we talk to people who disagree with us, and they are not swayed, a respectful conversation can help open doors later on. Anti-immigrant views seem to thrive in our current divisive environment. Perhaps if we work to tone things down and help move our country towards a more rational debate, it will also help immigrants. This needs to be done in big ways, but it also needs to be done in small ways, one conversation at a time. If you want to educate yourself about immigration issues, a good (pro-immigrant) source is the [American Immigration Lawyers Association](#), which has policy statements on various issues.

There is no magic solution to improving the situation of non-citizens in our country. But by supporting immigrants, in big ways and small, it is possible for each one of us to make a difference.

Chapter 12: Fixing Asylum

How the Biden Administration Can Fix the Asylum System

There's always a bit of whiplash when a new President takes office, particularly when the new President is from a different party as his predecessor. Policies and priorities change, hundreds of new political appointees come in, and we have to adjust to a new leadership style. In terms of Presidential transitions, nothing compares to the Trump-Biden changeover. Donald Trump was probably the most virulently (and dishonestly) anti-immigrant President in modern history. Joe Biden seems likely to be the most pro-immigrant President in recent memory (though on this point, the jury is still out). It's a dramatic shift, and we can expect lots of changes. And lots of resistance to those changes.

Here, I will discuss some ideas for reforming USCIS, the Asylum Offices, and the Immigration Courts. There is a lot of damage to repair. There are also many affirmative changes that are needed and that are long overdue. Let's discuss some ways that the Biden Administration can improve our nation's immigration system.

Part 1: Politics

Before we discuss substantive asylum reform, we need to talk politics, since any reform will take place in the context of the current political crisis where, even in the best case, millions of Americans will view President Biden's Administration as illegitimate and where many Republican leaders will be vying to outdo each other in obstructing the President's agenda. The divisive political climate will potentially limit Mr. Biden's ability to make changes, and in turn, any changes he manages to implement could lead to further division. This begs the question: should the new Administration follow the Trump game plan, and do all within its power to achieve its goals? Or is it better to focus on areas of bipartisan agreement (to the extent we can find any)?

I'm of two minds about this dilemma. On the one hand, non-citizens in our country have been treated unfairly and cruelly. They have been lied about (and to), terrorized, exploited, and in many cases, forced to wait for years for status to which they are legally entitled. Also, when President Obama tried to take a middle road on immigration (remember when he was referred to as the "Deporter-in-Chief"?), it did nothing to move the other side towards compromise. Perhaps that's because there is a stark [partisan divide](#) over illegal immigration: only 23% of Democrats view it as a "big problem," while 67% of Republicans see it that way. So if compromise is impossible, maybe the Biden Administration's better approach is to implement whatever reforms it can manage regardless of the political consequences.

On the other hand, what is most needed now is to try to heal the divisions in our nation. Pushing through partisan immigration reforms (legislatively or administratively) will likely exacerbate the divide. Further, if President Biden overplays his hand on immigration, it could result in a backlash that advantages Republicans and other immigration restrictionists. Of course, the same predicament exists for other issues—like climate change—and the idea of waiting for a broader consensus when action is needed imminently makes little sense. Immigrants and asylum seekers urgently need relief and protection. So, while ideally it is best to continue reaching out to moderate Republicans and to continue working to educate the public about immigration, it is

important for the Biden Administration to start enacting changes immediately.

That said, the Biden Administration needs to move with caution. Some [immigration issues](#)—such as DACA and (surprisingly) refugee resettlement—have broader bipartisan support than others, such as border security and deporting people who are here illegally. Certainly, the new Administration can focus on areas where it will encounter less resistance and face fewer negative repercussions.

The proposals I will discuss below fall on the more bipartisan side of the spectrum, and cover ideas for improving efficiency and fairness at the Asylum Office, the Immigration Court, and at USCIS.

In contrast to Mr. Biden's [pre-election policy agenda](#), my focus will not be the Southern border. Protecting asylum seekers at the border is a more divisive issue than most other areas of immigration law, and I believe that advocates and policymakers need to lay a political foundation before enacting successful change there. Unless we build a more bipartisan consensus about who is eligible for asylum, we risk a severe [backlash](#) by easing restrictions at the Southern border. Indeed, one could argue that President Trump was elected largely as a reaction against perceived porous borders.

While the politics of border reform is a crucial concern, the situation along the U.S.-Mexico border is clearly untenable—people are dying and something needs to be done. How the Biden Administration will navigate that political minefield, I do not know, but I worry that the political capital required for improving conditions at the border will make it more difficult to enact needed changes in other, less politically charged regions of the immigration system, such as USCIS, the Asylum Office, and the Immigration Court. In any event, those are the main areas that we will discuss below.

Despite the difficulties, President Trump's departure has opened up some space to improve the situation for non-citizens: by reversing many of his Administration's damaging immigration policies, but also—hopefully—by bringing long-needed improvements to the immigration system. The trick will be to balance that change with the current political realities, to minimize the inevitable counter-reaction, and to avoid doing further damage to the cohesion of our nation.

Part 2: USCIS Forms

Here's a point that should be self-evidence but isn't: bureaucracy exists to facilitate the implementation of the law. Congress passes a law, and then government agencies create a system of policies and procedures to put that law into effect. In principle, this system should be easy to use and efficient, and should allow people to obtain the benefits to which they are entitled. In other words, it should be the exact opposite of what we have with the USCIS.

There are many problems with the agency that adjudicates immigration benefits (including asylum), but here, I want to focus on one area of particular concern: [USCIS forms](#). USCIS forms are poorly designed, confusing, inconsistent, culturally insensitive, and inefficient. Here, we'll discuss these problems in a bit more detail, and I will make some suggestions for improvement.

Let's start with the most basic question on every USCIS form—the applicant's name. Almost every form has boxes for an applicant's first, middle, and last name. The problem is that naming convention vary widely, depending on where you are from. Many cultures do not have a first-middle-last name format, and so the USCIS question does not make much sense. One solution might be to ask the question in a more specific way: "Write your name as it appears on your passport." Of course, not everyone has a passport, so maybe a second question can ask: "Write your name as it appears on your birth certificate or other government-issued identity document."

In addition to these iterations, the name question would also need to ask about “all other names used” (as many USCIS forms currently do). The confusion surrounding this very basic question—What is your name?—illustrates the difficulty of creating one-size-fits-all forms.

Another problem arises with regard to addresses and places of employment. One issue here is that address formats vary widely by country, and the forms generally only allow for addresses in the format that we use in the United States. Another issue is that different forms request address and employment histories in different ways. So for example, the I-589 form (application for asylum) allows you to list one address or one job per line, so that your address and job histories fit onto one page (with room to spare). The I-485 (application for permanent residency), by contrast, requires this information in a different format, so that less information takes up much more space. The N-400 (application for citizenship) requests the same information in a third format. Maybe this is a minor quibble, but the inconsistencies between the various forms is confusing, and it is not confined only to the applicant’s address and work histories.

One area where inter-form differences sometimes create problems is the issue of arrest history. Different forms ask about this in different ways. Sometimes, USCIS wants information about all arrests. Other times, they want only information about criminal arrests or convictions. In some questions, USCIS wants to know about arrests anywhere in the world; other times, they want only arrests that occurred in the United States. Indeed, if you look at the main forms a successful asylum applicant will complete over the course of their time with USCIS, there are probably dozens of questions about criminal activity, and those questions are inconsistent between forms, and—in many cases—confusing, even for someone trained in the law.

Speaking of confusing questions, if you look at the lists of questions on the I-485 and the N-400, you will see scores of yes/no questions about all sorts of activities. Some of these questions are not amenable to a yes-or-no answer. Others (many others) are poorly written and difficult to understand. In many cases, the two forms ask similar questions using different language. All this can easily trip up an applicant and can lead to unintentional inconsistencies where there really are none.

Another problem is the large number of yes-or-no questions on many forms (the I-485, for example, has over 100 yes/no questions). These questions relate to everything from criminal and immigration violations, to national security, to persecution of others, to membership in totalitarian political parties, to prostitution and illegal gambling. Most people check almost all the boxes “no,” but periodically, they may need to check “yes” (for questions such as “have you ever been denied a visa” or “have you ever worked without authorization,” for example). Given the vast number of questions, the fact that almost all are “no,” and the fact that many of the questions are confusing, it is easy to slip up and miss a “yes” answer. This can lead to big trouble, including having your application denied.

These examples represent just a few of the problems with USCIS forms, and every immigration lawyer can cite many more. The short answer is that all USCIS forms need a major overhaul. This should be done with an eye towards making the forms shorter (the I-485 and the N-400 are each 20 pages long). The forms should be made consistent with each other in terms of format and the substance of questions asked. They should accommodate different naming and address conventions.

Also, USCIS needs to do something about the overwhelming number of yes/no questions. There are too many questions, many are difficult to understand or redundant (or both), and many are irrelevant (do we really need three questions about Nazi activity between 1933 and 1945?). The number of questions should be reduced and the questions themselves should be simplified so

that you don't need a law degree to understand what the heck USCIS is asking about.

One final point on forms: why are we still printing forms and mailing paper copies to the agency (to a plethora of different mailing addresses)? A limited number of forms can be filed [online](#), and USCIS should expand e-filing, so that all forms and evidence can be filed online. E-filing would also solve the problem of USCIS rejecting forms for simple mistakes or for not writing "N/A" in every empty box.

To reform its forms, USCIS needs help. It needs to hear from immigration advocates, immigrants, and other stakeholders. Forms should be more understandable and more able to accommodate cultural differences. Questions should be standardized across different forms, and the format of the forms should be made more consistent. All forms should be available for online filing.

Improving USCIS forms is long overdue. Fixing the forms will make USCIS more efficient, and will ultimately save everyone time, trouble, and money. The purpose of USCIS forms is to facilitate the application process and to help USCIS determine who is—and who is not—eligible for an immigration benefit. Clearer and more efficient forms will help move USCIS towards these goals.

Part 3: Asylum Office

As of "July 31, 2020, [USCIS](#) had 370,948 asylum applications, on behalf of 589,187 aliens, pending final adjudication." "Over 94% of these pending applications [about 348,691 cases] are awaiting an interview by an asylum officer." The remaining cases—approximately 22,257—have been interviewed and are waiting for a decision.

In terms of resources, the most recent [data](#) (from May 2019) indicates that there are 763 Asylum Officers and 148 supervisory officers. While most of these staff members were devoted to interviewing affirmative asylum seekers, "over 200 officers" were assigned to conduct credible fear interviews at the border (a credible fear interview or CFI is an initial evaluation of asylum eligibility). Assuming everything remains the same (meaning that there are about 563 officers available for affirmative cases) and assuming each officer conducts eight interviews per week, it would take about 15 months to get through the entire backlog—if no new cases enter the system.

Realistically, though, new cases are continuously being filed, Asylum Officers probably can't adjudicate eight cases per week for 52 weeks a year, and—given the mess at the Southern border and President Biden's plan to send more resources to that region—it is likely that many more than 200 officers will be assigned to CFIs (which will make them unavailable for "regular" affirmative asylum interviews). In short, even if the pandemic magically disappears, it seems unlikely that we can get through the backlog anytime soon. We are today facing the same problem that has dogged the asylum system since at least 2013: there are too many cases and not enough officers.

So what can be done?

Hire More Officers: One obvious solution is to hire more Asylum Officers. But this would cost money, and it is unclear whether USCIS has the means to pay for more officers or whether Congress would be willing to increase the agency's budget.

Even if there is no additional money available, there are steps Mr. Biden can take to improve the asylum system.

More Efficient Scheduling and Shorter Interviews: The data I found (pre-pandemic) shows that roughly 8% of asylum applicants are “no shows” for their interviews and another 15% cancel their interviews (what percentage of these are rescheduled, I do not know). This makes sense, given the long gap between filing for asylum and attending an interview: people leave the U.S. or find other ways to obtain status here; others fail to update their address and so never receive notice of the interview. To mitigate this problem, Asylum Offices schedule more interviews than they have the capacity to conduct, with the expectation that some applicants will not appear. This seems to me a huge waste of energy. Why not call applicants a few weeks in advance to determine whether they intend to appear for their interview? This should be done after the interview notice is mailed out, and that notice should indicate that the applicant will receive a call from the Asylum Office. Applicants who fail to respond to the phone call can be rescheduled and sent a warning letter by mail. Those who still do not respond can then be referred directly to Immigration Court. Where possible, the calls and notices should be in the applicant’s native language.

There are other benefits to calling applicants prior to the interview: They can be reminded to submit all evidence in advance and can be queried about what language they will speak at the interview. They can also be told to review the I-589 form and determine in advance what updates and corrections are needed. Better yet, the asylum interview notice can include a form to update the I-589, which is often submitted years before the interview. While not all applicants will be able to complete such a form on their own, many can, and this will save significant time at the interview.

Another way to save time at the interview would be to include a copy of the “bar” questions along with the interview notice. The “bar” questions determine whether a person is barred from receiving asylum (because they are criminals or terrorists, for example). Why not require applicants to review these questions ahead of time, and then certify at the interview that they read and understood each question? Most people will answer “no” to all the (many) bar questions, and if the officer has specific concerns, she can raise those at the interview.

Also, while we’re on the subject of bar questions, why do the officers need to ask these questions to children? I’ve seen officers question dependent children as young as three or four years old about whether they are terrorists. It’s just plain silly (though it can be entertaining). We would save a lot of time and trouble if parents could answer these questions for their minor children, or at least for children under a certain age—say 14 or 15.

LIFO vs. FIFO: Another issue related to scheduling is The Great LIFO-FIFO Debate—whether cases should be interviewed in the order received (first-in, first-out or FIFO) or whether the newest cases should receive priority (last-in, first-out or LIFO). All Asylum Offices are currently operating under the LIFO system. The logic is that interviewing new cases first will deter fraudulent asylum seekers, since they would not be guaranteed a years-long wait for their interview (during which time they can live and work in the U.S.). The [Asylum Division](#) believes LIFO is working, as there was a 30% drop in new filings after it was implemented. However, I hope they will revisit this finding. My sense is that any decrease in filings was unrelated to the LIFO policy and instead came about for other reasons, such as fewer people arriving in the U.S. due to stricter visa requirements.

Also, from the perspective of asylum seekers, LIFO is very unfair. Old cases are given the lowest priority, meaning many people will (seemingly) never get to the front of the line. These applicants are facing severe hardships, including separation from family and endless uncertainty. At a minimum, a certain percentage of officers should be assigned to work on backlog cases,

starting with the oldest. Better yet, we should return to FIFO and the now defunct Asylum Office Scheduling Bulletin (which gave some idea about when to expect an interview), so we will have a more orderly and predictable process for scheduling interviews.

Create Rules for Expediting: One final point about scheduling interviews: we need a more formal system for expediting cases. Currently, it is possible to expedite, but there really are no rules about who is eligible to expedite or about what constitutes a valid reason to expedite. The predictable result is that many people try to expedite, which wastes Asylum Office staff time and also makes it more difficult for the neediest people to expedite their cases. There should be a national policy with publicized criteria about who is eligible for expedition. In my personal opinion, the first priority should be people who are separated from their family members, especially minor children. For me, a distant second is a person with a documented mental or physical health issue. Until the Asylum Offices can expedite all the people in these two categories, I see no reason to allow for any other category of applicant to request expedited processing.

Premium Processing: A more radical idea to address the backlog is premium processing for asylum seekers. [Premium processing](#) already exists for several USCIS forms and allows an applicant to pay an additional fee (currently between \$1,500 and \$2,500) for faster processing of her case. Affirmative asylum seekers—in contrast to refugees—have paid their own way to the United States, and so presumably, many of them could afford an additional fee for premium processing. Also, while the idea of asylum seekers paying for their cases may seem unpalatable, the Trump Administration attempted—unsuccessfully in the end—to implement a non-waivable \$50 fee for all asylum applicants, and so the taboo of paying for humanitarian protection has already been broken. Thus, as I see it, there is no valid objection to implementing premium processing for asylum seekers, and—given the overwhelming humanitarian need—it is a solution whose time has come.

How would premium processing help? For those who pay, their cases would be interviewed more quickly. How quickly, I do not know, but premium processing for other USCIS forms is currently 15 days. I doubt that a similar time frame would be realistic for an asylum case, but perhaps 60 or 90 days would be achievable. Even those who cannot pay would benefit, as the infusion of money into the system would benefit all applicants. An added benefit from the government’s viewpoint would be that faster processing would—if we accept the LIFO logic—help discourage fraudulent applications. So premium processing is a win all around: for the applicants who pay, for those who do not pay, and for the U.S. Government.

Eliminate the Asylum Office: A final idea—perhaps the most radical of all—is to eliminate the Asylum Office altogether, at least for most cases. Under the current system, an applicant files an asylum case, and if he loses, his case is usually referred to Immigration Court where an Immigration Judge reviews the case de novo and issues a brand-new decision. As an advocate, I am grateful for a second chance to present my clients’ cases. But in terms of “the system,” this type of redundancy is not very efficient. One solution might be to shift all asylum cases where the applicant is out-of-status to the Immigration Court. Or maybe just leave vulnerable applicants—such as minors—at the Asylum Office. While this idea has been floating around for years, it is still unclear whether it would improve or reduce efficiency. In any event, given the current mess, nothing should be off the table, and the idea of (mostly) eliminating the Asylum Office might warrant further study.

For the sake of asylum seekers and their families, and for the integrity of our humanitarian immigration system, we need major changes to the affirmative asylum system. Perhaps some of these ideas can contribute to that effort.

Part 4: Immigration Court

There are currently about [1.3 million cases](#) pending before our nation's Immigration Courts (how many of these cases involve asylum, we do not know). The average wait time for a case is [849 days](#). What has caused this large backlog, and what can be done to alleviate the long waits in Immigration Court?

There are a number of reasons for the Immigration Court backlog. As with the Asylum Office, the basic reason is that there are too many cases and not enough Immigration Judges ("IJs") and support staff. But a significant aggravating factor is what [Judge Paul Wickham Schmidt](#) calls "aimless docket reshuffling" or ADR, which he defines as "arbitrarily or maliciously moving cases around without actually deciding them." In other words, different Administrations have different priorities, and when Administrations change (or change their priorities), cases get moved around in ways that do not result in their completion but do result in significant delay. The Obama Administration was responsible for its share of ADR, but the Trump Administration—with its decision to make every case a priority—turned ADR into high art. Other aggravating factors include increased resources for enforcement without a commensurate increase for the Immigration Courts and a significant influx of asylum seekers from Central America, which began in about 2012. One last factor is EOIR leadership (EOIR is the Executive Office for Immigration Review—the agency that oversees the Immigration Courts), which under the Trump Administration had been composed of partisan loyalists who lack the competencies needed to run a large organization.

So what can be done? Below are a few suggestions for improving the situation in our nation's Immigration Courts. Some would require Congressional action; others would not—

Article I Courts: The National Association of Immigration Judges and other advocacy groups have long supported the idea of making Immigration Courts into "[Article I](#)" courts. Article I of the U.S. Constitution gives Congress the power to create independent courts. Currently, Immigration Courts are part of the Department of Justice, which is subservient to the Attorney General and ultimately, the President. An Article I court would operate independently from the Executive Branch and would thus be less subject to political influence.

I must admit that I have been largely ambivalent about the Article I idea, since immigration and international relations are so inherently political. However, after four years of the Trump Administration's unprecedented politicization of the system, it is becoming increasingly clear that subjecting the Immigration Courts to the vagaries of our political process has contributed to the mess at EOIR. A more independent system would reduce aimless docket reshuffling and increase efficiency. IJs could better control their dockets, and there would be more certainty for litigants.

Prosecutorial Discretion: Given limited resources, we should be selective about who we try to deport. Criminals should receive priority over law-abiding non-citizens. Previously, with the consent of DHS (the prosecutor), IJs had the authority to "administratively close" cases that were low priority. That way, they could focus on more urgent matters. The Trump Administration eliminated this prosecutorial discretion and made everyone a priority for removal. And if

everyone is a priority, no one is a priority. It makes sense to use resources wisely and to set aside low-priority cases, and so I hope that the Biden Administration will restore prosecutorial discretion to help ease the burden on Immigration Judges and DHS.

Premium Processing: Certain applications before USCIS allow for premium processing. The applicant pays money to receive a faster decision (though not necessarily a better decision). Maybe EOIR could create some type of premium processing so that respondents in court can pay additional money to speed up their cases. The people who pay this fee would benefit the most, but the infusion of money into the system should benefit everyone.

Empower DHS: DHS attorneys are overworked and lack the resources necessary to properly do their jobs. Adding additional staff to the various DHS offices would allow those attorneys to review applications for relief in advance and—where appropriate—agree to relief. Even if only a small percentage of cases were removed from the mix, it would help free up space on the court’s docket. If this idea were combined with premium processing, a respondent could pay a fee to have DHS review her case (and DHS could use this money to hire more staff). Maybe DHS could even meet with the applicant to explore whether relief is appropriate, and if so, it could inform the IJ, who would then grant the relief without a hearing.

Pre-Master Calendar Hearings: Master Calendar Hearings (“MCHs”) are a huge waste of time for judges, DHS, applicants, and lawyers. Why not require any non-citizen who enters the system to attend a pre-MCH with a member of the court staff (not an IJ)? The pre-MCHs could be arranged by language group, so that everyone attending speaks the same language and the staff member could be fluent in that language (or have an interpreter). At the pre-MCH, the non-citizens would watch a video in their own language explaining the system and their rights (basically what the IJ repeats to pro se respondents 31 times each MCH). The staff member could answer basic questions and encourage the pro se respondents to find lawyers (basically what the IJ does 31 times each MCH). Respondents who will not use a lawyer can be scheduled for an in-person MCH, like what we have now. Those who say they will hire a lawyer will be given a deadline for the lawyer to enter her appearance. If the deadline passes, the respondent will need to attend an in-person MCH.

e-Filing and e-Master Calendar Hearings: Federal courts across the United States require electronic filing, and Immigration Courts have been trying to implement a similar system for almost two decades. Once an attorney enters his appearance, he should be able to go on-line and plead to the allegations and charges in the Notice to Appear (the charging document in Immigration Court). He should also be able to indicate the relief sought and submit applications. If there is some reason that the lawyer needs to see the IJ, he can request to appear at an MCH. But for the large majority of cases, all the pleadings and requests for relief could be done on-line. An easy-to-use, workable electronic system would avoid MCHs and save significant time and money for the courts, DHS, and respondents.

Impose Costs: Another idea for infusing money into the system would be to impose costs. I am not a big fan of this idea, but it might be worth exploring. Criminal and civil courts routinely impose costs and fines, so maybe Immigration Courts should too. There generally is only one reason that a person would have a case before an Immigration Judge—he violated the immigration law. Maybe the violation wasn’t his fault (in the case of a referred asylum seeker,

for example), and so a fine may not be warranted, but the IJ can make that determination. The Immigration Court system is expensive, and there is an argument that people who are in the system because they violated the law should help pay for it. If this idea were implemented, one way to ease the burden would be to spread out the cost over time and make the payment a condition for maintaining status.

Provide Legal Counsel: A final idea is to provide attorneys to respondents in Immigration Court. On its face, this might seem like a prohibitively costly reform. However, when respondents in court have attorneys, their cases tend to be faster and more efficient. This idea might be particularly effective when combined with other reforms, such as empowering DHS (as discussed above). Whether the net result will cost money or save money, I do not know, but the idea certainly warrants more study or perhaps a pilot program to test whether the benefits of providing attorneys is worth the cost.

There is a lot of work to be done to start addressing the mess that is the Immigration Court system. Hopefully, EOIR can implement creative and compassionate policies to increase due process and decrease the backlog.

Part 5: Benefits

There are different types of benefits available to people with a pending asylum case and to people who have been granted asylum. Here we will discuss these benefits and how they might be improved. Let's start with the benefits available to people who have a pending asylum case—

Employment Authorization Document (EAD): The law imposes a waiting period of 180 days before an asylum seeker is eligible for an EAD. See INA § 208(d)(2). Under the old rules, asylum applicants could apply for an EAD 150 days after filing for asylum, on the (optimistic) theory that it would take at least 30 days to process the application and that the EAD would not be issued until 180 days had passed. The Trump Administration changed the waiting period to one year, but that change was partially blocked by a federal court. And so—as long as you jump through certain hoops—it [remains possible](#) to apply for an EAD 150 days after filing for asylum. Most observers expect the Biden Administration to return to the old 150-day rule, which it can do by issuing new regulations. But perhaps more can be done.

To shorten the 180-day waiting period, Congress would have to change the law, which seems unlikely. This rule was created in order to reduce fraud. The theory being that if we make it too easy or quick to get an EAD, more people will file for asylum solely to get a work permit. I suspect that this is true. Nevertheless, the waiting period has the effect of punishing everyone, and legitimate asylum seekers are suffering because they can't earn a living while they wait for their cases. The problem is compounded by the long delays for USCIS to process EAD applications (under the rules, it should take only 30 days to get an EAD, but wait times of five, six, seven months or more have become common). So what can be done?

One easy solution is to allow asylum seekers to start processing their EADs earlier. The old (pre-Trump) regulations allowed applicants to file for their EADs 30 days before the 180-day waiting period had ended. Why not make it 60 days or 90 days? Better yet, why not start the EAD process as soon as someone files for asylum? Under the EAD rules, if a person deliberately delays their case (by missing an appointment, for example), they can become ineligible for an EAD. That rule could still apply, but there is no good reason to force asylum seekers to apply

separately for an EAD. The process can start automatically when the person files for asylum.

The Trump Administration made the EAD process more difficult in other ways as well, such as limiting or blocking EADs for people who entered the U.S. illegally, people who missed the one-year asylum filing deadline, and people with certain criminal convictions. These limitations should be removed, and we should go back to the pre-Trump EAD process, which at least allowed asylum applicants to obtain permission to work without all the bureaucratic barriers.

Advance Parole (AP): To travel and return to the U.S. while an affirmative asylum case is pending, you need Advance Parole (people with a defensive asylum case—in Immigration Court—cannot travel and return, even with AP). The procedure to obtain AP is slow, unpredictable, and expensive. Worse, USCIS can deny an application for AP if the asylum seeker does not provide an adequate “humanitarian” reason for the travel. This is all ridiculous. Given that many asylum cases stretch for years, asylum seekers sometimes need to travel. The process for obtaining AP should be simplified and made more predictable.

Improving the EAD and AP processes would make the long wait for asylum more bearable. Next, let’s discuss the [benefits](#) available to people who have been granted asylum—

I-730 Process: After an applicant wins asylum, she is eligible to bring her spouse and minor unmarried children to the United States. However, this process—which used to be relatively quick—now takes one or two years, or more. Asylee dependents should receive higher priority from USCIS and the State Department, so they can come to the United States more quickly. This is particularly important since most asylum seekers have already waited years for their cases to be adjudicated.

Refugee Travel Document: After a person receives asylum, he can apply for a Refugee Travel Document (RTD), which functions like a passport. Currently, it can take six months or a year to receive the RTD, and the document is only valid for one year. There is no reason it should take so long to get an RTD, and no reason to limit the document’s validity to one year. There was a [proposal](#) in 2005 to extend the RTD’s validity to 10 years. This makes sense given that asylees need a travel document until they are eligible for a U.S. passport, which takes at least five or six years.

Green Card: Asylees can generally apply for a Green Card one year after asylum is granted. They complete the same form as anyone else seeking a Green Card, and they often have to wait one or two years or more to receive the card. Sometimes, they are interviewed for the Green Card; other times, they are not. Why not simplify this process? USCIS can initiate an automatic background check after one year of asylum, and then—assuming nothing adverse comes up—simply issue the Green Card without the necessity of an additional form.

The asylum process is a mess, but there are steps that the U.S. Government can take to make aspects of the process easier. Hopefully, we will see some positive changes from the Biden Administration.

The Unbearable Lightness of BIA-ing

Way back in 2010, I did a blog post about the Board of Immigration Appeals, where I complained that the BIA issues too few decisions and does not provide enough guidance to Immigration Judges. Ten years later, things are no better. In fact, based on the available data, the Board is publishing even fewer decisions these days than it did back in the late aughts. Here, we'll take a look at the situation in 2010, and then review where things stand now.

Before we get to that, we have to answer a preliminary question: what is the Board of Immigration Appeals? According to the [BIA Practice Manual](#)—

The Board of Immigration Appeals is the highest administrative body for interpreting and applying immigration laws. The Board is responsible for applying the immigration and nationality laws uniformly throughout the United States. Accordingly, the Board has been given nationwide jurisdiction to review the orders of Immigration Judges and certain decisions made by the Department of Homeland Security (DHS), and to provide guidance to the Immigration Judges, DHS, and others, through published decisions. The Board is tasked with resolving the questions before it in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act and regulations, and to provide clear and uniform guidance to Immigration Judges, DHS, and the general public on the proper interpretation and administration of the Immigration and Nationality Act and its implementing regulations.

In essence, the BIA is supposed to be the Supreme Court of immigration law. But because the Board issues so few published decisions, it is not fulfilling its duties to provide guidance or ensure that laws are applied uniformly throughout the country. This is not a recent problem.

If you look back at the data, you will see that in 2007, the BIA decided a total of 35,394 cases and had 45 published decisions. In 2008, it decided 38,369 cases and published 33 decisions, and in 2009, it decided 33,103 cases and published 34 decisions. This means that for every 1,000 cases the Board decided, it published about 1 case. Looked at another way, during 2007, 2008, and 2009, the Board had about 15 Members (judges on the BIA are called Board Members). This means that in its most prolific year (2007), each Board Member would have had to publish three cases. I'm told that publishing a case is a real production, but even so, three cases per year? That seems pretty weak. The not-very-surprising result is that the Board is not providing the guidance that Immigration Judges need, and this contributes to a situation where different adjudicators are interpreting the law in widely inconsistent ways.

Fast forward 10 years and the situation is no better. In FY2016, the Board decided 33,241 cases and in FY2017, it decided 31,820 cases. In each year, the Board published just 27 decisions. In FY2018, the Board decided 29,788 cases and published 38 decisions, and in FY2019, the BIA published 22 decisions. Indeed, in 2018 and 2019, the situation was even worse than these numbers suggest. That's because in 2018, of the 38 published BIA decisions, 15 were actually decided by the Attorney General (meaning only 23 were decided by the BIA). In 2019, the AG published six cases, meaning that the Board itself published a paltry 16 decisions, or—given the expanded number of Board Members—less than one published decision per Member.

Let's digress for one moment to discuss the difference between an Attorney General decision and a BIA decision. The BIA derives its decision-making authority from the Attorney General. This means that the AG has power to decide immigration appeals, but he has given that authority to the specialists on the Board, who presumably know more about immigration law than their boss. However, because decision-making power ultimately comes from the AG, he can "certify"

a case to himself and then issue a decision, which has precedential authority over Immigration Judges and over the Board itself. This means that if the Board issues a decision that the AG does not like, he can change it. Prior to the Trump Administration, AGs generally deferred to the Board and rarely certified cases to themselves for decisions. In the last two years of the Obama Administration, for example, the AG issued a total of three published decisions, two in 2015 and one in 2016, as compared to 21 AG decisions in 2018 and 2019 (to be fair, the Trump Administration did not issue any AG decisions in 2017).

The main reason for the AG to issue decisions is to more forcefully implement the Administration's immigration agenda. Many who work in the field oppose this type of politicization of the immigration law, and organizations such as the National Association of Immigration Judges (the judges' union) have been pushing for an independent court system.

Aside from politicization of the law, one result of the AG's more active role in issuing decisions has been to sideline the BIA. I imagine this is not good for morale. Essentially, the "Supreme Court of Immigration Law" has been relegated to deciding unpublished decisions, which contribute little to improving the overall practice of law.

In any event, it has always surprised me how few decisions the BIA publishes. Chapter 1 of the BIA Practice Manual provides: "Decisions selected for publication meet one or more of several criteria, including but not limited to: the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest." Frankly, it is difficult to believe that less than one case in one thousand satisfies these criteria. As I wrote in 2010—

Although it might be more work over the short term, if the Board published more frequently, Immigration Judge decisions would become more consistent [and this would reduce the workload] for the BIA over the long term. It would also make life easier for the federal courts of appeals, saving government resources. Finally—and most important from my point of view—it would create more certainty and predictability for immigrants and their families.

All this remains true. And so I still believe—as I believed ten years ago—that the BIA should embrace its role as "the highest administrative body for interpreting and applying immigration laws" and publish more decisions.

Appendix I: Useful Websites

Asylee Outreach Project

asyleeoutreach.org

This website is for people who have been granted asylum. It provides information about the various benefits that are available to asylees. Note that many benefits can only be claimed for a short time after receiving asylum, so act fast!

Asylum Case Status

egov.uscis.gov/casestatus/landing.do

This is only for asylum cases filed affirmatively, meaning, you filed a case with the Asylum Office. If so, you should have received a receipt with an Alien number (a nine-digit number usually starting with 0 or 2) and a receipt number (three letters followed by a 10-digit number; the first letter is “Z”). You can now enter the receipt number into this page and obtain information about your case. This system will be even more helpful for those who set up an account with USCIS to receive automatic case updates (see below).

Asylum Office Locator

egov.uscis.gov/office-locator/#/asy

You can identify your local Asylum Office by zip code and follow the link to the web page for each Asylum Office. Here, you can find the email addresses and other contact information for the different Asylum Offices. You can also find information about where to file an initial application for asylum, which varies depending on where in the U.S. you live (this information is not always up to date, so double check the initial mailing address on the form I-589 web page).

Asylum Office Procedures Manual

www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf

The manual provides guidance on policies and procedures for the Asylum Office. This is the most up-to-date version of the manual that is publicly available.

Automatic Case Updates from USCIS

egov.uscis.gov/casestatus/displaySignUpStep1.do

If you set up an account with USCIS, you can receive automatic updates about your case by email or text message.

Biometric/Fingerprint Appointment—See *Immigration Benefits in Immigration Court, below*

Board of Immigration Appeals Practice Manual

www.justice.gov/eoir/board-immigration-appeals-2

On this website, you can download the Board of Immigration Appeal Practice Manual, which contains the policies and procedures of the BIA.

DHS Ombudsman—Case Assistance

www.dhs.gov/case-assistance

This office can assist with delayed USCIS and asylum office cases.

Family Reunification Manual

cliniclegal.org/resources/asylum-and-refugee-law/i-730-refugeeasylee-family-reunification-practice-manual

This manual provides guidance for filing an I-730 petition to reunite with family members after asylum is granted.

Forms for the Immigration Court and the BIA

www.justice.gov/eoir/forms

Here, you can find links to forms used in Immigration Court and before the Board of Immigration Appeals.

Forms for USCIS and the Asylum Office

www.uscis.gov/forms

Here, you can find links to all USCIS forms, including the asylum form I-589.

Freedom of Information Act Request with EOIR

www.justice.gov/eoir/foia-submit%20a%20request

At this website, you can request a copy of your file from the Immigration Court and the Board of Immigration Appeals

Freedom of Information Act Request with USCIS and the Asylum Office

www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act

At this website, you can request a copy of your file from the Asylum Office and USCIS

House of Representatives

www.house.gov/representatives/find-your-representative

Find information about the Member of Congress who represents your district. In some cases, these offices can help with delayed asylum or USCIS cases—if you call the office and ask for the person who assists with immigration cases, they may be able to assist you. You do not need to be a U.S. citizen to access this help.

I-94 Locator

i94.cbp.dhs.gov/I94/#/home

Here, you can find your I-94, which indicates how long you are permitted to remain in the United States. You can also find your travel history.

ICE Detainee Locator

locator.ice.dhs.gov/odls/#/index

When a person is detained by ICE, it is often difficult to know where that person is located. This online resource can sometimes help you locate a detained non-citizen.

Immigration Benefits in Immigration Court

www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings

For people seeking asylum or adjustment of status (or other relief) in Immigration Court, you

must obtain a biometrics/fingerprint appointment before the Immigration Judge can grant you a benefit. You also have to pay any applicable fee. If you fail to attend this appointment, the judge could deny your case and order you deported because you have not completed the biometric appointment. You can find information about what to do prior to your final hearing and after your final hearing at this website. Note that if your case was referred from the Asylum Office to the Immigration Court, you should not need a biometrics/fingerprint appointment, but check with the Immigration Judge or the DHS Attorney (the prosecutor) to be certain.

Immigration Court and BIA Case Status

portal.eoir.justice.gov/InfoSystem/Form?Language=EN

On this website, you can enter your Alien number and obtain information about your case with the Immigration Court and the Board of Immigration Appeals. You can also find this same information, plus information about your “Asylum Clock” if you call 800-898-7180 and enter your Alien number when prompted by the computer.

Immigration Court Listing

www.justice.gov/eoir/eoir-immigration-court-listing

This website contains contact information for each Immigration Court, as well as contact information for the Office of the Chief Immigration Judge and the Assistant Chief Immigration Judges.

Immigration Court Practice Manual

www.justice.gov/eoir/office-chief-immigration-judge-0

On this website, you can download the Immigration Court Practice Manual, which contains the policies and procedures for cases before the Immigration Court. The manual is referred to as the “OCIJ Practice Manual” for the Office of the Chief Immigration Judge.

Informed Delivery with the U.S. Post Office

informeddelivery.usps.com/box/pages/intro/start.action

If you sign up for Informed Delivery with the U.S. Post Office, you will receive an email with a scan of all mail coming to your house, so you will know exactly when your USCIS notifications (and all your other mail) are arriving. Informed Delivery is not available everywhere, but you can check the website to see whether it is available in your area.

Law Library for the Executive Office of Immigration Review

www.justice.gov/eoir/virtual-law-library

This website contains published BIA decisions and Attorney General decisions, Federal Register announcements, and more.

National Visa Center Contact Page

travel.state.gov/content/travel/en/us-visas/immigrate/national-visa-center/nvc-contact-information.html

After an I-730 or other immigrant or nonimmigrant visa petition is approved, the case goes to the NVC, which then forwards the file to the appropriate U.S. Embassy. If a case gets delayed at the NVC, you can contact that office through this website. See also Family Reunification Manual, above.

Office of the Principal Legal Advisor

www.ice.gov/contact/legal

This website contains contact information for the DHS attorneys' office (the prosecutors) for each Immigration Court.

Pro Bono Assistance

www.justice.gov/eoir/list-pro-bono-legal-service-providers

www.immigrationlawhelp.org

These two websites—the first from the U.S. Government and the second from a non-profit—provide state-by-state lists of organizations that may be able to assist with an asylum or immigration case for no fee or a low fee.

Senate

www.senate.gov/general/contact_information/senators_cfm.cfm

Find information about your U.S. Senators. In some cases, these offices can help with delayed asylum or USCIS cases—if you call the office and ask for the person who assists with immigration cases, they may be able to assist you. You do not need to be a U.S. citizen to access this help.

TRAC Immigration

trac.syr.edu/immigration/reports/judgereports/

The website provides asylum grant rates for many Immigration Judges. It also provides information about Immigration Court backlogs, wait times, and more.

USCIS

www.uscis.gov

The website for U.S. Citizenship and Immigration Services contains links to forms, case status, news, immigration benefits, and many other immigration resources.

USCIS Contact Information

www.uscis.gov/about-us/contact-us

This website contains information about how to contact the various USCIS offices, including Lockboxes, Service Centers, and the National Benefits Center. It also has information about processing times, case status, and online accounts. Additional information about various ways to contact USCIS can be found at www.uscis.gov/contactcenter. If you wish to contact USCIS by phone, the main number is 800-375-5283.

USCIS Fee Calculator

www.uscis.gov/feecalculator

This website helps calculate USCIS fees for the various forms. For more information on paying fees, see www.uscis.gov/forms/filing-fees

USCIS Office Locator

<https://egov.uscis.gov/office-locator/#/>

Here, you can find links to the various USCIS offices, including Field Offices, Service Centers, the National Benefits Center, and the Asylum Offices, among others.

USCIS Scams, Fraud, and Misconduct

[**www.uscis.gov/scams-fraud-and-misconduct/scams-fraud-and-misconduct**](http://www.uscis.gov/scams-fraud-and-misconduct/scams-fraud-and-misconduct)

On this website, you can report fraud, abuse, and misconduct. You can also learn about avoiding scams.

Appendix II: Useful Forms

USCIS Forms

Below are the forms most commonly used by asylum seekers and asylees. All USCIS forms can be found at www.uscis.gov/forms.

Also, you can create a USCIS online account, which allows you to check your status, get automatic updates, and file certain forms and documents online. For information about creating an account, see myaccount.uscis.gov/users/sign_up.

Form	Description
AR-11	Update your address with USCIS and the Asylum Office. It is best to do this online through your USCIS account, or if you do not have an account, you can change your address here: egov.uscis.gov/coa/displayCOAForm.do
G-28	Notice of entry of appearance for attorney or representative
G-639	Freedom of Information Act Request is used to get a copy of your USCIS or Asylum Office file. It is best to request your file using the online system, available here: www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act
I-131	Application for Advance Parole (when you have an asylum case pending with the Asylum Office) or a Refugee Travel Document (after asylum is granted); Advance Parole is <i>not</i> available to people with a case pending before the Immigration Court or the Board of Immigration Appeals
I-485	Application for Lawful Permanent Residency (a Green Card)
I-589	Application for Asylum, Withholding of Removal, and relief pursuant to the United Nations Convention Against Torture
I-765	Application for an Employment Authorization Document (i.e., a work permit)
I-730	Used by a person who has been granted asylum to provide derivative asylum to a family member
I-912	Application for a fee waiver
N-400	Application for U.S. citizenship

EOIR Forms (Immigration Court and Board of Immigration Appeals)

Below are the forms most commonly used by asylum seekers and asylees who have a case before the Immigration Court or the Board of Immigration Appeals. All EOIR forms can be found at www.justice.gov/eoir/list-downloadable-eoir-forms

Form	Description
EOIR-26	Notice of Appeal from a Decision of an Immigration Judge
EOIR-26A	Fee waiver request
EOIR-27	Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals
EOIR-28	Notice of Entry of Appearance as Attorney or Representative before the Immigration Court
EOIR-33/MIC	Change of Address with the Immigration Court
EOIR-33/BLA	Change of Address with the Board of Immigration Appeals
EOIR-42A	Application for Cancellation of Removal and Adjustment of Status for Certain Permanent Residents
EOIR-42B	Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents
EOIR FOIA	Request a copy of your file from the Immigration Court or the Board of Immigration Appeals. You can learn more here: www.justice.gov/eoir/freedom-information-act-foia

Appendix III: Certificate of Translation

Below is a sample Certificate of Translation. This example is in the format required by the Immigration Court Practice Manual, Appendix H, which can be found here:

www.justice.gov/eoir/office-chief-immigration-judge-1

The portions in **[bold and brackets]** need to be customized to reflect the language and information about the translator, and the Certificate should be signed and dated by the translator:

Certificate of Translation

I hereby certify that I am proficient in English and [language] and that I am competent to translate this document. I further certify that the attached translation from [language] to English is true and accurate to the best of my knowledge and ability.

[date]

[signature of translator]

Date

[Name of Translator]
[Address of Translator]
[Phone Number of Translator]

Appendix IV: Asylum Office

Contact Information for the Asylum Office

A list of Asylum Offices and contact information can be found here: egov.uscis.gov/office-locator/#/asy

Sample E-Mail Communications with the Asylum Office

Below is a sample email requesting that the asylum case be expedited. Different offices have different expedite procedures, but the below email provides an example of how to request an expedited interview:

From: Jason Dzubow <jdzubow@dzubowlaw.com>
Sent: Friday, December 11, 2020 9:59 AM
To: Arlington Asylum <ArlingtonAsylum@uscis.dhs.gov>
Subject: Request to Expedite – Charles FORT, A 012-345-678, DOB: 01/01/1980, Afghanistan

Dear Asylum Office -

I am entering my appearance as attorney for the above-listed Applicant. See Attached G-28. Applicant has two young children in Afghanistan. They are living with their grandmother, but due to health problems, she has become unable to properly care for them. In addition, extremists have been looking for Applicant and the children, and Applicant fears that the children will be harmed in retaliation for Applicant having worked with the U.S. Government in Afghanistan. For these reasons, we respectfully request that this matter be expedited. Attached is an expedite request form, a G-28, and supporting documents.

Thank you,
Jason

Below is a sample email inquiring about the status of a pending case after the interview has been completed:

From: Jason Drubnow <jdrubnow@dzuhowlaw.com>
Date: Thu, Sep 3, 2020 at 6:46 AM
Subject: Yosh SHMENGE; A 012-345-678; DOB: 02/02/1985; Cambodia
To: Arlington Asylum <ArlingtonAsylum@uscis.dhs.gov>

Dear Asylum Office,

I am the attorney of record in the above-listed case. My client was interviewed on April 18, 2019, but we have had no news since that time (we previously inquired on July 24, 2019 and January 28, 2020). Can you please give us an update on the status of the case? The wait has been a hardship for my client.

Thank you,
Jason

Sample Index of Exhibits

Below is a sample Index of Exhibits for an Asylum Office case. Remember that when submitting evidence to the Asylum Office, you should submit an original and one copy of the complete packet of evidence. You can separate exhibits using tabs, and each page should be numbered. The below index would go on top of the packet of evidence, and should help the Asylum Officer understand what evidence you have submitted and why each piece of evidence is important:

Index of Exhibits

Tab	Description	Page(s)
A	<u>Asylum Application, Form I-589</u> – Applicant seeks asylum, withholding of removal, and withholding of removal under the United Nations Convention Against Torture. Including one passport-style photo.	1-11
B	<u>Forms G-28</u> – Notice of Entry of Appearance as Attorney or Representative for Applicant.	12-15
C	<u>Applicant's Affidavit</u> – Applicant is a native and citizen of Eritrea. The government views Applicant and several of his family members as political opponents because they published articles on social media critical of the regime. As a result, Applicant and his family members were persecuted. Applicant fled Eritrea. He fears that if he returns to Eritrea, he will be harmed or killed due to his political opinion and imputed political opinion. He respectfully requests asylum in the United States.	16-28
D	<u>Applicant's Passport, U.S. Visa, and I-94</u> – Applicant is a native and citizen of Eritrea. He last entered the United States on January 1, 2009, with an F-1 visa.	29-30
E	<u>Applicant's Birth Certificate</u> – Including certified English translation. Applicant was born on September 1, 1985, in Asmara, Eritrea. His father is Bob NEFER and his mother is Jane NEFER.	31-42
F	<u>Applicant's Education Documents</u> – Applicant submits the following education documents— <ul style="list-style-type: none">• Secondary School Certificate, 2003• Secondary School Transcript• Miskatonic University, Diploma, 2006	43-48
G	<u>UNHCR Refugee Document of Applicant's Sister</u> – Including certified English translation. Applicant's sister is a refugee in Ethiopia.	49-51
H	<u>Declaration of Martyrdom for Applicant's Brother</u> – Including certified English translation. Applicant's brother was killed in combat in 1999.	52-60
I	<u>Letter from Chairperson of the Free Eritrea Party</u> – The Chairperson states that Applicant has been a member of the party since 2008. The FEP is an opposition party that advocates for human rights, social justice, and the rule of law in Eritrea.	61

Application for Asylum, Form I-589
Mail NEFER, A 012-345-678

Tab	Description	Page(s)
J	<u>Letter from Webley Webster</u> – Applicant's former co-worker states that he and Applicant worked at the Housing Ministry in Asmara, Eritrea. The co-worker states that Applicant illegally crossed the border to Sudan in May 2004 and then went to Europe. The co-worker's photo ID is attached.	62-64
K	<u>Letter from Artie Schermerhorn</u> – Applicant's friend states that in 1997, Applicant went to the national service and was assigned to work at the Housing Ministry. The friend left Eritrea in June 2001. The friend was aware that the government detained Applicant's brother. In April 2004, Applicant called the friend and told him that he was in danger because he posted anti-government statements on social media. The friend's photo ID is attached.	65-66
L	<u>Photographs</u> – Applicant attended FEP meetings in 2012 and 2013 in Washington, D.C.	67-71
M	<u>U.S. State Department Country Report on Eritrea, 2017</u> – The Report states, "Eritrea is a highly centralized, authoritarian regime under the control of President Isaias Afwerki." "The People's Front for Democracy and Justice (PFDJ), headed by the president, is the sole political party." "There have been no national-level elections since the country's independence from Ethiopia in 1993." "The most significant human rights issues included arbitrary deprivation of life; disappearances; torture and other cruel, inhuman, and degrading treatment by security forces, including for political and religious beliefs; harsh prison and detention center conditions; arbitrary arrest; denial of fair public trial; arbitrary or unlawful interference with privacy, family, or home; restrictions on freedoms of speech and press; restrictions on internet freedom, academic freedom, and cultural events... limits on freedom of internal movement and foreign travel; inability of citizens to choose their government in free and fair elections; corruption and lack of transparency... and forced labor, including forced participation in the country's national service program, routinely for periods beyond the 18-month legal obligation." "The government did not generally take steps to investigate, prosecute, or punish officials who committed human rights abuses." "Impunity for such abuses was the norm."	72-88

Sample Interview Template

Below are the questions and statements you can expect to hear at a typical Asylum Office interview. This material was developed by Lindsay M. Harris, Associate Professor & Director of the UDC Law Immigration & Human Rights Clinic based on her participation in multiple asylum interviews.

Asylum Office Interview Prep:

- Date:
- Time:
- My name is Officer
- Language
 - o Interpreter
 - Explain telephonic monitoring
- How are you feeling today?
- Purpose of the interview is for me to understand why you are seeking asylum, give me an opportunity to gather evidence to support your claim.
- I'll be taking notes, those will be confidential, too.
- All of the evidence will be carefully considered to make a decision on your case.
- You have representatives here today, do you want them to represent you in your interview?
- Oath – do you understand? Telling the truth is very important and the consequences can be serious if you do not tell the truth during this interview. Stand and raise your right hand, swear to tell the truth, whole truth, and nothing but the truth during the interview today. We will sign a form at the end of the interview about this oath.
 - o Swear in interpreter if applicable.

The interview will proceed in three parts:

1. Review an application and make sure it is complete and true
2. Understand why you applied for asylum
3. I'll explain what happens next. There will be no decisions today. That's a normal part of the process.

I will be asking a lot of questions and it's very important for us to understand each other.

- You can say, I don't remember, or I don't know.
- It is OK to estimate.
- Sometimes things are difficult to talk about, so if you need a break, let me know.
- It's important that we focus the interview, it could take days, weeks to talk about your life.
- I am going to use a hand motion to ask you to stop, I'm not trying to be rude.
- I will give you an opportunity to add anything important at the end. And your attorney will also have a chance to give a statement or ask you some clarifying questions.
- Do you have any medical issues or health concerns that affect your ability to speak to me today?
- Are you comfortable proceeding with the interview?
- Did anyone help you prepare your application?
- Who prepared your written statement?
- Have you reviewed everything in your file? Is it all true and complete?

- Review the form... in detail..
 - o Verify every page and box, for the most part.
 - o Employment – have you worked at all since coming to the U.S.?
- Review the changes and sign with # of changes indicated (at the end of the interview during COVID)
- How did you meet your attorney?
- In a moment, we will discuss why you've applied for asylum. We may not be able to discuss everything in your app. I know you have a lot to tell me, but we have a limited amount of time to discuss your eligibility for asylum. At the end, you'll have a chance to discuss anything we haven't talked about today

Client Specific:

- * Can you share why you cannot return to your home country?
- * When did you first start having problems?
- * What happened next?
- * Ask about family members, colleagues, etc., remaining in country, as relevant
- * Ask about attempts to seek protection elsewhere
- * Ask about how left the country – avoiding detention/surveillance/persecutor's knowledge?
- * Ask about attempts to report to police/government in home country?
- * Ask about attempts to live elsewhere? Why not safe?
- * Ask about threats received since leaving home country?

Is there anything else you would like to discuss?

Bar Questions:

I have to ask these questions for everyone.

- Have you traveled outside the U.S. since you came here?
- Where have you traveled outside the U.S. before you came here?
- Have you ever received or offered a permanent offer of refugee status or permanent residence in any other country?
 - o Ask about specific immigration statuses that you had in other countries?

- Have you ever harmed anyone?
- Have you ever been arrested?
- Have you ever committed any crimes in any country?
- Have you ever been charged with a crime in any country?
- Have you ever been convicted of a crime in any country?
- Have you ever served in the military, police, or other law enforcement organization?
- Have you ever been a member of a terrorist organization?
- Terrorist activities may include using a firearm or explosives or other weapons, hijacking, kidnapping, or assassination.
 - o Have you ever helped anyone to do any of these things?
 - o Have you ever encouraged anyone to do these things?
 - o Have you ever attempted or planned to do these things?
 - o Have you ever been accused of doing any of these things?
- Have you ever harmed or helped to harm another person for any reason?
- Have you ever supported a group that advocated violent means to overthrow a government?
 - o Have you ever provided money, food, housing, or other support to a person or group involved in terrorist activities?
 - o Have you ever recruited members or raised money for a person or group involved in terrorist activities?
 - o Have you ever received any military or weapons type training?
- Do you have any plans to engage in any illegal activities here in the United States?

Do you have anything else to add about why you are afraid to go back to your home country?

Have you understood all my questions today?

Advise about decision –pick up in 2 weeks vs. mail out (all cases are mail outs during COVID). Referral to court rather than “denial.”

Appendix V: Immigration Court

Contact Information for the Immigration Court and DHS

A list of Immigration Courts and contact information can be found here: www.justice.gov/eoir/eoir-immigration-court-listing

Information and contact details for the DHS Attorneys Offices (the “prosecutors” in Immigration Court) can be found here: www.ice.gov/contact/legal. This office is also referred to as the Office of the Principal Legal Advisor and the Office of the Chief Counsel.

Immigration Court Practice Manual and Biometrics

The Immigration Court Practice Manual can be found here:

www.justice.gov/eoir/office-chief-immigration-judge-0

On this website, you can download the Immigration Court Practice Manual, which contains the policies and procedures for cases before the Immigration Court. The manual is referred to as the “OCIJ Practice Manual” for the Office of the Chief Immigration Judge.

For people seeking asylum or adjustment of status (or other relief) in Immigration Court, you must obtain a biometrics/fingerprint appointment before the Immigration Judge can grant you a benefit. You also have to pay any applicable fee. If you fail to attend this appointment, the judge could deny your case and order you deported because you have not completed the biometric appointment. You can find information about what to do prior to your final hearing and after your final hearing at this website:

www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings

Note that if your case was referred from the Asylum Office to the Immigration Court, you should not need a biometrics/fingerprint appointment, but check with the Immigration Judge or the DHS Attorney (the prosecutor) to be certain.

Sample Legal Brief, List of Witnesses, and Exhibits for Trial

Jason A. Deubow, Esquire
DZUBOW & PILCHER, PLLC
1900 L Street, N.W. – Suite 610
Washington, DC 20036
Telephone: (202) 328-1353
Facsimile: (202) 318-4528
JDzubow@DzubowLaw.com
ID: No. VT123456

Not Detained

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
Arlington, VA 22202

IN THE MATTER OF:

3

Harris MILSTEAD.

5

File No.: 012-345-678

In Renewal Proceedings

3

Immigration Judge Bryant

Next Hearing: July 22, 2020 at 8:30 AM
Individual Hearing

RESPONDENT'S LEGAL BRIEF, LIST OF WITNESSES, AND EXHIBITS FOR TRIAL

Respondent, Harris Milstead, through undersigned counsel and pursuant to the Immigration Court Practice Manual, hereby files these exhibits. Respondent's Individual Hearing is scheduled for July 22, 2020 at 8:30 AM. He respectfully requests a Dari interpreter.

Legal Argument

I. Facts

Respondent is a native and citizen of Afghanistan. He worked for the Afghan government as a Support Officer. In this position, he interacted with high-level government officials and traveled around the country.

In 2016, members of the Taliban began calling him. They accused him of working against Islam. The callers indicated that they knew where Respondent lived and worked. One of Respondent's colleagues was kidnapped and tortured after receiving similar threats. Members of the Taliban struck Respondent's car with their car as a warning. The Taliban also asked Respondent to give them information about his work, but he refused. The Taliban left a threatening letter at Respondent's house, again accusing him of being a non-Muslim and ordering him to stop his work.

Respondent reported the threats to the police and his employer, but they were unable to assist him. As a result of the threats, Respondent left the country.

After Respondent left Afghanistan, the Taliban left a threatening letter for him with his father. The Taliban indicate that they would kill Respondent because he is an infidel and a Western spy. After this threat, Respondent decided to seek asylum.

Later, members of the Taliban attacked and stabbed his cousin because of the cousin's relationship with Respondent.

Respondent fears that if he returns to Afghanistan, members of the Taliban will harm or kill him because they view him as an infidel and a Western spy. The government of Afghanistan is unable and unwilling to protect him. He respectfully requests asylum so he can remain safely in the United States.

II. One Year Bar

Respondent entered the United States on April 17, 2017. See Notice to Appear. He filed for asylum on May 8, 2017. See Exhibit B (Asylum Receipt). Accordingly, the application was timely filed.

III. Asylum Claim

A. Nexus

Respondent was threatened because of his imputed religion (infidel, non-Muslim), his political opinion (pro-Afghan government, pro-West), and his imputed political opinion (Western spy).

B. Respondent Is a Victim of Past Persecution

"Persecution" means "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I&N Dec. 211, 216 (BIA 1985). Persecution has been further defined as:

[T]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. *The harm or suffering need not be physical*, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.

Abdel-Masieh v. INS, 73 F.3d 579, 583 (5th Cir. 1996) (quoting *Matter of Laipeniekis*, 18 I&N Dec. 433, 456-57 (BIA 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985)) (emphasis added). Detention and threat of imprisonment may be persecution. *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990). Indeed, courts have held that "discrimination and harassment, in combination with lower levels of violence, may also constitute persecution." *Lolong v. Gonzales*, 400 F.3d 1215, 1220 n. 3 (9th Cir. 2005). Further, persecution should be treated cumulatively, not in isolation. See *Poradisova v. Gonzales*, 420 F.3d 70, 79-81 (2d Cir. 2005) (events must be viewed cumulatively instead of in isolation); *Baharon v. Holder*, 588 F.3d 228 (4th Cir. 2009) (minor beating combined with threat is persecution); *Krotova v. Gonzales*, 416 F.3d 1080, 1084-85 (9th Cir. 2005) (cumulative effects of mistreatment due to anti-Semitism in Russia amount to persecution).

In the instant matter, the Taliban repeatedly threatened Respondent with death because they view him as an infidel and a Western spy. They kidnapped and tortured Respondent's colleague, and they harm and kill many people who work for the Afghan government or who they view as pro-Western. See Exhibit W (State Department report stating that anti-government elements killed and wounded thousands of people, and that they deliberately targeted government workers). Further, the Taliban attacked Respondent's cousin in order to punish Respondent. We respectfully suggest that this harm, viewed cumulatively, amounts to past persecution.

C. Even If Respondent Is Not a Victim of Past Persecution, He Has a Well-Founded Fear of Future Persecution

Even if Respondent has not suffered past persecution, he has a well-founded fear of future persecution based on his imputed religion, his political opinion, and his imputed

political opinion. See *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (To qualify for asylum, applicant must demonstrate a "well-founded fear" of future persecution based on a protected ground). To establish a "well-founded fear," an asylum applicant must have a reasonable possibility (though not a probability) of persecution. *INS v. Cardoza-Ponseca*, 480 U.S. 421 (1987); 8 C.F.R. § 208.13(b)(2).

The term "well-founded fear" requires that the asylum applicant show that a "reasonable person in his circumstances would fear persecution." *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987); *Matter of Barrera*, 19 I&N Dec. 837, 845 (BIA 1989). The well-founded fear test requires both a subjective component (fear) and an objective component (a reasonable possibility of persecution). Sufficient evidence is established by showing that "the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it, that a persecutor is aware or could become aware the alien possesses this characteristic, that a persecutor has the capability of punishing the alien, and that a persecutor has the inclination to punish the alien." *Matter of Mogharrabi*, 19 I&N Dec. at 446.

In the instant matter, Respondent is subjectively afraid to return to Afghanistan. See *Shatt v. Reno*, 172 F.3d 978, 981 (7th Cir. 1999) (subjective component requires a showing that the alien's fear is genuine). Respondent's testimony alone, if deemed credible, may be sufficient to demonstrate a subjective fear of harm. See *Ghebrehiwot v. Attorney General*, 467 F.3d 344, 352 (3d Cir. 2006) (alien's credible testimony may be sufficient to sustain burden of proof); *Mousour v. INS*, 230 F.3d 902, 907 (7th Cir. 2000) (same). In this case, Respondent's fear is based on the threats against him, the attacks on his colleague and his cousin, and

country condition information, which indicates that the Taliban harm and kill many people similar to Respondent.

Respondent must also show an objective fear of persecution in Afghanistan. We respectfully suggest he has met that burden as follows:

First, Respondent must show that he "possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it." See *Matter of Mogharabi*, 19 I&N Dec. at 446. Respondent worked for the Afghan government and has lived in the United States. Members of the Taliban regularly target individuals like Respondent, who oppose their extremist beliefs, and they explicitly threatened to kill Respondent. Thus, Respondent's religion and political opinion are characteristics that the Taliban seek to overcome through violence.

Second, the persecutors are aware of Respondent's political opinion and religion. See *Matter of Mogharabi*, 19 I&N Dec. at 446. The Taliban specifically threatened Respondent and attacked his cousin due to their opposition to Respondent's political views and his imputed religion. Thus, members of the Taliban are aware of Respondent's political opinions and religion.

Third, members of the Taliban have "the capability of punishing the alien." See *Matter of Mogharabi*, 19 I&N Dec. at 446. Members of the Taliban have already threatened Respondent on multiple occasions and harmed Respondent's cousin and his colleague. The group is active throughout the country and regularly harms similarly situated individuals. See Exhibit U (CBS News Article describing a recent surge of violence: "Almost 900 Afghan security personnel and 150 civilians were killed or wounded in a wave of Taliban attacks

across Afghanistan last week"). Accordingly, the Taliban has the capability to punish Respondent.

Finally, members of the Taliban have "the inclination to punish the alien." See *Matter of Mogharabi*, 19 I&N Dec. at 446. Members of the group threatened Respondent, attacked his cousin, and attacked his colleague. In addition, the Taliban regularly targets people similar to Respondent and has killed thousands. See Exhibit W (State Department report indicating that in the first nine months of 2019, antigovernment actors killed 1,743 people and injured 3,500 more; also, antigovernment elements threatened, robbed, kidnapped, and attacked government workers). Based on the past threats and harm, Respondent is likely to be targeted again by the Taliban.

Based on the foregoing, we respectfully suggest that Respondent has a well-founded fear of persecution if he returns to Afghanistan.

D. The Government Is Unable and Unwilling to Protect Respondent

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018), is relevant to the present case because the persecutors in our case are not government actors. *Matter of A-B-* states, "[t]he fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States." *Id.* at 337-338. "There may be many reasons why a particular crime is not successfully investigated and prosecuted." *Id.* "Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id.*

across Afghanistan last week"). Accordingly, the Taliban has the capability to punish Respondent.

Finally, members of the Taliban have "the inclination to punish the alien." See *Matter of Mogharrabi*, 19 I&N Dec. at 446. Members of the group threatened Respondent, attacked his cousin, and attacked his colleague. In addition, the Taliban regularly targets people similar to Respondent and has killed thousands. See Exhibit W (State Department report indicating that in the first nine months of 2019, antigovernment actors killed 1,743 people and injured 3,500 more; also, antigovernment elements threatened, robbed, kidnapped, and attacked government workers). Based on the past threats and harm, Respondent is likely to be targeted again by the Taliban.

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In the instant matter, the police have not failed to act on "a particular report of an individual crime," as discussed in *Matter of A-B-*. Rather, as demonstrated by country condition information, the police have failed to protect Afghan citizens from almost all crimes perpetrated by the Taliban and similar radical groups, and the police sometimes even collaborate with these groups. See Exhibits W (State Department report indicating that corruption was a major problem, and that thousands of people were killed by anti-government elements); Exhibit X (report stating that 2019 was the "deadliest year on record" for insider attacks in Afghanistan); Exhibit Y (report stating that the Taliban is the most powerful it has been in 18 years, and that it controls many parts of Afghanistan).

Based on the foregoing, we respectfully suggest that the Afghan government is unable and unwilling to protect Respondent.

E. Respondent Cannot Live Safely in Afghanistan

Safe internal relocation is not an option for Respondent. Relocation within the country must be reasonable and should not require an applicant to live in hiding. See 8 C.F.R. § 1208.13(b)(i); see also *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012) (internal relocation must be "reasonable under all the circumstances"). In Afghanistan, the Taliban is active throughout the country and often has ties with government officials and the police force. See Exhibit Y (report indicating that, "the Taliban is stronger now than at any point in recent memory, controlling dozens of Afghan districts and continuing to launch attacks against both government and civilian targets"). Accordingly, Respondent would not be able to safely relocate within Afghanistan.

F. Asylum and Withholding of Removal

Based on the foregoing, we respectfully suggest that Respondent qualifies for asylum. In the alternative, we request Withholding of Removal pursuant to INA § 241(b)(3).

IV. Relief Under the United Nations Convention Against Torture

The Taliban operates with the consent and acquiescence of the Afghan government. See Exhibits W (State Department report discussing corruption). The Taliban also operates as a government, controlling large part of the country, with its own court system to execute its perverse version of justice. See Exhibit Y. Accordingly, we respectfully suggest that Respondent qualifies for relief under the Torture Convention.

Witnesses

The following witnesses will testify in this matter:

1. **Harris Milstead** (Respondent) – Mr. Milstead will testify as set forth in his Asylum Application and Affidavit, Exhibits A & C, below. He will testify in Dari and his testimony will take approximately 40 minutes; and
2. **Wally Ballew** (Respondent's family friend) – Mr. Ballew will testify as set forth in his letter, Exhibit S, below. He will testify in English and his testimony will take less than 10 minutes.

Exhibits

Respondent submitted the following exhibits for the Court's consideration:

<u>Tab</u>	<u>Description</u>	<u>Pages</u>
A	Asylum Application, Form I-589 – Respondent and his dependent family members seek asylum, withholding of removal, and protection under the United Nations Convention Against Torture.	I-12

- | | | |
|---|--|-------|
| B | <u>Asylum Receipt and Biometrics</u> – Respondent's asylum application was received on May 8, 2017. | 13-14 |
| C | <u>Respondent's Affidavit</u> – Respondent is a native and citizen of Afghanistan. He worked for the Afghan government. As a result, the Taliban accused him of being an infidel and a Western spy. They threatened him, attacked his cousin, and kidnapped and tortured his colleague. Respondent fears that if he returns to Afghanistan, members of the Taliban will harm or kill him. The government of Afghanistan is unable and unwilling to protect him. He respectfully requests asylum. | 15-24 |

[Additional Exhibits Redacted]

Respectfully Submitted,

Jason A. Dzubow, Esquire
EOIR ID VT123456
Dzubow & Pilcher, PLLC
1900 L Street, N.W. – Suite 610
Washington, DC 20036
Telephone: (202) 328-1353
Facsimile: (202) 318-4528
JDzubow@DzubowLaw.com

* * * *

Name of Alien(s): Harris MILSTEAD

A number: A 012-345-678

PROOF OF SERVICE

On June 24, 2020, I, Jason Dzubow, Esquire, served a copy of this
**RESPONDENT'S LEGAL BRIEF, LIST OF WITNESSES, AND ADDITIONAL
EXHIBITS FOR TRIAL** and any attached pages to Office of the Chief Counsel at the
following address: 500 12th Street SW, Mail Stop 5902, Washington, D.C. 20536-5902 by
First Class Mail, Postage Pre-Paid.

Jason Dzubow

Date

Appendix VI: Board of Immigration Appeals

Contact Information for the BIA and DHS

General information about the Board of Immigration Appeals can be found here:
[**www.justice.gov/eoir/board-of-immigration-appeals**](http://www.justice.gov/eoir/board-of-immigration-appeals)

Contact information for the BIA clerk's office and the emergency stay line can be found here: [**www.justice.gov/eoir/contact-eoir**](http://www.justice.gov/eoir/contact-eoir)

Information and contact details for the DHS Attorneys Offices (the “prosecutors” in Immigration Court and before the Board of Immigration Appeals) can be found here: [**www.ice.gov/contact/legal**](http://www.ice.gov/contact/legal). This office is also referred to as the Office of the Principal Legal Advisor and the Office of the Chief Counsel.

BIA Practice Manual

The Board of Immigration Appeals Practice Manual can be found here:
[**www.justice.gov/eoir/board-immigration-appeals-2**](http://www.justice.gov/eoir/board-immigration-appeals-2)

The BIA Practice Manual contains the policies and procedures of the BIA.

Sample BIA Brief

To file an appeal, use form EOIR-26 (see Appendix II). For a sample brief (legal argument to the Board of Immigration Appeals), see [**www.asylumist.com/wp-content/uploads/2020/11/BIA-Brief-Redacted.pdf**](http://www.asylumist.com/wp-content/uploads/2020/11/BIA-Brief-Redacted.pdf)

Appendix VII: Pro Bono Organizations

Below are websites that can help you find a *pro bono* (free) attorney. Also, the last listed website—the Immigration Advocates Network—contains resources for attorneys who provide *pro bono* representation to asylum seekers. For more information about finding a *pro bono* attorney, see Chapter 8.

Immigration Law Help

www.immigrationlawhelp.org

This website contains a map of the United States. You can click on your state to see a list of *pro bono* service providers in that state. If no providers are available in your state, you can try a nearby state. Also, you can search by zip code or, for detained non-citizens, by detention center.

Executive Office for Immigration Review – List of *Pro Bono* Legal Service Providers

www.justice.gov/eoir/list-pro-bono-legal-service-providers-map

The website is a map of the U.S. Click on your state for a list of *pro bono* service providers in your state. If there are no providers in your state, try a nearby state. To see all the *pro bono* service providers on one list, see www.justice.gov/eoir/file/probonofulllist/download

Law Professor Blog Network – Legal Clinics

lawprofessors.typepad.com/files/copy-of-immigration-clinics-list.xlsx

This link opens an Excel spreadsheet, which lists law school clinics that can potentially represent asylum seekers *pro bono*. The spreadsheet contains contact information for the different clinics.

Immigration Advocates Network

www.immigrationadvocates.org/probono

This website contains resources for attorneys representing asylum seekers *pro bono*, including an online law library, training materials, and *pro bono* opportunities. For attorneys interested in appellate cases, see CLINIC's BIA *Pro Bono* Project at cliniclegal.org/issues/bia-pro-bono-project

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About the Author

Jason Dzubow is a nationally recognized expert in asylum and immigration law. Since forming his own law firm in 2003, he has represented hundreds of asylum seekers from many different countries. His clients include politicians, diplomats, journalists, victims of domestic violence and gang violence, LGBT individuals, victims of religious persecution, activists for human rights and women's rights, members of ethnic and racial minorities, torture victims, democracy advocates, and many others. His blog, *The Asylumist*, is the only blog exclusively devoted to asylum law in the United States.



Mark Schaerf '21

Since 2011, Washingtonian magazine has included Mr. Dzubow on its list of the best

immigration lawyers in Washington, DC. He has been recognized as one of the top 25 legal minds in the country in the area of immigration law, and has been honored for his work by CAIR Coalition, the Catholic Legal Immigration Network (CLINIC), and the U.S. Department of Justice.

Before forming his own law firm, Mr. Dzubow clerked for the United States Court of Appeals for the Third Circuit and the Immigration Court in Arlington, Virginia. He also worked as an immigration attorney at Catholic Community Services in New Jersey and an associate at two litigation firms in Washington, DC.

Mr. Dzubow received his Juris Doctor from Georgetown University Law Center and his Bachelor's Degree, *summa cum laude*, from Temple University in Philadelphia.

Prior to law school, Mr. Dzubow worked for the Refugee Assistance Program in Philadelphia, helping immigrants and refugees find jobs. He has lived in Nicaragua and Israel, and has traveled widely in Europe, the Middle East, North Africa, Ethiopia, South East Asia, and Latin America. He and his family live in Washington, DC.