CHAPTER TWO
Overview of Asylum Standard & Case Law

“The Congressional intent of the 1980 Refugee Act was to establish a politically and geographically neutral adjudication standard for both asylum status and refugee status, a standard to be applied equally to all applicants regardless of country of origin.”

Modern asylum laws were established in 1980 when Congress enacted the Refugee Act in order to bring the United States into compliance with its international obligations. The legal standards for asylum are set forth in the Immigration and Nationality Act (“INA”) and its Code of Federal Regulations (“CFR”). The following is an overview of the most common areas of asylum law. The pro bono attorney is also urged to seek out additional information on the topic.

2.1 Definitions and Case Law

A. Definition of Refugee. A person seeking asylum has the burden to prove that he/she meets the definition of refugee.

INA § 101(a)(42)(a); 8 U.S.C.A. § 1101(42)(A), defines ‘refugee’ as:

“(A) [A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion….”

B. Asylum Standard. Under this standard, the asylum applicant must show:

1. Past persecution or a well-founded fear of future persecution on account of:
   a. Race
   b. Religion
   c. Nationality
   d. Membership in a particular Social Group
   e. and/or Political Opinion.

See 8 CFR §§[1]208.13(b)(1) and (2).

2. An applicant must show by clear and convincing evidence that he/she has filed for asylum within one year of entering the U.S. See INA § 208(a)(2)(B).

C. Definition of Persecution. Neither the INA nor its Code of Federal Regulations defines persecution.
1. Case law has defined persecution as the 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 [only] 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. *Matter of Laipenieks*, 18 I & N Dec. 433, 456-457 (BIA 1983) *See Matter of Acosta* 19 I&N Dec. 211, 211-12 (BIA 1985) and *Mikhael v. INS*, 115 F. 3d 299, 303 (5th Cir. 1997).

2. Examples of Persecution
   a. While persecution is not defined in the INA, courts have made clear that it includes threats to life, including confinement, and torture. *See Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997).
   b. Persecution may also include rape, sexual assault, harm to a person’s family, prolonged detention, restrictions on the right to earn a living, interference with privacy and more. In some situations, deliberate imposition of severe economic deprivation may also constitute persecution. *See Berdo v. INS*, 432 F.2d 824, 847 (6th Cir. 1970).

D. Well-Founded Fear

To qualify for asylum, an applicant must demonstrate a well-founded fear of future persecution. This requirement has objective and subjective components. To satisfy the objective component, the applicant must show that a reasonable person in the same circumstances would fear persecution. *See Mikhael v. INS*, 115 F.3d 299, 304 (5th Cir. 1997); *Kratchmarov v. Heston*, 172 F.3d 551, 553 (8th Cir. 1999). The subjective component requires a showing that the applicant’s fear is genuine. *See Bhatt v. Reno*, 172 F.3d 978, 981 (7th Cir. 1999).

The Supreme Court has noted that fear may be well-founded if there is only a 10% chance (or even less) of the events occurring. *See INS v. Cardoza-Fonseca*, 480 US 421, 440 (1987).

E. Past Persecution

Past persecution, in itself, can establish eligibility for asylum. 8 CFR §208.13(b). *See Rivera-Cruz v. INS*, 948 F.2d 962, 969 (5th Cir. 1991).

The *Rivera* court noted that under *Matter of Chen* Int. Dec. 3104 (BIA 1989), asylum may be granted under certain circumstances even if there is no reasonable likelihood of present persecution. Discretionary asylum may be granted if past persecution was so severe that repatriation of the applicant would be inhumane. *Id.* at 969. This standard is exceedingly difficult to meet.

To establish eligibility for asylum based on past persecution, an applicant must prove and incident that: (1) rises to the level of persecution; (2) is on account of one of the

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2 See also Germain at 30-32.
3 Id. at 38-39.
five protected grounds; and (3) is committed by the government or by private actors the government is unable or unwilling to control.\footnote{Id. at 38, quoting Knezevic v. Ashcroft, 367 F.3d 1206, 1211 (9th Cir. 2004).}

Established past persecution creates the presumption that an applicant has a well-founded fear of persecution. See Marcu v. INS, 147 F.3d 1078, 1081 (9th Cir.1998); 8 CFR §208.13(b)(1). The INS has the burden to rebut the presumption. Matter of H\textsuperscript{r}, Int. Dec. 3276 (BIA 1996) at 16.

If a preponderance of the evidence establishes that conditions in the applicant’s home country have changed to such an extent that the applicant no longer has a well-founded fear of persecution, the request for asylum will be denied. 8 CFR §1208.13(b)(1)(i).

\section{Persecution “On Account Of” One of the Five Enumerated Grounds}

An asylum applicant must demonstrate that the persecution suffered or feared is/was “on account of” his/her race, religion, nationality, membership in a particular social group, and/or political opinion. Applicants who filed new applications after May 11, 2005, must show that one of the five grounds was or will be at least one central reason for their persecution. INA 208(b)(1)(B)(i).

\section{Five Enumerated Grounds: Race, Religion, National Origin, Membership in a Particular Social Group, and Political Opinion}

\subsection{Race}

Race in the asylum law context is understood in its widest sense, including “all kinds of ethnic groups that are referred to as ‘races’ in common usage.” UNHCR Handbook on Procedures and Criteria for Determining Refugee Status\footnote{http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PUBL&iid=3d58e13b4 at ¶ 68.} notes Apartheid in South Africa, the Holocaust, and slavery as examples of persecution on the basis of race.\footnote{Germain at 42.}

\textbf{Case Law - Race}

\begin{enumerate}
\item \textit{Singh v. INS}, 94 F. 3d 1353 (9th Cir. 1996). Claim of Indo-Fijian analyzed as on account of race. (The Singh case has been rejected and declined to be followed outside of the Ninth Circuit).\footnote{See Kho v. Keisler, 505 F.3d 50 (1st Cir. Oct. 16, 2007) (NO. 06-2306); see also Banturino v. Holder, 576 F.3d 10 (1st cir. Jul 31, 2009) (NO 08-1979).}
\item \textit{Duarte de Guinac v. INS}, 179 F. 3d 1156, 1159 n.5 (9th Cir. 1999). Persecution based on ethnicity, “a category that falls somewhere between ‘race’ and ‘nationality’,” can amount to persecution on account of race.
\item \textit{Andriasian v. INS}, 180 F. 3d 1033, 1042 n.15 (9th Cir. 1999). Persecution based on Armenian ethnicity treated as on account of race.
\end{enumerate}

\subsection{Religion}

Religion should be interpreted broadly to encompass all manner of religious beliefs and practices that might give rise to persecution.
a. Persecution on account of religion may assume various forms, including the prohibition of membership in a religious community, of worship in private or in public, of religious instruction, or serious discriminatory measures imposed on persons because they practice their religion or belong to a particular religious community. UNHCR *Handbook* at ¶72.\(^8\)

b. **The International Religious Freedom Act of 1998.** The International Religious Freedom Act of 1998 (Pub. L. No. 105-292) established within the State Department an Office of International Religious Freedom, whose mission is to promote religious freedom as a core objective of U.S. foreign policy. The Office monitors religious persecution and discrimination worldwide, recommends and implements policies in respective regions or countries, and develops programs to promote religious freedom.\(^9\)

c. The Secretary of State, with the assistance of the Office of International Religious Freedom, prepares an annual report on religious freedom on September 1 of each year. The report describes the nature and extent of violations of religious freedom committed or tolerated by foreign governments.

d. However, 22 USC §6471 states that while the report, “together with other relevant documentation, shall serve as a resource for immigration judges” and other officials in asylum claims, “[a]bsence of reference by the Annual Report to conditions described by the alien shall not constitute the sole grounds for a denial of the alien’s claim.”\(^10\)

### Case Law – Religion

a. *Ahmad v. INS*, 163 F.3d 457, 463 (7th Cir. 1999). Mere assertion that one is aligned with a minority religion is not sufficient to establish a prima facie case of religious persecution. *See also* UNHCR *Handbook* at ¶73.

b. *Kojevnikova v. Reno*, 173 F.3d 844 (2d Cir. 1999), 1999 WL 197166 (C.A.2). Applicant detained for some months at a “psychiatric” institution because of her Jewish ethnicity and her involvement with a Jewish dissident group suffered past persecution.

c. *Abdel-Masieh v. INS*, 73 F.3d 579 (5th Cir. 1996). Sudanese Christian who demonstrated that his government persecutes Christians was not required to demonstrate countrywide persecution.\(^11\)

3. **National Origin.** “Nationality” refers to both citizenship and membership in an ethnic or linguistic group and may overlap with “race.” UNHCR *Handbook* at ¶74. *See, e.g., Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994) (granting asylum to an ethnic Albanian from Yugoslavia).

Persecution on the basis of nationality may also overlap significantly with persecution based on political opinion, particularly where a political movement is identified with a specific “nationality.” *Handbook* at ¶75. Also, it is quite

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\(^8\) Germain at 43.

\(^9\) See http://www.state.gov/g/drl/irf/.

\(^10\) 22 USC §6471.

\(^11\) Germain at 44.
possible for members of a majority group to face persecution by a dominant minority. *Id.* at ¶76.\(^\text{12}\)

4. **Membership in a Particular Social Group**

a. The BIA, in *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), interpreted the phrase “persecution on account of membership in a particular social group” to mean:

   “Persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”

b. The First, Third, and Seventh Circuit Courts of Appeals have endorsed this approach. The Ninth Circuit set forth a four-part test for determining a particular social group in *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), which was specifically rejected by the Seventh Circuit in *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998), in favor of the BIA’s Acosta approach.\(^\text{13}\)

**Case Law - Membership in a Particular Social Group**

a. *Mgojan v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999). A family that plays a prominent role in a minority group that is the object of widespread hostile treatment.


c. Persecution related to gender

i. *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996). Female member of the Tchamba-Kunsuntribe who had not been subjected to female genital mutilation and who was opposed to the practice.


5. **Political Opinion.** Asylum claims based on political opinion can arise from actual political opinions expressed through words or actions. *See, e.g.*, *Chang*

\(^{12}\) *Id.* at 47.

\(^{13}\) *Id.* at 48-49.
Political opinions are not always straightforward claims based on one’s expressed political opinion. Other types include:

a. **“Imputed” Political Opinion** refers to a political opinion that is mistakenly attributed to a person. In *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997), a 15-year old Indian boy was threatened by a terrorist group. The boy’s father was a member of a political party called Akali Dal. The son did not know anything and was never a member of the party. The opposing terrorist group beat up the father and threatened to kill the Sangha family. Past persecution of family members is routinely considered as evidence of possible imputed political opinion.

b. **“Unexpressed Political Opinions”** refer to political opinions where the applicant has yet to express a political opinion. However, due to the strength of his/her convictions it could be reasonable to assume such an opinion would eventually be expressed. At such time the applicant would come into conflict with the government’s authorities. See UNHCR’s *Handbook ¶82*.

c. **“Neutrality”** refers to a situation where a conscious choice to remain neutral is considered to be a political opinion. See, e.g., *Umanzor-Alvarado v. INS*, 896 F.2d 14 (1st Cir. 1990).

d. **“Coercive Population Control”** can also be considered a political opinion. Pursuant to a 1996 amendment to the definition of refugee, persons who have suffered or fear persecution for resistance to coercive population control measures are deemed to have a well-founded fear of persecution based on their political opinion. 8 USC §1101(a)(42)(B).

e. **“Mixed Motives”** applies to cases before May 11, 2005. It refers to a situation in which the persecutor has more than one motive to persecute a person. See, e.g., *Matter of D-V-*, Int. Dec. 3252 (BIA 1993). Passage of the REAL ID Act requires that race, religion, nationality, political opinion, or particular social group be at least one central reason for the persecution.

### 2.2 Exceptions to the Authority to Apply for Asylum under INA § 208(a)(2)

INA §208(a)(1) generally sets out that any alien who is physically present in the United States many apply for asylum. However, § 208(a)(2) establishes various exceptions that bar a resident alien from applying for and receiving asylum.

A. **Can Be Removed to a Safe Third Country Pursuant to a Bilateral or Multilateral Agreement.** Pursuant to the *Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, certain aliens who are arriving from Canada, or in transit during removal from Canada, are barred from applying for asylum and related protections in the U.S. 

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exceptions\textsuperscript{15}, the Agreement provides for the U.S. to return such arriving aliens to Canada, the country of last presence, to seek protection under Canadian law, rather than applying in the United States for asylum, withholding of removal, or under protection from the Convention Against Torture.\textsuperscript{16}

1. This Agreement permits the U.S., subject to a host of exceptions, to return to Canada two specific classes of asylum seekers: those attempting to enter the U.S. from Canada at a land border port-of-entry and those who assert protection claims while being removed by Canada through the U.S. Upon return to Canada, the asylum seeker’s protection claims will be considered under Canadian law.\textsuperscript{17}

2. Similarly, asylum seekers arriving in Canada from the U.S., either at a shared land border port-of-entry, or in transit during removal by the U.S., may be returned to the U.S. for consideration of their protection claims under U.S. law.\textsuperscript{18}

B. \textbf{One-Year Filing Deadline.} Asylum applications filed on or after April 1, 1998 must be filed \textit{within} one year from the date the applicant first entered the United States. If he/she cannot prove entry, the applicant is not eligible for asylum. See INA § 208(a)(2)(B) and 8 CFR 208.4(a)(2). Several exceptions apply:\textsuperscript{19}

1. Changed circumstances, such as change in country conditions or a change in the applicant’s personal circumstances.
2. Extraordinary circumstances, such as serious illness or mental or physical disability that may be a result of torture.
3. Legal disability, such as unaccompanied minors or mental impairment.
4. Ineffective assistance of counsel.
5. Maintaining some type of legal status.
6. Timely Initial submission of application, such as an administrative closure or improper filing of I-589 application before the one-year deadline.

C. \textbf{Prior Asylum Denial.} An applicant cannot reapply for asylum if his/her application has been previously denied unless the applicant can demonstrate a change in circumstances. INA §208(a)(2)(C) and (D)

D. \textbf{Judicial Review.} INA § 208(a)(3) provides that “[n]o court shall have jurisdiction to review any determination of the Attorney General”. Other areas that cannot be appealed in Federal Court include issues related to safe third country, one-year filing deadline, previous asylum denials, and changed circumstances. See INA § 208(a)(2) for more information and exceptions.

\section*{2.3 Exceptions to Conditions for Granting Asylum under INA § 208(b)}

\textsuperscript{15} See 8 CFR 208.30(e)(6)(iii) (listing exceptions).


\textsuperscript{18} Id.

\textsuperscript{19} Asylum Officer Basic Training Course, One-Year Filing Deadline, Immigration Officer Academy. 30 Nov. 2001 http://www.asylumlaw.org/docs/united_states/asylum_officer_training_oneway_112001.pdf.
A. Persecution of Others. Ordering, inciting, or assisting in the persecution of others on one of the five grounds. INA §§208(b)(2)(A)(i) and 241(b)(3)(B)(i)

B. Particularly Serious Crimes. Having been convicted of a particularly serious crime, constituting a danger to the community of the U.S. INA §§208(b)(2)(A)(ii) and 241(b)(3)(B)(ii), including aggravated felonies (INA 101(a)(43)

C. Serious Non-Political Crimes. Legitimate reasons for believing the applicant committed a serious non-political crime outside the U.S. INA §§208(b)(2)(A)(iii) and 241(b)(3)(B)(iii)

D. Danger to the Security of the U.S. Reasonable grounds for believing the applicant is a danger to the security of the U.S. INA §§208(b)(2)(A)(iv) and 241(b)(3)(B)(iv)


F. Firm Resettlement. The alien applying for asylum was “firmly resettled” in another country prior to arriving in the U.S. 8 USC 1158(b)(2)(a)(vi). “Firmly resettled” is defined at 8 CFR §208.15:

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or,

(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

See also Wangchuck v. Department of Homeland Security, Immigration, 448 F.3d 524, 529 (2nd Cir. 2006); e.g. Harutunov v. Mukaskey, 300 Fed. Appx. 494 (9th Cir. 2008) (explaining that a firm resettlement inquiry should focus on the offer made to the alien to receive a permanent resident status).

G. The Exercise of Discretion. The BIA recognizes that asylum is different from other immigration benefits. It has established exceptional limitations on the exercise of discretion in asylum cases. The BIA found that negative factors such as the use of false documents and transit through a safe third country should not be determinative (see In re Pula and In re Kasinga). Positive factors have included general humanitarian considerations such as age, health, and severity of persecution.

2.4 Withholding of Removal (INA §241(b)(3) & 8 CFR [1]208.16)

A. When the client submits his/her I-589 Application for Asylum he/she will also be considered for withholding of removal. An individual ineligible for asylum may be eligible for withholding of removal. Withholding of removal forbids an alien or refugee from being returned to any country where the alien’s life or freedom is threatened. See INS v. Cardoza-Fonseca, 480 US 421, 429 (1987).

B. In order to be eligible for withholding of removal, an applicant has the burden of establishing that it is more likely than not that he or she will be persecuted on account of race, religion, nationality, membership in a particular social group, or
political opinion if returned to his/her country of origin. This requires the establishment of a "clear probability of persecution," which is a heavier burden than the establishment of a "well-founded fear of persecution" necessary for asylum. See *INS v. Stevic*, 467 U.S. 407 (1984).

C. For most clients, withholding of removal is less desirable because it does not allow them to bring their spouse and children to the United States. In addition, derivative status is not available for dependent family members included in the application. The status also does not allow the client to adjust to become a permanent resident. Although he/she is entitled to employment authorization, he/she is not allowed to remain in the United States indefinitely like an asylee. Once the danger in the home country has ended and the threat of persecution has ceased, the individual is no longer qualified to remain under a withholding of removal order. Furthermore, the individual may be removed to a third country at any time. The order of withholding is not a permanent solution for the refugee. At some point in the future, that individual may have to return to the home country.

D. Withholding of removal is typically granted at the EOIR. Since the persecution standard is higher, a withholding of removal grant is rare. The most common grant is given to an individual who has failed to meet or evidence the one year filing deadline.

2.5 Withholding of Removal Under the Convention Against Torture (CAT) (8 CFR[1]208.16(c))

A. When the client submits his I-589 Application for Asylum he/she may also request relief under the Convention Against Torture by checking the box on the first page which states: “Please check the box if you also want to apply for withholding of removal under the Convention Against Torture.” There is also a checkbox on page 5, section B, question 1: “Torture Convention”.

B. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is a treaty to which the United States is a signatory. CAT prohibits the return of a person to a country where it is more likely than not that the person would be subjected to torture. Regulations require that the harm be “inflicted by or at the instigation or with the consent of or acquiescence of a public official or other person acting in an official capacity.” 8 CFR §[1]208.18(a). See, e.g., *In re S-V*, Int. Dec. 3430 (BIA 2000) (holding that Colombian authorities did not “acquiesce” to torture by guerillas). *Contrast with In re Opku*, Int. Dec. ___ (BIA 2000) (holding that Ghanaian prison guards are “public officials” within the meaning of CAT). In order to be eligible for withholding of removal under CAT the client must:

1. Be a victim of torture as defined by 8 CFR [1]208.18(a).
2. Prove he/she is *more likely than not* to be tortured if removed to the proposed country of removal. Assessment of likelihood of torture based on:

   a. Evidence of past torture
   b. Ability to safely relocate to another portion of the country where he/she is not likely to be tortured
   c. Evidence of gross human rights violations in the country

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20 8 CFR § 274a.12(a)(10).
21 Under some circumstances an asylee’s status can be terminated pursuant to 8 CFR § 208.22.
C. Withholding of removal under CAT is typically granted at the EOIR. However, due to the BIA’s narrow interpretation of the term “acquiescence” eligibility is more difficult. The BIA requires the government officials be “willfully accepting” of torture inflicted upon its citizens. The Ninth Circuit has found it is contrary to congressional intent to require only “awareness,” and not to require “actual knowledge” or “willful[ ] accept[ance].”\(^\text{23}\) This broader interpretation of a “willful acceptance” has been applied by the 3\(^{rd}\) Circuit as well.\(^\text{24}\)

\(^{23}\) Zheng v. Ashcroft, 332 F.3d 1186, 1188-89 (9th Cir. 2003).