

PREPARING
SEXUAL ORIENTATION-BASED
ASYLUM CLAIMS:
A HANDBOOK FOR ADVOCATES
AND ASYLUM SEEKERS

Written by
the Midwest Human Rights Partnership for Sexual Orientation and
the Lesbian and Gay Immigration Rights Task Force



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Biographies of the Authors

Heather McClure

Former Director of the Midwest Human Rights Partnership for Sexual Orientation (MHRPSO), Ms. McClure has conducted fact-finding trips in Guatemala, provided oral and written testimony, and provided documentation, legal referral and support to gay, lesbian and HIV-positive asylum-seekers and their advocates. Ms. McClure, with Guatemalan organization OASIS, co-organized a meeting on the human rights of gay/lesbian/bisexual/transgendered people and persons with HIV/AIDS in Central America that brought together advocates from Central and North America (August 1997 in Guatemala City). Ms. McClure's academic work is in performance studies, anthropology and history, with a focus on Latin America. She received her Masters of Arts from Northwestern University in 1994 and her doctorate from Northwestern University in 1999. Her doctoral dissertation focused on asylum based on sexual orientation. She currently serves as Managing Editor of the Journal of Latin American Anthropology.

Chris Nugent

In 1991, Mr. Nugent received his B.A. from Sarah Lawrence College, and in 1996, his J.D. from City University of New York (CUNY) School of Law. He is a licensed attorney and currently the executive Director of Florence Immigrants and Refugee Rights Project in Phoenix, Arizona and works with people detained by INS. Before joining Florence Immigrants project, Mr. Nugent also was a National Association for Public Interest Law Equal Justice Fellow at Chicano Federation of San Diego County, Inc., and worked with Mexican and Guatemalan indigenous farmworkers in community economic development efforts. Mr. Nugent also served as Interim Director and Board of Immigration Appeals Accredited Representative at American Friends Service Committee Immigrant Rights Program in Newark, New Jersey, where he prepared and represented clients in immigration matters including asylum for sexual minorities and people with HIV/AIDS. He has spent a total of ten years serving immigrants and asylum-seekers at nine not-for-profit immigration assistance agencies. Mr. Nugent has conducted numerous trainings nationwide on areas of immigration law, especially sexual orientation-based asylum, to audiences as diverse as Asylum Officers, practitioners, and community groups. Since 1995, he has been a Board member of the Lesbian and Gay Immigration Rights Task Force in New York, New York.

Lavi Soloway

A founding member of the Lesbian and Gay Immigration Rights Task Force (LGIRTF), Lavi Soloway has served as the Chair of its Board of Directors and the National Coordinator since 1994. LGIRTF is a national support and advocacy organization dedicated to challenging the discriminatory impact of U.S. immigration law on lesbians, gay men and people with HIV/AIDS. In addition to New York, where it is headquartered, LGIRTF has chapters in eight other cities: Boston, Chicago, Los Angeles, Portland (OR), San Diego, San Francisco, Seattle, and Washington, D.C. Born in Canada, Lavi Soloway holds a Juris Doctor degree from Yeshiva University Benjamin N. Cardozo School of Law and a Bachelor of Arts in History and Political Science from the University of Toronto. Since 1993, he has been active as an organizer and advocate for lesbian and gay immigrants and has been active in education and outreach efforts to immigrants and attorneys nationwide. He has participated in numerous panels and conferences speaking on gay immigration issues and has been quoted widely in newspaper and magazine articles across the nation on issues impacting lesbian, gay and HIV+ immigrants. Since 1995, he has been in private practice as an immigration lawyer in the Law Offices of Masliah & Soloway, P.C. He has won numerous cases of political asylum and suspension of deportation for lesbians, gay men and people with HIV/AIDS. Lavi Soloway assisted in drafting the Permanent Partners Immigration Act (H.R. 3650), which was introduced in Congress by Rep. Jerrold Nadler on February 14, 2000.

Dear Reader:

This handbook is dedicated to the many asylum-seekers, asylees, activists and advocates whose determination and commitment have helped to ensure that fundamental human rights are protected through the fair application of United States asylum law. We are particularly grateful to the asylum-seekers whose experiences and insights have inspired this publication.

The original version of this handbook was published in December 1997. The handbook since then has become an effective tool for attorneys and thousands of asylum seekers in preparing sexual orientation based asylum claims. We have produced this second edition of this handbook to update basic information and to lend support to asylum-seekers and their advocates as they face increasing pressure due to the new filing deadline and challenges of Convention Against Torture claims. It is our hope that this handbook will continue to prevent gay, lesbian, bisexual, transgendered and HIV-positive asylum-seekers from falling through the cracks.

This handbook is a component of the Emergency Asylum Campaign, an important nationwide educational effort launched by the Lesbian and Gay Immigration Rights Task Force (LGIRTF). The Campaign seeks to alert potential asylum-seekers to the one-year filing deadline and potential Convention Against Torture claims, and provide them with information about the asylum process and resources to help them learn more about their legal options. We invite those of you interested in participating in this campaign to contact LGIRTF at (212) 714-2904; fax: (212) 714-2973; e-mail: info@lgirtf.org; or to visit our website at www.lgirtf.org.

This guide would not have been possible without the assistance of others. We are especially grateful to Reverend Sid Mohn, President of the Heartland Alliance for Human Needs and Human Rights, for his generous support and commitment to the project. We are also indebted to Betsy Leonard and Amanda Adams for their editorial expertise and project guidance. Our warm thanks for their reviews of the first edition of this publication go to: Noemi Masliah, Immigration Attorney, New York; Roger Doughty, Associate Attorney at Heller, Ehrman, White & McAuliffe, San Francisco; Amy Gottlieb, Staff Attorney at American Friends Service Committee Immigrant Rights Program, Newark; Amanda Orendain, Managing Attorney at American Friends Service Committee Central American Asylum Project, Miami; Diego Bonesatti, Immigrant & Citizenship Coordinator, Illinois Coalition for Immigrant & Refugee Protection, Chicago; and Suzanne Goldberg, Staff Attorney at Lambda Legal Defense and Education Fund.

On April 1, 1998, an unprecedented and harsh new one-year filing deadline took effect, requiring that all asylum applicants file within one year of arrival in the United States. This new deadline has rendered many future asylum-seekers ineligible for asylum, despite their well-founded fear of persecution if returned to their country of origin (see Chapters 1,3 & appendix to 3) for full explanation of the filing deadline). Also, on October 21, 1998, Congress passed and the President signed into law the legislation incorporating Article 3 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) into domestic U.S. immigration law. This new remedy will extend "withholding of removal" and "deferral of removal" relief to people fearing torture in their home

countries, who are otherwise ineligible for asylum (see Chapter 6 for a full explanation of Convention Against Torture claims).

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The authors take full responsibility for all information contained in this handbook.

Lavi S. Soloway
Chair, Board of Directors LGIRTF
February 25, 2000

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CHAPTER 1

Introduction: Asylum Based On Sexual Orientation

This handbook is intended to assist individuals who are gay, lesbian, bisexual, transgendered¹ and/or HIV-positive, who are not legal permanent residents or citizens of the United States, and who have a well-founded fear of persecution based on sexual orientation and/or HIV status (for a definition of persecution, see Chapter 2.III.B.3). It is also is written for legal advocates - attorneys and accredited representatives - who are helping individuals with claims of asylum based on sexual orientation.

The handbook focuses on affirmative applications for asylum. The effective preparation of applications at the affirmative level (i.e. to be initially reviewed during an interview with an Asylum Officer) may eliminate the need for further steps, including having to appear in front of an Immigration Judge and preparing appeals which can be stressful, time-consuming and costly for the applicant and legal representative. In addition, many of the issues discussed in the handbook are applicable to removal proceedings. (For further resources on representing asylum-seekers in removal proceedings, see the list of publications in Chapter 7.) The handbook is specifically designed to provide information and resources to aid asylum-seekers and their advocates in the preparation and representation of viable asylum claims.

The handbook provides a review of fundamental concepts and processes in order to provide information and resources to asylum-seekers and advocates who are new to asylum based on sexual orientation. Each chapter includes lessons from the authors' experiences as legal representatives, researchers and witnesses involved with asylum based on sexual orientation cases. The handbook is not intended to substitute for careful and thorough research or quality legal counsel and representation, nor is it meant to support frivolous applications for asylum. (Asylum provides protection from persecution for many *bona fide* asylum applicants. These existing protections are undermined by the misuse of the asylum process by those who knowingly file frivolous or fraudulent claims.) Instead, the handbook is written as a supplement that provides greater access to the field of sexual orientation asylum law, discusses practical considerations for asylum-seekers and advocates, and foregrounds the particular needs and struggles of gay, lesbian, bisexual, transgendered and HIV-positive asylum-seekers.

Finally, for readers interested in excellent in-depth law review articles on relevant issues, and international resources for practitioners and asylum-seekers, please see [Asylum Based on Sexual Orientation: A Resource Guide](#) (edited by Sydney Levy and published by the International Gay and Lesbian Human Rights Commission and Lambda Legal Defense and Education Fund. For order information, see Chapter 7 “Additional U.S. Immigration Resources”).

¹ Throughout this handbook, the authors also use the term “sexual minorities” to refer to gay, lesbian, bisexual, and transgendered individuals, some of whom may be HIV-positive. Current asylum based on sexual orientation caselaw, however, refers only to homosexuals, or gays and lesbians; to date, there is no published caselaw that relates specifically to bisexual and transgendered asylum-seekers. There is no controlling caselaw on HIV asylum claims. The INS has issued guidance to handle such claims on a case by case basis (for further discussion of these issues see Chapter 2.III.B.5).

(For stylistic reasons, throughout the handbook the terms “advocate” and “legal representative” are used interchangeably to refer to both attorneys and BIA (Board of Immigration Appeals) Accredited Representatives. The terms “client,” “asylum-seeker,” and “applicant” are also used interchangeably.)

I. A Brief History Of Asylum Based On Sexual Orientation

The origins of asylum can be found in international agreements drafted in the early 1900s to address flows of refugees in Europe. Prior to this century, refugees were not distinguished from other migrants. Following World War I, individual *ad-hoc* agreements were drafted by some European nations that recognized and conferred legal protection and status on certain groups of people. For example, in 1922, these agreements made provisions specifically for Russians fleeing the revolution and the civil war. Later in the 1920s, these provisions were extended to Armenians, and to Assyrians and others fleeing the break-up of the Ottoman empire. In the 1950s and 1960s, the U.S. also dealt with refugees on a very *ad-hoc* basis with the result that refugees from the Holocaust were excluded while, in 1956, President Eisenhower used a little-known provision of immigration law called “parole status” to admit refugees from Hungary.

In 1951, in response to large migrations of refugees following World War II, the United Nations and some European nations drafted the United Nations Convention Relating to the Status of Refugees in an attempt to forge a document that all countries would agree to regarding the treatment of refugees. The definition of refugee they devised is essentially the same definition the United States uses today:

[A refugee is a person who] owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²

Originally, this agreement applied only to persons who were refugees as of January 1, 1951; it did not apply to future refugees. However, in 1967, under the United Nations Protocol Relating to the Status of Refugees, the United Nations extended this definition to future refugees and encouraged countries to sign a protocol, thereby agreeing to give refugees - or persons with a well-founded fear of persecution on account of one (or more) of those five factors - legal protection and status. In 1980, the U.S. signed the 1967 United Nations protocol.

The fifth protected ground, participation in a particular social group - which applies to individuals seeking asylum on the basis of their sexual orientation - does not have a well-defined

² *United Nations Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* § 34 (Geneva 1979).

history. It was originally proposed by a Swedish delegate during the United Nations 1951 Convention, and served as a catch-all category. Its earliest application may have been to nobility, for example to Romanian princes who were persecuted during the Communist revolutions, not for their political opinions but for their elite status. Since that time, the definition of “particular social group” has become somewhat clearer. For example, some groups have been excluded, including groups that are based strictly on statistical divisions, or who share some characteristic that is so broad that courts refuse to recognize it as a particular social group (e.g. urban, draft-age men during the war in El Salvador).³

Within the last decade, countries around the world have begun to recognize gay and lesbian refugees, and have offered them protection from persecution in their countries of origin (for list of countries that have granted claims of asylum based on sexual orientation, see Chapter 7: Further Resources). The U.S. has offered protection to asylum-seekers claiming well-founded fear of persecution based on sexual orientation since 1994. In that year, Attorney General Janet Reno declared that a case involving a gay Cuban man who was granted relief from deportation would become precedent for homosexuals for purposes of asylum.⁴ According to this precedent, homosexuals, for purposes of asylum, were to be considered members of a particular social group. The recognition by the United States and other countries that homosexuals may be eligible for asylum as members of a “particular social group”⁵ is a simultaneous acknowledgment of established principles of international refugee law.

II. Important Elements In An Asylum Based On Sexual Orientation Claim

“Political asylum” is a generic term for “asylum,” and includes asylum based on sexual orientation. Even if an individual has not been persecuted because of his/her political opinions, he/she may still apply for political asylum on the basis of the other four grounds: nationality, race, religion, or participation in a particular social group (for detailed discussion of grounds for asylum, see Chapter 2).

An individual can apply for asylum on several grounds at once. For example, if an individual fears persecution on the basis of sexual orientation, gender, and political opinion, he/she may file a claim based on all of these fears. The fears may be related to one another, or they may be unrelated.

The most important elements of an asylum claim based on sexual orientation are that the applicant *has a well-founded fear of persecution based on past persecution or risk of persecution in the future if returned to the country of origin because of his/her membership in a particular*

³ See Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) requiring close affiliation among social group members, members' common impulse or interest fundamental to their identity, and small size.

⁴ The case designated as precedent is Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

⁵ Though particular social group is not defined by law, it has been described as the following: “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 a shared past experience such as military leadership or land ownership.” (Matter of Acosta, 19 I. & N. Dec. 211, 2 Immig. Rptr. B1-20 (BIA 1985)).

social group (i.e. homosexuals) (for a fuller review of the elements of an asylum claim, see Chapter 3). A second element in asylum claims involves the *applicant's explanation of the basis for his/her fear* in his/her *personal testimony* and *supporting evidence* (for further discussion of supporting evidence, see Chapter 4). While it is not necessary that the applicant was "out" or experienced persecution in the country of origin, it is essential that the applicant clearly describe his/her homosexual identity, and his/her particular well-founded fear of persecution because of this identity.

In all asylum cases, credibility or the truthfulness of an individual's personal testimony must be established. If an asylum-seeker fabricates his/her sexual orientation or events described in his/her testimony and the fabrications are revealed, it is almost certain that he/she will lose his/her asylum claim, and may be permanently barred from seeking immigration benefits in the future.⁶ Similarly, if an asylum-seeker who has experienced or fears persecution on the basis of sexual orientation does not state on the asylum application the true reason(s) he/she is seeking asylum and, instead, fabricates another reason(s), he/she may jeopardize his/her chances of gaining asylum based on sexual orientation in the future. This may hold true, even if the asylum-seeker at a later point discloses the true reasons he/she would like to pursue asylum based on sexual orientation.⁷

III. Confidentiality And Trust

In the U.S., the legal representative is not a police officer or a government employee. Anything an asylum-seeker tells a legal advocate (short of intentions to commit bodily harm to another human being) must be kept strictly confidential. The primary loyalty of an advocate is to the client, not to any other person or institution. It is very important that an asylum-seeker truthfully confide in his/her advocate, even if the asylum-seeker has committed an act he/she believes is unlawful, so that the advocate is able to give the client the best advice and representation possible (for a fuller discussion of these issues, see Chapter 2).

Note: It is also very important that an asylum-seeker chooses a legal representative with whom he/she trusts and feels comfortable talking. If possible, talk with three or four different advocates before deciding who you would like to represent you. (For the American Bar Association's guidelines as to questions a client can ask while choosing an advocate, see Chapter 7: Further Resources.)

⁶ "Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act." Instructions from Form I-589 (Application for Asylum and Withholding of Removal), pg. 1.

⁷ This is due to the possibility that the Asylum Officer or Immigration Judge might not believe the asylum-seeker is telling the truth about his/her sexual orientation and fear of persecution later in the hearings if he/she did not tell the truth at the beginning. In addition, the Instructions for Form I-589 (Application for Asylum and Withholding of Removal) state that "Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings," pg. 1.

IV. Whether To Apply For Asylum

The burden of proof⁸ for winning an asylum claim is on the applicant. It can be very difficult to prove a claim. Applying for asylum is a process that may be as short as a few months or as long as a few years if an asylum-seeker's claim is denied and he/she continues to appeal.⁹

Since 1994, several hundred cases based on sexual orientation have been granted.¹⁰ A number of these claims were granted by the Asylum Officer, and others were granted by Immigration Judges. Once granted asylum, an asylee is eligible to apply for employment authorization and to apply for permanent legal residence (green card) one year from the date he/she was granted eligible to file adjustment.¹¹ (For further information on adjustment of status, see Chapter 5.IV.A.10).

For individuals who are undocumented (entered without admission or are no longer in valid immigration status), applying affirmatively for asylum means that the INS is aware that you are in the U.S. and are out of status (undocumented). Once you apply for asylum, you cannot be deported until the conclusion of all hearings and subsequent appeals of a denied claim. Even if a claim is denied by an Asylum Officer, and then by the Immigration Judge, the asylum-seeker can continue to appeal to the Board of Immigration Appeals (BIA) and to the Circuit Court of Appeals.¹²

If asylum is denied and the applicant does not appeal or no longer has the option to appeal, he/she either will be ordered deported, granted voluntary departure (he/she will have to leave the U.S. and may travel to any other country), or granted withholding of removal, also known as restriction on removal. In order for the Immigration Judge to grant voluntary departure, the asylum-seeker must demonstrate that he/she is of "good moral character" (for further discussion, see Chapters 2 & 4), has the intention to leave the U.S. within 60 days, and can afford the passage (airfare, train fare, etc.) to the designated country. (For a list of countries who have granted asylum based on sexual orientation, see Chapter 7.)

Asylum cases that involve "sensitive" issues or new areas of asylum law may be forwarded for final review to Quality Assurance in the Asylum Division at Asylum Headquarters

⁸ 8 C.F.R. 208.13 (a)

⁹ INS asylum officers granted 22% of applications adjudicated in 1996 according to "INS Asylum Data Preliminary FY 1996" (U.S. Dept. of Justice, Immigration and Naturalization Service, Washington, D.C.), November 19, 1996 at 8. Also, 98% of new cases are decided by Asylum Offices or Immigration Judges within 180 days according to "Asylum Reform: A Year of Success, Fact Sheet" (U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.), January 4, 1996 at 2. Some slow track cases filed prior to 1/4/95 are still backlogged in the system, while newer cases have been expedited.

¹⁰ Exact figures are not available; INS does not track numbers of claims based on sexual orientation. This estimate is based on the authors' informal survey of immigration attorneys and advocacy groups.

¹¹ 8 C.F.R. 209.2

¹² The Instructions for Form I-589 (Application for Asylum and for Withholding of Removal) which state that "applicants who are in the United States illegally are subject to removal (deportation) if their asylum or withholding claims are not granted by an asylum officer or an immigration judge" are misleading. It is still possible for appeals to be made beyond the immigration judge to the BIA and Federal Circuit Court of Appeal.

in Washington, D.C. In particular, all decisions in asylum cases involving issues of diplomacy, statelessness, contiguous territories (e.g. Mexico and Canada), or new areas of asylum law that have not yet been interpreted must be reviewed in Washington, D.C. Sensitive cases involving gender, HIV/AIDS, and sexual orientation may be reviewed, as may unexpected cases (for example, if a citizen of France applied for asylum based on sexual orientation in the U.S.). The average turnaround time for the review of these cases is between a few days, weeks or months. In rare instances, a case may be forwarded by Asylum Headquarters to the INS General Counsel for final review.¹³

V. Additional Considerations

The process of applying for asylum based on sexual orientation may be both emotionally and financially challenging. The uncertainty as to whether an asylum-seeker will be ordered deported or not can often place great strain on relationships with partners, friends and family.

Asylum-seekers who have experienced severe psychological, physical or sexual trauma may re-experience the events during the legal proceedings in the forms of insomnia, irritability, depression, physical tension or pain (e.g. clenching of jaw muscles) and sometimes flashbacks. These can be symptoms of post-traumatic stress disorder (PTSD). It may be important for the asylum-seeker to receive counseling or medical assistance during this time (for further discussion, see Chapter 2. For further resources, see Chapter 7).

Persons who are taking protease inhibitors or other AIDS medications and deciding whether to apply for asylum may want to consider whether a forced return to the country of origin, or voluntary departure from the U.S., may mean not only a risk of persecution but also the possibility that they will no longer have access to AIDS medications or medical treatment.

For asylum-seekers living with HIV/AIDS, it may be important to consult their doctors while pursuing their asylum claims to ensure that any stress they are experiencing does not adversely impact their immune response and health.

¹³ From Heather McClure's telephone interview with Christine Davidson, Staff Attorney, Asylum Headquarters, Washington, D.C., October 7, 1997.

CHAPTER 2

Working With The Asylum Applicant: A Client-Centered Approach

A client-centered approach differs from traditional lawyering by stressing the central role of the client in his/her relationship with the advocate, and the client's active, intelligent participation in the preparation and representation of his/her claim.¹⁴ While not suspending a professional rapport, a client-centered approach encourages the advocate to consider the client's circumstances from the client's perspective and to respond to both the client's legal issues (and non-legal concerns when appropriate) with human care and compassion. This approach helps both the legal representative and the client work together in a partnership more effectively, thereby ensuring client satisfaction, high quality legal services and even client empowerment. Client empowerment results not only when the client understands his/her relationship to the relevant law and its procedure, but when he/she duly assumes a central role and responsibilities in the case. Through this approach, the client becomes a critical agent in the process and in the potentially successful outcome of the case.

There are additional considerations that both client and advocate should be aware of when beginning to explore an asylum claim. Asylum-seekers can be experts in their own culture, language and education, and particular concerns related to their experiences and fears of persecution in their homelands, and therefore, asylum-seekers can be valuable sources of information for the advocate. However, asylum-seekers' unfamiliarity with the United States' legal system compounded with experiences they may have had in their home countries, also can challenge the development of client-advocate rapport. Asylum-seekers often mistrust the law and lawyers, especially when their countries' legal systems are not independent and are riddled with corruption. Additionally, asylum-seekers may be unfamiliar with refugee law in the United States and its procedures. Given their intense fear of return and the possible psychological repercussions of their experiences, it is important that asylum-seekers and their advocates understand how stress or trauma can affect asylum-seekers' memory, testimony and demeanor during the proceedings, which can adversely impact their claims.¹⁵ Through a client-centered approach, the advocate and client can build mutual trust, respect and understanding and, in turn, facilitate the client's openness and cooperation with the legal representative.

A client-centered approach can also assist sexual minority immigrants including those with HIV/AIDS who are unfamiliar with the relatively new grounds of asylum based on sexual orientation and/or HIV/AIDS and who may fear "coming out," especially to a foreigner (let alone a legal professional). This reluctance is understandable given societal homophobia, AIDS phobia and/or clients' perceptions that their sexual orientation or positive HIV status is an irrelevant, personal, private "fact" not for a legal representative and immigration authorities to

¹⁴ See, e.g. D. Binder, et al., Lawyers as Counselors: A Client-Centered Approach (1991); Bastress & J. Harbaugh, Interviewing, Counseling and Negotiating: Skills for Effective Representation (1990).

¹⁵ See, e.g., Testimony, May 08, 1996, Phyllis A. Coven, Director of International Affairs, Immigration and Naturalization Service, U.S. Department of Justice, House International Relations on International Operations and Human Rights and Victims of Torture, discussing sensitive INS interviewing techniques of torture victims and asylum gender guidelines.

know - indeed, a "bad immigrant" fact that they often erroneously believe would be a ground for removal from the United States.¹⁶ ¹⁷

The advocate thus needs to take affirmative steps to create a safe space for the client to trust the legal representative, disclose her sexual orientation and/or HIV status and related experiences in her homeland, and ensure her empowered participation in the case. There are certain methods that the advocate may use in interviewing, preparing and representing the client that in fact provide for an effective demarcation of roles and a time-saving division of labor. While not intended to be an exhaustive list, these methods have been employed by the authors in many successful asylum claims.

I. Methods To Create A Safe Space For Client Disclosure Of Sexual Orientation, HIV-Status And Related Experiences

A. Recognizing And Respecting Client Individuality

An open, non-judgmental attitude that involves recognizing and respecting client individuality is the key to a successful relationship with sexual minority clients and clients with HIV/AIDS through the proceedings. As sexual minorities and people with HIV/AIDS are individuals as diverse as their heterosexual or HIV-negative counterparts, the legal representative should not assume the client's sexual orientation (or HIV status) and related experiences based merely on stereotypical profiles such as character, appearance, dress and physical features; e.g. gay men as effeminate and probably HIV-positive; lesbians as masculine. Questions laden with stereotypes or judgments not only might injure the client's self-esteem but might inhibit the client from trusting and working with the advocate. Common stereotypes to avoid include: that a person's sexual orientation or HIV-status is the central defining feature of his/her identity; that homosexuals are promiscuous, lonely, self-hating people; that a homosexual no longer practices or believes in his/her religion since most religions reject homosexuality; that homosexuality is

¹⁶ See, e.g., "Homosexuals Seek U.S. Political Asylum: Claim Persecution in their Homelands," Elizabeth Llorente, *The Record*, August 11, 1996 at p. 1.

¹⁷ Homosexuality and HIV were never per se grounds of deportation. Rather, from 1952 until its repeal in Immigration Act of 1990, Pub. L. 101-649, Stat. 4978 (Nov. 20, 1990) homosexuality was considered as a "psychopathic personality", a health-related ground of exclusion for intending immigrants and non-immigrants under 8 USCA 1182(a)(4). However, HIV remains a health-related ground of exclusion for aliens designated as a "communicable disease of public health significance" under INA 212(a)(1)(A)(i) as amended by National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122 effective July 10, 1994. However, this HIV exclusion ground does not bar nor affect the adjudication of asylum claims on their merits. For purposes of HIV-positive applicants granted asylum seeking adjustment of status to permanent residence, the applicant will have to apply for waiver of the exclusion ground proving that the grant of permanent residence a) is for humanitarian purposes, to assure family unity, or is in the public interest b) the danger to the public health of the United States created by his or her admission is minimal c) the possibility of the spread of the infection created by his or her admission is minimal and d) there will be no cost incurred by any level of government agency without the prior consent of that agency. See "Immigrant Waivers for Aliens Found Excludable under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act due to HIV Infection," Memorandum HQ 213.3-P, Alexander Aleinikoff, Executive Associate Commissioner, September 6, 1995, reprinted in 72 Interpreter Releases 1347 (October 2, 1995); and INS Cable, March 2, 1988, James A. Puleo, INS Assistant Commissioner of Examiners, reprinted in 65 Interpreter Releases 239 (March 14, 1988).

"caused" in men by overbearing, controlling mothers and absent fathers; that lesbians are trying to be men, or always dress in a masculine or androgynous manner; that an ostensibly "effeminate" character means that the male homosexual plays a woman's role in a romantic relationship.

Regarding people with HIV/AIDS, there are many judgmental assumptions about how they contracted HIV (e.g. that they contracted HIV through willful or reckless conduct); their celibacy (e.g. that they should be celibate now); medical treatment regimes (e.g. that they should be pursuing western medical treatment and the pro-tease inhibitor "cocktail"); social support needs (e.g. that they should be involved in individual or group therapy). Additionally, there is the negative assumption that a client is somehow self-hating when he/she is not completely "out" about her sexual orientation and/or HIV status to family, friends, employer, etc.

The diversity of how clients construct, understand and live their identities is the evidence that contradicts these stereotypes and judgmental perspectives. Through the advocate's conscious, close attention to his/her own communication and interaction with the client, the legal representative can evince an open, nonjudgmental attitude. This bolsters the client's trust, confidence and cooperation with the advocate through all stages of case preparation and representation.

B. Opening The Door To Sexual Minority Clients And Clients With HIV/AIDS

Several discreet and easy ways for the advocate to reveal that his/her door is open to clients who are sexual minorities and people with HIV/AIDS include: advertising in the gay or lesbian press; having such media available in the waiting room; creating a flyer or intake form for clients to read/and or fill out in the waiting room stating the firm or organization's non-discrimination g61 policy towards clients on the basis of race, religion, national origin, gender, sexual orientation or medical condition including HIV; posting or wearing gay pride or HIV symbols in the office or waiting room such as the rainbow colored flag, pink triangle (symbolizing gay victims of the Holocaust), red ribbon (symbolizing solidarity with people with HIV/AIDS) or images of the AIDS quilt. These symbols are recognizable to many sexual minority members and people with HIV/AIDS.

However, as a caveat, these means prove more effective to sexual minority immigrants and people with HIV/AIDS who are relatively assimilated to mainstream Anglo gay and lesbian culture or HIV activism or supportive organizations who read the gay and lesbian press (usually in English) and are familiar with such symbols.¹⁸ Additionally, the legal representative should bear in mind that while these means may suggest a welcoming environment, they do not lead every client to disclose his/her sexual orientation or HIV status during the initial consultation without more pertinent discussion as described below.

¹⁸ See, e.g., Diane Seo, "A Place in the Sun: Gay Immigrants Who Come from Countries Where Homosexuality is Taboo Grapple with Some of the Most Difficult Conflicts as they Struggle for Acceptance," *Los Angeles Times*, March 27, 1994, discussing divide between gay immigrants and their often homophobic communities and racism within the mainstream gay community.

C. Setting The Stage For Client Trust, Confidence And Candor In The Initial Consultation

It is important in the initial consultation for the advocate to set the stage for client trust, confidence and truthfulness by explaining the format of the consultation and the legal representative's and client's respective roles. The advocate should stress that the consultation is confidential and no information will leave the office or be revealed to anyone including immigration authorities without the client's prior consent.¹⁹ ²⁰ The legal representative simultaneously should clearly caution the client that he/she needs the client to share all information to be able to assist the client and cannot help a client lie in any immigration matter since the client would be committing a crime. Given the advocate's professional ethical responsibilities, he/she could face sanctions by immigration authorities.²¹

D. Brief Explanation Of Asylum Law, Its Extended Eligibility To Socially Marginalized Groups And Its Requirements

During an initial consultation, it is professional, ethical and fair to briefly but clearly explain United States asylum law, its requirements and extended eligibility to members of socially marginalized groups like sexual minorities and, in rarer instances, people with HIV/AIDS, who have experienced and/or fear persecution at the hands of the authorities or groups the authorities are unable or unwilling to control on account of such status. Indeed, given immigrants' general unfamiliarity with immigration law, it may be useful for the legal representative to provide an overview of immigration remedies, including asylum.²² The

¹⁹ The knowing placement of false information on an asylum application is covered by criminal penalties under title 18 of the United States Code and civil penalties under section 274C of the Immigration and Nationality Act, which can result in a permanent bar to any immigration benefit. 8 C.F.R. 208.3(a)(4). Additionally, the knowing filing of a frivolous asylum application on or after April 1, 1997 can render the applicant permanently barred from any benefits under the Immigration and Nationality Act. 8 C.F.R. 208(a)(5).

²⁰ See, e.g., ABA Model rules of Professional Conduct on Scope of Representation (1992), *supra*; and 8 C.F.R. 292.3 Discipline of Attorneys and Representatives providing authority to Immigration Judge, Board of Immigration Appeals, and Attorney General to suspend or bar from practice before Immigration and Naturalization Service and Executive Office for Immigration Review or take other appropriate disciplinary action including censure for actions including overcharging clients for services, frivolous behavior or willful misinformation or disinformation before immigration authorities.

²¹ See, e.g., ABA Model Rules of Professional Conduct on Scope of Representation (1992), *supra*; and 8 C.F.R. 292.3 Discipline of Attorneys and Representatives providing authority to Immigration Judge, Board of Immigration Appeals, and Attorney General to suspend or bar from practice before Immigration and Naturalization Service and Executive Office for Immigration Review or take other appropriate disciplinary action including censure for actions including overcharging clients for services, frivolous behavior or willful misinformation or disinformation before immigration authorities.

²² See, e.g., Preamble: A Lawyer's Responsibilities, ABA Model Rule of Professional Conduct (1992), *supra*, defining lawyer's educational role to "provide client with informed understanding of client's legal rights and obligations and- their practical obligations," and Rule 1.4 ABA Model Roles of Professional Conduct (1992) on Communication, requiring that the "lawyer - explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" noting that "adequacy of communication depends in part

advocate can also raise examples of the types of abuse and mistreatment that often occur to people in these groups, including rape and sexual abuse, and their psychological repercussions such as trauma, nightmares, night sweats, insomnia, stress and diminished self-esteem. This preface serves to inform any client as to the possible, pertinent recent developments in immigration law, and contributes to a safe space, if the client is a sexual minority or person with HIV/AIDS, to disclose their identities and experiences.²³

If the client readily confides this information, it is appropriate for the legal representative to thank the client for trusting him/her. It is also fair for the legal representative to "come out" to the client as a sexual minority or person with HIV/AIDS if comfortable, or refer to his/her familiarity with other gays or lesbians or people with HIV/AIDS as friends, family, etc. to build on the advocate-client rapport.²⁴

Once the client "comes out," the advocate should consistently use the term the client wishes to use in referring to his/her identity to ensure the client's confidence in and candor with the advocate. For example, a client who hears the legal representative constantly refer to him/her as a "homosexual," when he/she instead defines him/herself as gay or lesbian might shy away from the advocate given the former homophobic usage of "homosexual" to describe a medical pathology.

If the client does not respond to the preface, especially if he/she looks hesitant or distracted, it is warranted for the legal representative to ask the client for his/her thoughts or to ask whether anything he/she had explained might apply to his/her situation in an ultimate effort to secure disclosure when applicable.

If the client declines, it is reasonable to conclude that sexual orientation and/or HIV-status is a non-issue in the client's immigration situation.

E. Communication, Interpersonal And Interviewing Methods To Help The Client Share His/her Story

Even when a client discloses his/her sexual orientation or HIV-status, he/she may not readily express his/her actual fears of return and share his/her story with the legal representative. This may be due to psychological discomfort and shame over past incidents, fears for the future, unfamiliarity with legally relevant experiences for claims for asylum, and/or related anticipation that the advocate will lead him/her through direct, intense "interrogation". In instances where the client routinely experienced violence as a sexual minority or person with HIV/AIDS, the

on the kind of advice or assistance involved."

²³ Notwithstanding many clients' understandable desperation to secure a valid immigration status, it is highly improbable that this cursory explanation would lead a client to falsely claim to be a sexual minority and/or person with HIV/AIDS to pursue asylum on such grounds since he/she would not want and would not know how to identify with such stigmatized social groups. The interviewing methods outlined below also safeguard against fraudulent claims by their very rigor, thereby causing a fabricator's story to disintegrate in its details, coherence and logic.

²⁴ See, e.g., "Out from Oppression: Immigration Cases Forged a Bond between Lawyer, Clients," Christopher Nugent, the Los Angeles Daily Journal, November 15, 1996, p. 6.

violence may have been so pervasive, stigmatizing and psychologically numbing such that he/she did not or cannot objectively recognize the abuse as abuse.²⁵ Hence, the need arises for practical communication and interpersonal and interviewing methods to facilitate the client's candid story-sharing.

F. Offer Client The Option To Write Out Experiences For Affidavit Preparation Before Discussion And Evaluation Of Experiences

After disclosure, the legal representative may offer the client the opportunity to write out his/her experiences and fears as a sexual minority and/or person with HIV/AIDS if returned to his/her homeland instead of discussing them during the initial consultation.²⁶ The client may wish to return to read, discuss and evaluate his/her story together with the advocate. The advocate can clarify that some clients prefer to do this as their experiences, especially if involving abuse or torture, can be very difficult to describe in words and easier to write down on paper. This technique is a time and labor-saving client-centered device that enables the client to explain and reflect upon his/her experiences. As an incentive, the advocate might explain that the client's statement, with review and revision, could later become his/her affidavit in support of the asylum claim, and might sound better when prepared completely and directly in the voice of the client rather than the advocate. For writing purposes, the advocate should clarify the value of a chronological format so that the reader can follow his/her story easily from the beginning with the caveat that there is no right or wrong way to relate his/her experiences as the legal representative and client will consider them together at the next consultation.

Client affidavit preparation calls for the advocate to review the client's written story thoroughly, and negotiate with the client the organization of its structure and content. Regarding structure, in addition to the chronological format, the affidavit should also use numbered paragraph form and be double-spaced so as to be easy to read. The advocate and client might consider for each paragraph alternating between the:

²⁵ See, e.g., Scarce, Michael. Male on Male Rape: The Hidden Toll of Stigma and Shame, New York: Insight Books, 1997; Eric Steiner Carlson, "Sexual Assault on Men in War," The Lancet, January 11, 1997, V. 349, N. 45 p. 129, discussing the hidden offense of male sexual assault as a specific human rights violation; Roberto Rodriguez; Patricia Gonzalez, "Surviving Torture and Political Violence is Long Healing Process," Fresno Bee, September 1, 1997 at B7; Mary C. Smith Fawzi, Malou Jean-Baptiste, Benjamin Rosenthal, Carole Mitnick, "Health Impact of Human Rights Violations in Haitian Refugees," Lancet, August 2, 1997, V. 349, N. 74, p. 371; Gavagan, Thomas; Martinez, Antonio, "Presentation of Recent Torture Survivors to a Family Practice Center," Journal of Family Practice, February, 1997, No. 2, Vol. 44; p. 209; Lipson, Juliene G.; Omidian, Patricia A., "Afghan Refugee Issues in the U.S. Social Environment," Western Journal of Nursing, February 1997, No. 1, Vol. 19; Pg. 110; Weinstein, Harvey M. ; Dansky, Laura ; Iacopino, Vincent, "Torture and War Trauma Survivors in Primary Care Practice," Western Journal of Medicine, September, 1996, VI. 165 ; No. 3 ; Pg. 112; Carlos J. Gonsalves, et. al, "The Theory of Torture and the Treatment of Its Survivors: An Intervention Model," Journal of Traumatic Stress, V. 6, N.3, 1993, pp. 351- 365, providing "formulations towards a comprehensive treatment approach for survivors of torture and political repression."

²⁶ Please note that this approach may not be appropriate for clients who are marginally literate, or who are uncomfortable expressing themselves in writing. However, if this is the case, many of the techniques described in this chapter may still be applicable.

- who, what, where, when and why of the client's experiences
- the impact of the experience on the client
- the client's conclusions about the experience(s)'s meaning

This integrates the hard facts with the client's own subjective and more objective perceptions, sharpening the relevance of the experiences in each paragraph.

In some instances, the persecution the client has experienced and/or fears in the future are based on sexual identity, sexual practices and social norms that interrelate in ways that may be unfamiliar to U.S. practitioners. For example, an asylum-seeker may experience or fear violence because of his or her non-conformity with cultural expectations of how women and men in that society should act, or what roles they are expected or permitted to play in society. For example, men who appear effeminate, regardless of their sexual practices, may be imputed to be gay - they may be treated as "gay" men because of their physical or social behavior, regardless of whether they actually consider themselves to be "gay" or have sex with men. In a second example, the persecution of lesbians in some countries may be triggered by their refusal to marry and have children. In some cases, a lesbian asylum-seeker may have felt attracted to women but may never have expressed her feelings for fear of repercussion. In these instances, a woman's lesbianism may remain invisible.

To offer a third example, in some countries, a gay or lesbian individual's ability to engage in same-sex relationships may depend on his or her ability to maintain the illusion that he or she completely conforms to heterosexual norms. For example, a gay or lesbian asylum-seeker may have been, or may still be, married while continuing to have same-sex sexual relationships and/or self-identifying as gay or lesbian. The asylum-seeker, in his/her country of origin, may seek cover as a married person, despite his/her sexual identity. Indeed, his/her ability to continue living a covert gay or lesbian life may depend upon the success with which he/she maintains a public identity as a heterosexual. (For a further example of an affidavit that discusses the issues above, please see Appendix 1 at the end of this chapter). This situation is comparable to members of an oppressed faith or religion who are forced to outwardly practice the dominant religion while secretly maintaining their own religious identity. These examples may alert advocates to different understandings of sexual identity in disparate countries which will assist them in their work with and representation of potential asylum-seekers.²⁷

Regarding content, the legal representative can assist the client in communicating his/her story so that the facts come alive in vivid detail the way they actually happened. As the relevant facts of asylum are, in essence, human experiences and fears of persecution, the client's affidavit can convey his/her fundamental humanity, his/her emotions, feelings, and reactions during and after experiences - albeit without embellishment. The legal representative, however, should also help the client understand the legal relevance, or lack thereof, of certain experiences, feelings or perceptions that the client recounted to decide whether and why to include them or exclude them in the final affidavit (e.g., graphic, moment-to-moment depictions of sexual abuse may be gratuitous.)

²⁷ Perez-Alvarez v. INS, 857 F.2d 23, 24 (1st Cir. 1988) clarifies that it is highly advisable for adjudicators to avoid assumptions about how other societies operate. As this chapter illustrates, it may be especially important in cases involving asylum based on sexual orientation to avoid assuming that gays and lesbians are similar worldwide.

The advocate will further need to negotiate how the client comfortably refers to and relates his/her identity as a sexual minority in the affidavit (e.g., in Western clinical or contemporary political terms as "homosexual", bisexual, transgendered, gay, lesbian, queer, and/or his own country's terms, e.g., "goorijideen", Mauritanian Senagelese Wolof literally "man-woman" analogous to "faggot"). The client should consider the connotations of the identity terms he/she selects and actual consistency with his/her self-perception. This is to say that a client might not label himself "gay" or "lesbian" due to unfamiliarity with the terms, their Westernized, politicized connotation, or his relationship to the mainstream "gay" or "lesbian" community. The client instead might refer to himself as, for example, "de ambiente" or "de onda," Mexican and Central American code words for gay men.

Client affidavit preparation usually requires several sessions between the advocate and client. To save time, after one review, the advocate can provide the client with a list of relevant, focused questions arising from the draft affidavit for the client to respond to in his/her revision. Through this process, affidavits tend to expand significantly in length. There is no reason for concern over the final product's number of pages provided that all of its contents are relevant - if not essential - in communicating the client's story. Given how immersed the advocate and client necessarily become in the preparation process, the final draft should always be reviewed by a colleague unfamiliar with the client's story for an outsider's neutral observations. In summation, while at times trying the patience of both the advocate and client alike given the time and precision involved, the affidavit preparation process not only can enhance the advocate-client rapport but can result in the central evidence in the client's claim: the client's full, true story in his/her own voice. (For a sample affidavit, see Appendix 1 at the end of this chapter.)

G. Using Open-Ended, Non-Judgmental Questions And Demonstrating Patience, Active Listening And Sensitivity To The Client To Establish His/her Identity, Voice, Chronology And Structure To His/her Own Story

The advocate may clarify in broad terms that he/she has no expectations of the client in this discussion but seeks to learn:

- his/her life story as a gay man, bisexual, lesbian or transsexual and/or person with HIV/AIDS
- experiences of importance to the client, and
- why asylum might be an applicable remedy.

If the advocate seeks to take notes on the client's narrative, he/she should explain their confidentiality and seek the client's permission.

This approach enables the client to narrate freely about his/her identity in his/her voice, chronology and structure. It entails that the legal representative temporarily suspend his/her legal framework of analysis and prejudgment of what a client describes. It is preferable for the advocate to hear and understand the client's entire story before attempting to evaluating it's

"facts" for their relevance for a claim for asylum. The advocate should show patience and listen actively and sensitively to the client as a person in his/her complexity. According to clinical studies, the client is more apt to be thorough, precise and honest when the advocate is empathetic and understanding.

The advocate may communicate patience through verbal and non-verbal communication by not appearing distracted, not interrupting, and using open-ended, non-judgmental questions. While narrow questions elicit "yes" or "no" answers without narration, open-ended, non-judgmental questions beginning with "what" rather than "why" facilitate narrative responses (e.g. "What experiences do you recall about how people treated you as a child" rather than "Did people mistreat you as a child?" or "Why did you fail to report your family's abuse to the authorities?"). Narrow "why" questions about the experiences the client recounts might sound accusatory to the client, thereby inhibiting his/her candor and the flow of his/her story. Although relevant for asylum claims, for example, to establish the client's state of subjective fear and persecutor's motive to mistreat the applicant on account of the protected ground, "why" questions can wait to be asked until the client finishes his/her story.

Additionally, the advocate may display active listening through maintaining eye contact and briefly echoing and infrequently summarizing the client's narration with statements supporting the client to continue to describe his/her experiences, e.g. "I really appreciate all that you are telling me. Are there more experiences you can share with me?" as opposed to a curt, gutteral "Uh-ah" or "What happened next?" Further, the legal representative can convey sensitivity to the client through appropriate comments or gestures during his/her description affirming their common humanity such as, "You have every reason to be angry over such an experience" or through simply offering water or tissues to the client if he/she becomes choked with emotion and tears when narrating his/her experiences. When working with clients who are less forthcoming, advocates may choose to ask more directed questions to supplement active listening (however, this type of questioning is not yet "focused follow-up questioning," as described below).

After the client finishes, the advocate might thank the client for trusting his/her story with the advocate.

H. Focused Follow-up Questioning

After listening to the client's story, the advocate can explain his/her need to engage in more focused questioning to both confirm his/her understanding of events as narrated and to fill in some details. The advocate can proceed to help organize the story in a chronological format through asking narrow, specific follow-up questions that flesh out the pertinent facts, for example, the who, what, where, when and why of each incident described by the client. Focused questioning is not intended to be cross-examination and the advocate should consider that many clients' memories are initially hazy, especially regarding dates, times, names and comments. It, can be very useful for the advocate to jot down the unverified information for the client to take home and reflect upon for review at a subsequent consultation.

II. Discovering Other Undisclosed "Relevant" Experiences

Finally, after verifying the client's story thus far, the advocate might encourage the client to consider whether there are any other experiences he/she would consider important to mention. The advocate then may proceed carefully with chronological, focused questioning in the areas most relevant to asylum:

- 1. Client's Realization of Identity:** At what age and how the client realized his/her different sexual orientation or HIV-positive status; what reactions this caused the client and why; what changes the client made in his/her life because of this identity.
- 2. Client's Childhood:** Whether and how the client was treated as a child by his/her family, peers, school, religious or other authorities because of actual or perceived sexual orientation and/or other protected groups (e.g. race, religion, national origin, gender, political opinion) and, if so, the who, what, where, when and why of the experiences and their effects on the client.
- 3. Client's Adolescence:** Whether and how the client was treated as an adolescent by his/her family, peers, school, employer, religious or other groups or authorities like the police, etc. because of actual or perceived sexual orientation and/or other protected grounds and, if so, the who, what, where, when and why of the experiences and their effects on the client.
- 4. Client's Adulthood:** Whether and how the client was treated as an adult by his/her family, peers, school, religious, employer or other groups or authorities like the police, etc. because of actual or perceived sexual orientation and/or other protected grounds and, if so, the who, what, where, when and why of the experiences and their effects on the client.
- 5. Client's Knowledge of People Similarly Situated:** Whether and how the client knows how others were and are viewed and treated because of their actual or perceived sexual orientation and/or HIV status or other protected ground in his/her country by the authorities or other groups.
- 6. Availability of Legal Protection for Client:** Whether and why, if abused in any experience, if he/she failed to report the incident to the authorities. If the incident was reported, what were the effects of such report, if any, on the client.
- 7. Client's Possible Delay in Departure after Abusive Experience:** Whether and why, if abused in any experience, he/she did not flee the country immediately.
- 8. Event(s) Triggering or Culminating in Client's Departure:** What, if any, specific event or series of events led to the client leaving his/her country.
- 9. Client's Destination Choice:** Whether when he/she finally left the country, why he/she did not opt to pursue: 1) relocation elsewhere in the country; 2) refugee status or relocation to another country, and/or; 3) immediate relocation to the United States.

10. Client's Comparison between United States and Home Country: What has been his/her experience in the United States as a sexual minority and/or person with HIV/AIDS and how has it been different than in his/her country (e.g. in the areas of employment, health care, social support, involvement in organizations or events for sexual minorities/people with HIV/AIDS).

11. Client's Specific Concerns over Return: What specifically does he/she as a sexual minority and/or person with HIV/AIDS actually think could and would happen if he/she returns to her country now and why.

As the client has confided his/her story to his/her best skill and ability, this difficult questioning might help elicit more relevant facts for the client's potential claim for asylum or withholding of removal.

III. Facilitating The Client's Informed Decision Of Whether To File For Asylum

The advocate's role in facilitating the client's informed decision-making over whether to file for asylum entails helping the client assess the advantages and disadvantages of such a strategy and to arrive at a decision the asylum-seeker is comfortable with. For affirmative asylum applications to be filed at an Asylum Office, the legal representative can specifically help the client consider:

- the strengths and weaknesses of his/her potential asylum claim
- the risks of referral to an Immigration Judge and removal from the United States, and
- other client-centered concerns (e.g. his/her need for employment authorization; for public assistance if HIV-positive; the potential separation from a partner in the United States if the claim is denied; the stress of the proceedings on the applicant's health, especially if HIV-positive).

If the client is already in removal proceedings after referral from the Asylum Office or apprehension by Immigration and Naturalization Service, the decision-making process is easier since filing for asylum and withholding of removal is defensive and are some of the few remedies available in removal processing to prevent deportation. There is no logical reason not to file when in proceedings unless the claim is patently frivolous (and, therefore, barred) and possibly could subject the legal representative to sanctions.

The advocate can help the client assess the strengths and weaknesses of a potential claim through reviewing his/her story in terms of the statutory definition of "refugee" the applicant must meet for asylum eligibility, and discussing the related legal elements of, and bars to, asylum eligibility and withholding of removal. The applicant can then demystify the following complex elements in plain language for the client to apply them when evaluating his/her own claim:

A. Burden On The Applicant

TO THE CLIENT: In asylum cases, you, as the asylum applicant, would have the responsibility to prove to the Immigration and Naturalization Service or Immigration Judge that you are a "refugee" in how the law defines "refugee" and all of its specific parts which we will review one by one below. A refugee is broadly defined as a person "outside his/her home country unable or unwilling to return to his/her home country because of persecution or a well-founded fear of persecution in the home country on account of the alien's race, religion, nationality, social group or political opinion."²⁸

TO THE LEGAL REPRESENTATIVE: An asylum-applicant bears the burden of establishing that he or she meets the statutory definition of "refugee". Immigration and Nationality Act (INA) § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

B. To Establish A Well-Founded Fear Of Persecution

1. Subjective Basis Of Fear

TO THE CLIENT: Whether you, in fact, are really and truly afraid to return to your country.

TO THE LEGAL REPRESENTATIVE: The well-founded fear standard entails both a subjective and objective component. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). "The subjective component requires that an applicant have a genuine concern that he will be persecuted." Pitcherskaia v. INS, 118 F.3d 641, 645 (9th Cir. 1997), citing Aguilera-Cota v. INS, 914 F.2d 1375,1378 (9th Cir. 1990). "An asylum applicant's candid, credible, and sincere testimony demonstrating a genuine fear of persecution satisfies the subjective component of the well-founded fear standard." Berroteran-Melendez v. INS, 955 F.2d 1251, 1256 (9th Cir. 1992).

"The evaluation of the subjective element is inseparable from an assessment of the personality of the applicant since psychological reactions of different individuals may not be the same in identical conditions." The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979), HCR/1P/Eng./REV. 2 , paragraph 40. While not controlling as force of law for United States, *The Handbook* has been considered important as a resource for asylum adjudication. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985).

2. Objective Basis Of Fear

TO THE CLIENT: That it is understandable that another person in your situation would be afraid to return to your country.

²⁸ INA § 101(a)(42), 8 U.S.C. § 1101 (a)(42).

TO THE LEGAL REPRESENTATIVE: "A reasonable person in the applicant's circumstances would fear." Matter of Mogharrabi, 19 I&N Dec. 439 at 11 (BIA 1987); INS v. Cardoza Fonseca, 480 U.S. 421 (1987). This "objective component requires a showing by credible, direct, and specific evidence of facts supporting a reasonable fear of persecution." Acewicz v. INS, 984 F.2d 1056, 1061 (9th Cir. 1993).

While the "fear must be reasonable... (e)xaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind may be regarded as justified." The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979), HCR/1P/Eng./REV. 2 , paragraph 41. While not controlling as force of law for United States, *The Handbook* has been considered important as a resource for asylum adjudication. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985).

3. Of Persecution

TO THE CLIENT: That you are afraid of and/or have experienced "persecution" such as unfair abuse, mistreatment, or threats of abuse or mistreatment; for example, detention; kidnapping; torture; beatings; rape or other sexual abuse; forced or otherwise unwanted medical or psychiatric treatment; unfair arrests and prosecution for crimes; extreme discrimination keeping you from working at all or earning a decent living; or extortion or robbery of money from you; or other reasons. You need not have experienced such abuse or mistreatment to qualify for asylum provided that you have particular reasons to fear such future abuse or mistreatment.

TO THE LEGAL REPRESENTATIVE: Although persecution has never been defined by statute, a broad, controlling legal definition of "persecution" is that of 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, I & N Dec. 211 (BIA 1985). Persecution is found "Only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference the persecutor will not tolerate." Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985).

It is notable that the applicant need not have experienced persecution to qualify for asylum. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of Barrera, 19 I&N Dec. 837 at 12 (BIA 1989); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Sotelo-Aquije v. Slattery 17 F.3d 33 (2nd Cir. 1994) (death threats issued by guerrillas against applicant who was not physically harmed); Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994)(applicant threatened by death squad without physical abuse). Indeed, an applicant may face persecution as a "refugee sur place" due to circumstances arising while the applicant is in the United States. Azarshahy v. INS, unpublished 1994 WL 446040 (N.D. Cal. 1994), citing Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987)(granting asylum to Iranian who participated in anti-Khomani demonstrations in United States); The Office of the United Nations High Commissioner, The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the

1967 Protocol Relating to the Status of Refugees, (Geneva, 1979), HCR/1P/Eng./REV. 2 , paragraphs 94-96, (explaining how a person can become a refugee sur place due to "circumstances arising in his country of origin while absent" due to his own actions requiring careful appreciation as to whether the actions may have now come to the attention of the authorities and how they would be viewed). While not controlling as force of law for United States, *The Handbook* has been considered important as a resource for asylum adjudication. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985).

As "persecution" is construed by the asylum adjudicator based on the particular asylum claimant's facts and circumstances on a case-by-case basis, there is not an exhaustive list of what constitutes or does not constitute "persecution."²⁹ However, caselaw helps to illustrate many examples of persecution and their nuances such as:

1. Serious Physical Harm. Serious physical harm including confinement, kidnapping or torture, beatings, rape and other forms of sexual violence and domestic violence. Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995) (detention and physical torture); Lopez Galarza v. INS, 99 F.3d 954, 958 (9th Cir. 1996) (rape or sexual assault); Lazo Majano v. INS 813 F.2d 1432 (9th Cir. 1987) (rape and other forms of serious sexual violence); In Re D-V, BIA Int. Dec. 3252 (BIA 1993) (rape and other forms of sexual violence); In Re Fauziy Kasinga Int. Dec. 3278 (BIA 1996) (female genital mutilation); In Re V-T-S Int. Dec. 3308 (BIA 1997) (kidnapping as very serious offense); "Sweet Asylum: Battered Wife from Bangladesh can Stay in U.S.", Beth Holland, New York Newsday, October 1, 1996 (domestic violence including forced sexual intercourse and threats by family and inability to obtain work due to threats to employers when inflicted by high-ranking police officer spouse, unpublished, unappealed decision by Immigration Judge).

2. Coercive, Unfair Medical-Psychological Treatment. Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997) referring to Board of Immigration Appeals' acknowledgment that "forced institutionalization, electroshock treatments and drug injections could constitute persecution" citing Sagermark v. INS, 767 F.2d 645, 650 (9th Cir. 1985) (involuntary and unjust confinement to mental institution). *However, in the case of people with HIV/AIDS who fear the unavailability of adequate medical treatment if deported, it is improbable that INS will recognize this as per se persecution.* Consider INS' following response to the Presidential Advisory Council's recommendations (to recognize persons with AIDS as a social group under asylum law and protect them from persecution): "The fact that an asylum claimant with HIV or AIDS cannot receive medical treatment equivalent to that available in the United States would be insufficient to establish eligibility for asylum." See "IJ Grants Asylum to HIV Positive Man, General Counsel Issues HIV instructions," 73 Interpreter Releases 901 (July 8, 1996). Failure to receive high-quality medical treatment is arguably discreet from a government's refusal to provide even

²⁹ Consider, e.g., "In this (Seventh) circuit, we view persecution as encompassing not only death and imprisonment but the well-founded fear of non-life threatening violence and physical abuse. Balazoski v. INS, 932 F.2d at 642 [7th Cir. 1991]. Within these vague contours, neither our caselaw nor the BIA (Board of Immigration Appeals) offers much guidance for sorting out asylum applicants. The prevailing approach is, perhaps, unfortunately, largely ad hoc." Marquez v. INS, 103 F.3d 374, 379 (7th Cir. 1997).

basic medical care to people with HIV/AIDS due to invidious AIDS phobia (rather than lack of resources), thereby subjecting them to needless suffering and possibly an accelerated death.

3. Invidious or Pretextual Prosecution or Disproportionate Punishment for Offense:

Under certain circumstances, a government's prosecution of an applicant under that country's laws may qualify as persecution. However, this type of prosecution qualifies only when invidious, meaning: a) specifically on a protected ground (e.g. particular social group based on sexual orientation, HIV-status or political opinion), b) punishment for common law or regulatory offense when extreme or disproportionate or pretextual for protected ground, or c) contrary to internationally accepted principles of human rights. See Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992), Behzadpour v. U.S., 946 F.2d 1351 (8th Cir. 1991), Hernandez Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985), standing for the proposition that fear of criminal prosecution may amount to persecution where the government's motive is improper and inspired by one of applicant's protected grounds. Also, Chanco v. INS, 83 F.3d 298, 302 (9th Cir. 1996) (criminal prosecution of the applicant for unsuccessful coup d'etat where peaceful means of expressing political opinion is available, therefore, this is prosecution as common law crime and does not provide for disproportionately severe punishment to be considered pretextual for persecution on political opinion); Ramos Vasquez v. INS, 57 F.3d 857, 863 (9th Cir. 1995) (punishment for desertion is persecution when type of action forced to be associated with is condemned by international community); Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992) (death penalty for apostacy in Iran as punishment constitutes persecution as opposed to mere discrimination or harassment); Chang v. INS, 119 F.3d 1055 (3rd Cir. 1997)(threat of one year imprisonment for applicant's violation of China's exit laws "generally applicable" but impermissibly based on enumerated "political opinion" ground and possibility for imprisonment and torture for political opposition was punishment severe enough to constitute "extreme conduct" and thus, persecution); The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979), HCR/1P/Eng./REV. 2 , paragraph 60, (recommending that in prosecution as persecution claims the fact-finder take into consideration their national laws as a yardstick and the law's accordance with international human rights standards). While *The Handbook* is not controlling as force of law for United States, *The Handbook* has been considered important as a resource for asylum adjudication. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985).

The advocate, therefore, should bear in mind that asylum adjudicators might compare the applicant's threatened or actual arrest or prosecution with United States laws and practices in determining persecution. In the United States, under state law, there also exist legal prohibitions against loitering, prostitution, homosexual sodomy, and HIV-transmission, which may be possibly analogous to other countries' codes. The legal representative should consider whether: a) the law is facially discriminatory as against sexual minorities or people with HIV/AIDS as opposed to laws of general application to all citizens; b) if the law is of general application, whether the law's enforcement is, in fact, a selective or pretextual means to target and/or punish sexual minorities or people with HIV/AIDS and/or chill their free association, expression and even political opinion; and c) if the law's punishment is blatantly disproportionate to the offense (including years of imprisonment for public morality offenses, vagrancy or organizing or

participating in marches or HIV outreach/education efforts and life imprisonment or the death penalty for sodomy).

The existence and federal constitutionality of United States state-law sodomy statutes in particular should not vitiate a claim of persecution based on another country's sodomy statutes considering:

- a. the overwhelming lack of enforcement in the United States against consensual, private sexual conduct under these statutes as opposed to in other countries;
- b. the Supreme Court's limited holding in Bowers v. Hardwick, 478 U.S. 186 (1986), that homosexuals do not have a fundamental "privacy" right under the United States Constitution to engage in sodomy emanating from the liberty interest of the Due Process Clause of the Fifth Amendment;
- c. Hardwick's diametric conflict with international legal precedent binding on human rights covenant signatories like the United States, e.g. Toonen v. Australia, U.N. Doc. CCPR/C/50/d/488/1992 (1994), where the United Nations Human Rights Committee struck down Tasmania's sodomy statute as violative of the International Covenant of Civil and Political Rights' non-discrimination and privacy provisions of Article 2(1) and Article 17, declaring that "it is undisputed that adult consensual sexual activity in private is covered by the concept of privacy;" and
- d. the Supreme Court's recent holding in Romer v. Evans, 116 S. Ct. 1620 (1996) that Colorado's state constitutional amendment barring state and all local governments from enacting or enforcing any policy or law to protect homosexuals contravenes the Equal Protection Clause of the Fourteenth Amendment since it infringes on the fundamental right of homosexuals' to participate equally in the political process. Romer negates the reasoning that state-sponsored discrimination against homosexuals is per se rational under the Constitution. In the context of asylum, Romer may be invoked to distinguish Hardwick as more of a gay privacy rights case and show that sodomy statutes targeting homosexuals as a class chills not only sexual conduct but, more importantly, their identity and political participation, thereby substantiating a claim of prosecution as persecution.

4. Severe Discrimination. *This definition includes discrimination only under extraordinary circumstances, when severe and pervasive.* Ghaly v. INS, 58 F.2nd 145, 1431 (9th Cir. 1995)(citing Matter of Salama, 11 I & N Dec. 536 (BIA 1996) (government campaign triggering 37,000 Jews' departure calling for boycott of Jewish doctors and expulsion of Jewish professionals from professional societies constituted persecution); Desir v. Ilchert, 840 F.2d 723, 727 (9th Cir. 1988), Matter of Acosta, 19 I & N Dec. 211, 222 (BIA 1985) (when economic deprivation severely affecting the applicant's ability to earn a livelihood constitutes persecution); ("severe discrimination over a long period of time or increasing in intensity as persecution") Asylum Branch, Immigration and Naturalization Service, A Training Manual for Immigration and Naturalization Officers (1991) at 120; but see Zalega v. INS, 916 F.2d 1257, 1260 (7th Cir. 1990) (inability to obtain preferred government employment does not establish persecution);

Sharif v. INS, 87 F.3d 932 (7th Cir. 1996) (westernized Iranian woman's mere inability to enjoy freedoms enjoyed by American women does not constitute threat of affirmative persecution by government); Fatin v. INS, 12 F.3d 1233, 1240 (3rd Cir. 1993) ("persecution does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional"); Fisher v. INS, F.3d 955, 961 ("persecution is an extreme concept, which ordinarily does not include discrimination on the basis of race or religion, as morally reprehensible as it may be"); Bucur v. INS, 109 F.3d 399 (7th Cir. 1997) ("Generally, 'persecution' differs from discrimination against members of minority groups in being either official and severe, or non-official but lethal and condoned"; "official imprimatur against minorities magnifies its gravity for purposes of determining whether discrimination amounts to persecution, as is implicit in the state action requirement of the Fourteenth Amendment"; forbidding asylum applicant to practice his/her religion would make him/her victim of persecution even without imprisonment, torture or banishment and with ability to attend school; laws forcing ethnic Hungarians to identify themselves with armbands and forbidding them to attend college or live in designated areas would rise to persecution even when they do not prevent them from earning a livelihood).

"(D)iscrimination will amount to persecution... if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities... Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in light of all the circumstances... A claim (will be) stronger where a person has been the victim of a number of discriminatory measures of this type and there is a cumulative element involved." The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979), HCR/1P/Eng./REV. 2 , paragraphs 54-55. While not controlling as force of law for United States, *The Handbook* has been considered important as a resource for asylum adjudication. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985).

The legal representative should consider that, notwithstanding the existence of federally-condoned public and private discrimination against sexual minorities in the United States, the Supreme Court in Romer v. Evans, 116 S. Ct. 1620 (1996) invalidated discrimination against homosexuals infringing on their equal political participation under the Equal Protection Clause of the 14th Amendment to the United States Constitution. Likewise, other governments' discriminatory legislation and practices explicitly barring or excluding sexual minorities and expression of their identity in the political process arguably could constitute persecution, especially when targeted against the individual asylum applicant.

The American with Disabilities Act of 1990, Pub. L. No. 101-336, 304 Stat. 327 (1990) provides a helpful benchmark in the recognition of discrimination that is illegal in the United States against people with HIV/AIDS. For applicants with HIV/AIDS, however, the

Immigration and Naturalization Service will generally not consider an applicant's fear of "social ostracism by itself" as that of persecution. See "IJ Grants Asylum to HIV Positive Man, General Counsel Issues HIV instructions," 73 Interpreter Releases 901 (July 8, 1996) (clarifying that "at the other extreme, torture or execution of persons because they have AIDS would of course meet the statutory definition").

International human rights protections applying to HIV status arguably trumping national public health considerations could also be invoked for guiding asylum adjudication as to whether government-sanctioned or condoned discrimination constitutes persecution. See, e.g., U.N. Commission on Human Rights, Resolution on HIV/AIDS, Res. 1995/44, adopted, Mar. 3, 1995; U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution on Discrimination in the Context of Human Immunodeficiency Virus (HIV) or Acquired Immune Deficiency Syndrome (AIDS), Res. 1995/21, adopted Aug. 24, 1995.

Many of the above examples of persecution may apply more readily to gay men than lesbians given the impact of gender norms in the cultural construction and state regulation of sexual orientation. As men, gay men may have more access to the public and political arenas where they directly experience or risk overt forms of violence or mistreatment by state actors like the police. Given women's subordination in many countries, lesbians may be more relegated to the private sphere of the home where they have less direct contact with state actors but may face abuse and mistreatment by the family, neighbors, etc. without recourse to legal protection.

5. Selective Criminal Extortion or Robbery. Criminal extortion may constitute persecution in instances where clearly and selectively targeted against individuals due to a protected ground. In Re T-M-B Int. Dec. 3307 (BIA 1997) (defining extortion as "illegal taking of money by anyone who employs threats, or other illegal use of fear or coercion in order to obtain the money", citing Desir v. Ilchert, 840 F. 2d 723 [9th Cir. 1988]). Robbery on account of a protected ground when committed by groups the government is unable or unwilling to control can constitute persecution. Surita v. INS, 95 F.3d 814 (9th Cir. 1996)(finding persecution for Ethnic Indian citizen of Fiji when she was robbed 10-15 times by ethnic Fijians because of her Indo-Fijian race which she reported to police who claimed that they could not do anything, among other experiences).

That the persecutor may initially target victim with extortion for economic reasons does not preclude finding of persecution on protected political ground when they later discover victim's political opposition and threaten his business and life. Gonzalez-Neyra v. INS, 122 F. 3d 1293 (9th Cir. 1997)(finding persecution by Shining Path guerrilla to successful Peruvian businessman who was initially subject to economic extortion but later revealed his political opposition, thereby triggering their subsequent threats on account of his political opinion).

4. By Governmental Or Non-Governmental Persecutor

TO THE CLIENT: By the authorities- that is, the government, police force, military, schools, etc. or groups the authorities are unable or unwilling to control- that is, the government fails to provide legal or real protection against other groups like death squads, guerrillas, and

even gangs or families, in certain instances, who have harmed you or whom you fear will harm you upon return.

TO THE LEGAL REPRESENTATIVE: *The actual or threatened persecution must be either by the government or by persons, organizations or groups that the government is unable or unwilling to control.* McMullen v. INS, 658 F.2d 1312 (9th Cir. 1988); Matter of Tan, 12 I&N Dec. 564 (BIA 1967). Persecution by a group recognized and sponsored by the government is persecution by the government. Montoya-Ulloa v. INS, 79 F.3d 930, 931 and n. 1 (9th Cir. 1996)(construing government-sponsored Sandinista Youth as a state agent of persecution). However, the persecutor is not required to be an organized or quasi-governmental group considering that "non-governmental groups need not file articles of incorporation before they can be capable of persecution". Singh v. INS, 94 F.3d 1353, 1359-1360 (9th Cir. 1996).

Groups the government is unable or unwilling to control include death squads Matter of Villalta, Int. Dec. 3126 (BIA 1990); guerrillas, Arteaga v. INS, 836 F.2d 1227, 1232; in certain instances, gangs, Singh v. INS, 94 F.3d 1353, 1359 (9th Cir. 1996)(finding death threats, assaults on one's life, family and business against Indo-Fijians by gangs of ethnic Fijians with the government's encouragement and condonation and their repeated failure to protect applicant to qualify as past persecution by a group the government is unable or unwilling to control on account of race) in limited instances, and family, In Re Kasinga, Int. Dec. 3278 (BIA 1996) (on female genital mutilation threatened upon applicant by family members with government's acceptance); and "Sweet Asylum: Battered Wife from Bangladesh can Stay in U.S.", Beth Holland, New York Newsday October 1, 1996 (domestic violence including forced sexual intercourse and threats by family and inability to obtain work due to threats to employers when inflicted by high-ranking police officer spouse, unpublished, unappealed decision by Immigration Judge).

For sexual minorities and people with HIV/AIDS, persecution may often be inflicted by non-governmental formal or semi-formal paramilitary hate groups operating with government complicity or impunity who are bent on extermination for social cleansing purposes. The persecutor may also be less formal such as individuals or local mafias or gangs who despise and seek to harm homosexuals and/or people with HIV/AIDS. While the former is analogous to the recognizable group of "death squads", the latter challenges the advocate to show that the government is unable or unwilling to control these individuals, mafias or gangs specifically in their activities against sexual minorities and people with HIV/AIDS. That the government may brand such individuals or groups as criminal because of their other activities does not mean that the government affords legal protection for sexual minorities and people with HIV/AIDS vis-a-vis these individuals or groups.

a. If The Persecutor Is A Non-Governmental Agent, Applicant Must Prove That There Is No Internal Resettlement Alternative And Threat Was/Is Country-Wide

TO THE CLIENT: If a group other than the government caused you to experience abuse or mistreatment and fear, you will have to show that you could not have reasonably relocated and lived safely elsewhere in your country and that the threat against you was, or is, throughout the country.

TO THE LEGAL REPRESENTATIVE: *When the government is the feared persecutor, the applicant generally should not have to prove an internal resettlement alternative within the home country considering that the government operates country-wide*, thereby posing a threat country-wide. Singh v. Moschorak, 52 F.3d 1031 (9th Cir. 1995). "Burden falls upon Immigration and Naturalization Service (INS) to show that government's persecutive actions are truly limited to a clearly delineated and limited locality and situation, so that applicant for asylum therefore need not fear likelihood of persecution elsewhere in the nation." Abdel-Masieh v. INS, 73 F.3d 579 (5th Cir. 1996)(dismissing that possibility of safety for alien in other area of nation in rebellion beyond governmental control does not prove lack of fear of persecution). Further, with past persecution established, the victim does not have to establish country-wide threat of persecution by the government, unless the INS can prove that circumstances have changed sufficiently to negate the applicant's fear of persecution. Singh v. INS, 63 F.3d at 1508-10 (9th Cir. 1995). If the persecutor is a nongovernmental agent, however, the applicant will be required to prove the lack of a reasonable, safe internal resettlement alternative within the country and that the threat by the group or organization was or is country-wide. See Matter of R, Int. Dec. 3195 (BIA 1992); Matter of Fuentes 19 I & N 658 (BIA 1988).

For country-wide threat, the Board of Immigration Appeals has considered whether the conflict for the applicant was confined to his/her hometown; and whether he/she was able to live and work in other areas of the country before fleeing or experiencing subsequent problems. In Re C-A-L-, Int. Dec. 3305 (BIA 1997),(finding no country-wide threat and denying asylum to former soldier of Guatemalan army who was able to live for more than one year in different areas within the country including guerrilla stronghold without further problems with guerrilla); also

Etugh v. INS, 921 F.2d 36 (3rd Cir. 1990)(dismissing asylum claim since there was no possibility that the applicant would face persecution beyond his hometown).

The Board also has considered the small size of the country, pervasiveness of human rights violation in question and availability of governmental protection. In Re Fauziya Kasinga, Int. Dec. 3278 (BIA 1996)(finding country-wide threat considering small size of Togo, pervasiveness of practice of female genital mutilation and lack of governmental protection for women against female genital mutilation and acts of violence and abuse). The reasonableness of internal resettlement should be evaluated in terms of the "likely financial or logistical barriers to internal relocation, as well as the circumstances which fail to satisfy civil, political, and socio-economic human rights norms, or to place the refugee in illusory or unpredictable situations," In

Re C- A- L-, Int. Dec. 3305, at 26, Rosenberg dissent, citing J. Hathaway, *The Law of Refugee Status* 134 (1991).

The reasonableness of internal resettlement for sexual minorities or people with HIV/AIDS might turn on whether he/she would have had to attempt to conceal his/her identity in another location in his/her country. As strictly legal arguments against the application of the resettlement doctrine, the advocate should consider how inconsistent it is with the spirit and letter of Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990), which recognizes homosexuals as a social group for asylum eligibility. Enforced concealment of sexual orientation also arguably runs counter to the BIA's proposition in Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985) for construing persecuted social groups based on "a characteristic... so fundamental to identity that they should not be required to change." As sexual orientation is fundamental to identity, an applicant should therefore not have to "closet" him/herself for self-preservation. It would be analogous to require members of an oppressed religion to practice the dominant religion while secretly maintaining their own religious identity.

As a practical consideration, the legal representative should consider whether the extent of hatred and violence against suspected or actual sexual minorities or people with HIV/AIDS renders it "unreasonable" for the applicant to relocate within his/her country. The advocate may also entertain whether such internal resettlement may prove "unreasonable" considering that forcing the applicant to conceal his/her identity violates recognized human rights norms such as freedom of expression. The applicant's concealment further does not necessarily provide for real safety from persecution if there is a "reasonable" possibility that his/her identity could become discovered by the same or new agents of persecution in the other location. Additionally, internal resettlement and concealment further may cause great psychological anguish to the applicant including suicidal ideation due to living in constant fear of being discovered and targeted. Indeed, being forced into the closet for attempted survival may feel like persecution itself to the applicant and also add to the well-foundedness of his/her fear of persecution as a sexual minority or person with HIV/AIDS: e.g. "The evaluation of the subjective element is inseparable from an assessment of the personality of the applicant since psychological reactions of different individuals may not be the same in identical conditions." The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979), HCR/1P/Eng./REV. 2 , paragraph 40, while not controlling as force of law for United States, *The Handbook* has been considered important as a resource for asylum adjudication. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985); and "While the "fear must be reasonable... Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind may be regarded as justified." The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979), HCR/1P/Eng./REV. 2, paragraph 41. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990); Matter of Acosta, 19 I&N Dec. 211, 14-15 (BIA 1985).

5. On Account Of (Proven By Direct Or Circumstantial Evidence) The Protected Social Group Of Homosexuals Or People With HIV/AIDS Or Other Protected Ground

TO THE CLIENT: You know the authorities or others have taken these actions, or will take these actions, specifically because of what they have said or done to you or others because you are homosexual and/or HIV-positive, and you identify with others in such groups, or for another reason the law protects, such as your political opinion.

TO THE LEGAL REPRESENTATIVE: *The applicant must prove that the persecutor was, or will be, motivated in his/her actions against the applicant specifically on account of his/her actual, and/or perceived, membership in the protected social group of homosexuals or people with HIV/AIDS, or other protected ground through direct or circumstantial evidence.* INS v. Elias Zacarias, 112 S. Ct. at 812 (1992); In Re S-P Int. Dec. 3287 (BIA 1996) (in mixed motive cases, direct or circumstantial evidence that persecution was inspired in part by protected ground sufficient for asylum); Osorio v. INS, 18 F.3d 1017 (2nd Cir. 1994) (allowing persecutor to have mixed motives to persecute and clarifying that refugee law does not require applicant to be high-profile politician but that even grassroots activists are protected); Rivas-Martinez v. INS, 997 F.2d 1143, 1148 (5th Cir. 1993) (addressing direct or circumstantial evidence of persecutor's motive including applicant's acceptable rudimentary statements at trial).

The legal representative should bear in mind that the victim's actual or perceived identification as a sexual minority or person with HIV/AIDS is the important consideration in establishing the persecutor's motive. While "many asylum cases involve actors who had a subjective intent to punish their victims- this subjective 'punitive' or 'malignant' intent is not required for the harm to constitute persecution." Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997) (threatened treatment including confinement, electroshock therapy and sedatives in effort to "cure" lesbian), quoting In Re Fauziya Kasinga, Int. Dec. 3278 (BIA June 13 1996) (female genital mutilation rite of passage to womanhood). As the definition of persecution "is objective", it is irrelevant "that the persecutor inflicts the suffering or harm in an attempt to elicit information,- for his own sadistic pleasure, -to 'cure' his victim, or to 'save his soul'". Id. The caveat is that the persecutor must have been, and/or must still be, motivated against the victim due to the protected characteristic irrespective of whether, for example, he/she derives gratification from sexual abuse or money from criminal extortion of the victim, or has a benign intent to provide for his/her treatment of sexual orientation or HIV/AIDS through objectively reprehensible means (e.g. confinement, quarantine, etc).

The advocate should also know that, as a general principle, personal disputes do not constitute persecution when the abuse or mistreatment is not directly attributable to the protected ground. Iliev v. INS, 127 F.3d 638 (7th Cir. 1997) citing Marquez v. INS, 105 F.3d 374, 380 (7th Cir. 1997) ("personal dispute, no matter how nasty, cannot support alien's claim for asylum"); Klawitter v INS, 970 F.2d 149, 152 (6th Cir. 1992) (in instance of rape of woman by Polish official, "harm or threats arising from personal dispute, even one taking place with individual in high ranking government position is not grounds for asylum"); Zayas-Marini v. INS, 785 F.2d 801, 805-6 (9th Cir. 1986). The legal representative should realize that "personal dispute" considerations arise particularly in asylum claims of sexual minorities and people with

HIV/AIDS alleging persecution such as attacks, domestic violence or sexual abuse by non-governmental agents of persecution like family, civilians, community (e.g. neighbors, local gangs). The persecutor in these instances often are not strangers to the victim and, therefore, may have personal sentiments or motives against the applicant like shame, resentment, vendetta, or retribution.

However, the advocate should realize that the fact that sexual minorities and people with HIV/AIDS may experience or face these extremely personal forms of mistreatment by non-governmental actors with whom they may have had some personal contact or relationship does not negate that this is persecution. This is provided that there is sufficient evidence to demonstrate that the persecutor's motive in his/her actions against the applicant was and will be primarily because of the protected ground(s) rather than for other reasons (as well as the considerations above in section: "If the Persecutor is a Non-Governmental Agent, Applicant Must Prove That There is No Internal Resettlement Alternative and Threat Was/Is Country-Wide").

While homosexuals have been recognized as a "particular social group" in Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990), it is notable that Attorney General Janet Reno's Order 1895-94 of June 19, 1994 designating Toboso-Alfonso as precedential authority only binds Asylum Offices, Executive Office for Immigration Review ("Immigration Court") and the Board of Immigration Appeals. The precedent does not bind federal district or appellate courts which have yet to rule on the issue. See, e.g., Pitcherskaia v. INS, 118 F.3d 641, 645 (9th Cir. 1997), explicitly not reaching the issue whether lesbians constitute "a particular social group"; and Vassilev v. INS, 110 F.3d 72 (Table) (9th Cir. 1997) unpublished, dismissing Bulgarian homosexual's asylum claim without ruling on BIA's holding in Toboso-Alfonso. Also, Toboso-Alfonso has no application to U.S. Consular Offices adjudicating refugee claims abroad and the United States Information Agency providing recommendations to INS on "persecution" waivers of the two-year foreign residency requirement for J-visa exchange visitors who seek to adjust their status. See 8 C.F.R. § 212(7)(c)(5) establishing as basis for waiver that the person "would be subject to persecution on account of race, religion or political opinion" (notably excluding "membership in a particular social group").

People with HIV/AIDS have yet to acquire any binding legal precedent as a "particular social group". Notably, the INS might require that the social group of people with HIV/AIDS be established by each individual applicant as indicated in their response to the Presidential Advisory Council on AIDS: "Whether HIV/AIDS infection is a characteristic that may define a 'particular social group' under asylum law depends on the practices of the government of the home country. Nothing in existing law or practice precludes recognition of 'persons with AIDS' as a particular social group if the proof in the individual case supports such a conclusion." "IJ Grants Asylum to HIV Positive Man, General Counsel Issues HIV instructions," 73 Interpreter Releases 901 (July 8, 1996). See Jin S. Park, "Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy," 42 UCLA Law Review 1115 (April, 1995), for discussion of discrete court formations of "particular social group", e.g. Board of Immigration Appeal's test established in Matter of Acosta 19 I & N Dec. 211 (BIA 1985) whether common characteristic among members of social group is "immutable and fundamental" (i.e. either innate or based on shared past experience that members cannot change or should not

be required to change) (applied in Toboso-Alfonso, finding homosexuality to be immutable, fundamental characteristic); the Ninth Circuit's test in Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) requiring close affiliation among social group members, members' common impulse or interest fundamental to their identity, and small size; and the Second Circuit's test in Gomez v. INS, 947 F.2d 660 (2nd Cir. 1991), requiring fundamental characteristic in common among members from persecutor's perspective, close affiliation and common impulse or interest among members.

The advocate may contend with the issue of Toboso-Alfonso's reach beyond the particular social group of "homosexuals" (gay men and lesbians) per se to bisexuals, transvestites and transgendered applicants. Toboso-Alfonso arguably may be construed as apposite to sexual orientation-based claims thereby encompassing other sexual minorities similarly situated to or considered "homosexuals" e.g. bisexuals and transvestites.³⁰ While ostensibly falling within Toboso-Alfonso, transgendered persons might also be argued to consist of a particular social group of their own. Indeed, the advocate may advance theories of particular social groups in precise terms sharpening their scope as evidenced by the Board of Immigration Appeals in In Re Fauziya Kasinga, Int. Dec. 3278 (BIA 1996) (construing the particular social group as "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice") (citing Matter of Acosta 19 I & N Dec. 211 (BIA 1985); Matter of H, Int. Dec. 3276 (BIA 1985) ("identifiable shared ties of kinship" as social group); Fatin v. INS, 12 F.3d 1233, 1241 (3rd Cir. 1993) ("Iranian women refusing to conform to the Iranian Government's gender-specific laws and social norms")). In Kasinga, pursuant to Acosta, the Board deemed as the particular social group's common characteristics which are fundamental to individual identities and cannot or should not be required to be changed as: a) being a young woman, b) of the particular tribe and, c) having intact genitalia.

Regarding political opinion as a supplemental ground for asylum claims by sexual minorities or people with HIV/AIDS, the advocate should consider carefully the applicant's actual attitudes, opinion and/or opposition to the treatment of sexual minorities or people with HIV/AIDS in his/her country, and if/how he/she will express them upon return. Also, the advocate should ask the asylum-seeker about the possibility that the persecutor will know the asylum-seeker has returned, and the chances that this will trigger the persecutor to harm the asylum-seeker. He/she must adduce evidence that: "1) he has been the victim of persecution; 2) he holds a political opinion; 3) his political opinion is known to his persecutors, and; 4) persecution has been or will be on account of his political opinion." Gonzalez Neyra v. INS, 122 F.3d 1293, 1296 (9th Cir. 1997), citing INS v. Elias Zacarias, 502 U.S. 478, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (finding that after Shining Path guerrillas learned of applicant's political

³⁰ It is unreasonable to consider Toboso-Alfonso as conferring social group membership to pedophiles, necrophiliacs, or adherents of bestiality, etc. Under Acosta, these sexual proclivities might be characteristics that people should be required to change considering that they are still treated as medical disorders and criminalized since they do not involve sex acts between consenting adults. See, e.g., Bastanipour v. INS, 980 F.2d 112, 1131 (7th Cir. 1992), expressing "no doubt that drug traffickers are not the sort of 'particular social group' to which the provision on asylum refers" as "whatever its precise scope, the term 'particular social group' surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do... (since) a contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other."

orientation their threats to his life and business constitute persecution "causally connected to his political opposition").

Political opinion may also be imputed by governmental or non-governmental agents based on the applicant's identity and activities, e.g. the applicant's homosexual identity or activities or HIV-status as de facto immoral against the state and thus subversive towards the government. Indeed, many fundamentalist, fascist or totalitarian countries may fixate on HIV issues to advance their political repression.³¹ Under the doctrine of imputed political opinion, an imputed political opinion, whether correctly or incorrectly attributed by the persecutor to the victim, may constitute political persecution. Ravindran v. INS, 976 F.3d 754, 760; Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992); Singh v. Ilchert, 801 F. Supp. 313, 319 (N.D. Cal. 1992); Rajaratnam v. A.D. Moyer, 832 F. Supp. 1219, 1222-24 (N.D. Ill. 1993). The Board of Immigration Appeals recently reaffirmed that an applicant can establish persecution based on imputed political opinion. In Matter of S-P, Int. Dec. 3287 (BIA 1996).

6. Adjudicator's Exercise Of Discretion After Meeting Statutory Eligibility As "Refugee"

TO THE CLIENT: Even if we can prove that with your fear, life story and experiences, you are a "refugee", the Asylum Officer or Immigration Judge will still want to see that you deserve asylum, maybe for special reasons like your health, family or ties here, and that there is no reason to deny you asylum for having entered into the United States with a fake visa or for seeking safety and a possibility for permanent residence in another country you lived in before coming the U.S.

TO THE LEGAL REPRESENTATIVE: *Even after establishing statutory eligibility for asylum as a "refugee", the applicant must show that he/she warrants a favorable exercise of discretion.* 8 C.F.R. §§ 208.14(a) and 208.14(b) (1996). The Asylum Officer or Immigration Judge may still deny asylum in his/her discretion under a "totality of circumstances" test where adverse factors outweigh the client's well-founded fear of persecution and positive factors in the asylum claim. Matter of Pula, 18 I&N Dec. 487 (BIA 1987). Under Pula, factors to be considered for the exercise of discretion include:

1. whether the asylum applicant passed through another third country or came directly to the United States;
2. whether orderly refugee procedures were available in the third country;
3. the duration of time and living conditions of the applicant in the third country and the possibility for long-term safety and legal residency;

³¹ Devin Morgan, "Risk: Health Safety and Environment" 299, Summer, 1997, book review on Global AIDS Policy (Douglas A. Feldman, Ed. Bertin & Garvey 1994).

4. whether the applicant has relatives legally in the United States or other personal ties behind his/her desire to secure asylum in this country;
5. humanitarian considerations such as the applicant's poor health or youth;
6. if the applicant engaged in fraud to bypass overseas refugee procedures, the seriousness of his/her fraud; and
7. if the applicant committed a fraudulent entry into the United States with fraudulent documents, this fraud will be considered a significant adverse factor.

When weighing the factors, asylum should only be denied in the exercise of discretion in exceptional circumstances. Matter of Pula, supra. For sexual minority clients, if the client has a United States citizen or permanent resident partner, the legal representative may consider emphasizing this "personal tie" or "humanitarian consideration" as an equitable factor under Pula. If the client is HIV-positive or has AIDS, his/her "poor health" could also be deemed an important "humanitarian consideration."

a. Mandatory Bars To Asylum Eligibility

TO THE CLIENT: There are several reasons for which you would automatically be prevented from even applying for asylum and having your story heard. Instead, the INS would seek to deport you. The reasons are, for example, if you ever harmed or helped harm another person because of their race, religion, national origin, political opinion or membership in a particular social group; had permanent residence or immigration status and freedoms in a safe third country before coming here; have a criminal record in the United States or another country for certain crimes like drugs, violence and sex crimes with youth; or they consider you a threat to the national security of the United States (e.g. if you were active in or supported a "terrorist" organization.)

TO THE LEGAL REPRESENTATIVE: There are several mandatory bars to asylum eligibility established by statute and regulation:

1. Participation in Persecution: if the applicant "has ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B); 8 C.F.R. §§ 208.13(c) and 208.16(c)(2)(i).

2. Firm Resettlement: if the applicant has been firmly resettled in a third country. INA § 207(c)(1), 8 U.S.C. § 1157(c)(1); 8 C.F.R. § 207.1(b); 8 C.F.R. § 208.14(c). 8 C.F.R. § 208.15 deems a person firmly resettled if he/she acquired permanent resident status, citizenship or another type of permanent resettlement unless a) he/she did not remain in that country for longer than necessary to continue travel and did not develop significant ties, or b) the conditions of his/her residence were so restricted by the authorities that he/she was not in effect resettled

considering, for example, living conditions of other residents, the availability of housing and employment, and rights to travel, education, reentry, public assistance and naturalization.

3. Safe Third Country: if the applicant is: a) removable to a country other than that of the applicant's nationality, or last habitual residence if stateless pursuant to a bilateral or multilateral agreement; where b) his life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion; and c) where the applicant would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection; unless d) the Attorney General considers it in the public interest for the alien to receive asylum in the United States. 8 U.S.C. § 1158 (a)(2)(A).

4. Criminal Conduct: The severity of offenses encompassed by the “aggravated felony” definition range from murder and drug offenses to misdemeanor sexual relations with a minor (i.e. statutory rape or consensual sex with a minor). The new definition of “aggravated felony” is quite extensive, and attorneys should consult other attorneys, the original law, and related regulations and caselaw to determine whether a client’s conviction falls under the “aggravated felony” definition. Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440 (amending INA § 101(a)(43); 8 C.F.R. § 208.16(c)(1); INA § 208(d), 8 U.S.C. § 1158 (d).

5. National Security Threat: if there are reasons to deem the alien a threat to national security. 8 C.F.R. §§ 208.14(d)(3) and 208.16(c)(2)(iv).

IV. Three General Approaches To Asylum

After this review, the legal representative may clarify for the client's evaluation that there are three approaches to establishing eligibility for asylum that, in practice, vary in terms of their difficulty:

TO THE CLIENT: *There are three ways to get asylum because of your experiences and fears due to your sexual orientation or HIV-status. The first, and easiest, is if you suffered severe abuse or mistreatment (e.g. torture, beatings, sexual violence) in the past in your country. In this case, we will not have to prove that you will be specifically at risk of more abuse or harm if you return. Once past persecution is established, the burden is on the INS to show that you will not experience future persecution if forced to return. We also will not have to show that the threat against you would be throughout the country if you had to return if you experienced this abuse or mistreatment by groups not with the government (e.g. death squads, vigilante groups or guerrillas).*

The second approach is to prove that you specifically are at risk of abuse or mistreatment if you return since you either experienced, or were threatened with future, abuse or mistreatment, or have strong reasons to fear abuse or mistreatment, and this has prompted you to seek asylum in the United States. We will have to show that the threats against you are specific and very serious and that there is no real legal protection for you. If the threats were by groups not with the government, for example death squads or guerrillas, we will have to explain how you could not live safely elsewhere in your country given the threats of abuse or mistreatment against you.

The third, and most difficult, approach is to show that there is a clear pattern and practice of abuse and mistreatment against sexual minorities and/or people with HIV/AIDS in your country that will place you at risk if you return, even though you have never experienced any abuse or mistreatment or threats to this day. Therefore, we will need to gather and look at all the evidence we can find on what happens to sexual minorities and/or people with HIV/AIDS by the government or other groups to see if there is enough evidence to show such a pattern and practice.

A. Past Persecution

TO THE LEGAL REPRESENTATIVE: An applicant may be granted asylum on the basis of his/her experience of persecution alone without having to prove a well-founded fear of persecution since there is a rebuttable presumption that the person should fear future persecution and favorable discretion should be exercised. INA § 101(a)(42)(A); 8 C.F.R. § 208.13(b); Matter of Chen, Int. Dec. 3104 (BIA 1989) (where past persecution established on basis of protected ground, a favorable exercise of administrative discretion may be warranted for humanitarian reasons notwithstanding the little likelihood of future persecution). The Service may rebut this presumption with evidence of little likelihood of present persecution or notice of changed political circumstances. Id.

Findings of past persecution should be considered in the totality of circumstances. Desir v. INS, 840 F.2d 723 (9th Cir. 1987) (finding beatings, imprisonment, extortion, and assaults by government security forces cumulatively constituted persecution); Prasad v. INS, 83 F.3d 315 (9th Cir. 1996) (finding past persecution to applicant per Matter of Chen consisted of being jailed twice, once for five days and another time for two days, beaten and subjected to sadistic and degrading treatment, beaten on another occasion, and unemployed due to activism).

Although a single experience may not rise to the level of persecution, the cumulative effect of several experiences may constitute persecution. Surita v. INS, 95 F.3d 814 (9th Cir. 1996), citing Shirazi-Parsa v. INS, 14 F.3d 1424, 1428 (9th Cir. 1994), overruled on other grounds by Fisher v. INS, 79 F.3d 955, 963 (9th Cir. 1996) (en banc). Further, with past persecution established, the victim need not have to establish a country-wide threat of persecution at the hands of governmental actors. Singh v. INS, 63 F.3d at 1508-10 (9th Cir. 1995).

The severity and duration of the persecution usually is critical in warranting a finding of "persecution" and grant of asylum irrespective of whether the applicant has a well-founded fear of persecution. In Re B-, Int. Dec. 3251 (BIA 1995) (finding past persecution to applicant who was detained 13 months in detention and prison, and subjected to physical torture and psychological abuse so severe that asylum was granted despite change in circumstances). The fact that the applicant might have remained some time after his/her experiences is irrelevant to determining the "atrocity" of the past persecution, since the persecution has already occurred and remaining does not lessen its severity. Lopez-Galarza v. INS, 99 F.3d 954, 962 (9th Cir. 1996) (in case of Nicaraguan woman applicant's experiences at age eighteen of 15 days imprisonment,

where her captors repeatedly raped her, physically abused her, deprived her of food, and subjected her to forced labor, BIA erred in considering that she remained eight years, worked, married and had children when they declared deportation not "inhumane" under exercise of discretion without comparing atrocity of past persecution to Chen, Int. Dec. 3104 (1989).

According to asylum regulations, claims based on past persecution alone should be denied when the applicant cannot demonstrate "compelling reasons" for his/her inability to return due to the severity of the past persecution. 8 C.F.R. § 208.13(b)(1)(i). However, the applicant need not prove these compelling reasons for grants of asylum based on past persecution, except in instances where the presumption of future persecution is rebutted by the Service with evidence that conditions in the applicant's country have changed such that a future fear of persecution is unreasonable. Matter of H, Int. Dec. 3276 (BIA 1996).

In the case of sexual minorities, several instances or one extreme experience of severe physical harm (e.g. torture or sexual violence, compulsory medical or psychiatric treatment and/or unfair arrests, detentions and prosecutions) or extremely severe discrimination could substantiate a finding of past persecution. While perhaps the most difficult to establish, past persecution often proves to be the easiest means for Asylum Officers or Immigration Judges to grant asylum consistent with the humanitarian spirit and letter of refugee law. Further, in past persecution cases, the asylum adjudicator does not need to over-engage the more complex issues of the reasonable likelihood of future persecution or the country-wide threat of persecution when by governmental actors.

B. Well-Founded Fear Of Persecution For Applicants Singled Out For Persecution

TO THE LEGAL REPRESENTATIVE: When past persecution alone cannot warrant a grant of asylum, the Asylum Officer or Immigration Judge will consider whether the applicant has a well-founded fear of persecution. The asylum applicant's burden of persuasion of whether "a reasonable person in his circumstances would fear persecution" obviously provides the Asylum Officer or Immigration Judge with greater latitude to consider the objective reasonableness of the applicant's fear rather than the more narrowly circumscribed issue of whether persecution has already occurred on account of a protected ground. Indeed, the applicant often must prove his/her "reasonable" fear under a four-part test showing that: 1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; 2) the persecutor is aware or could become aware that the alien possesses this belief or characteristic; 3) the persecutor has the capability of punishing the alien; and 4) the persecutor has the inclination to punish the applicant. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).³² For a well-founded fear, the applicant will have to further demonstrate the lack of an internal flight alternative for relocation and that the threat is country-wide particularly when the persecutor is a non-governmental actor. Matter of R, Int. Dec. 3195 (BIA 1992).

³² The 9th Circuit explicitly disapproved this fourth element of Matter of Acosta 19 I & N Dec. 211(BIA 1985) in Pitcherskaia v. INS, 118 F.3d 641, 645 (9th Cir. 1997).

Under this approach, some Asylum Officers or Immigration Judges opt to find a well-founded fear of persecution for applicants already "singled out individually" who might have experienced some harm not rising to the level of persecution and/or who fled relatively quickly afterwards and fear a specific, substantial threat of severe harm. As a corollary, for applicants who have yet to be individually targeted and/or who fled conditions of discrimination or harassment towards sexual minorities or people with HIV/AIDS, some Asylum Officers or Immigration Judges will be less inclined to find the applicant's fear well-founded or to constitute persecution.

However, in cases where the applicant has yet to be specifically singled out for persecution such as refugee sur place claimants, the advocate should consider that there is no legal requirement that the persecutor has in fact taken prior notice of the applicant. Najafi v. INS, 104 F.3d 943, 949 (7th Cir. 1997) (rejecting Immigration Judge's analysis of applicant's fears of religious persecution as an apostate in Iran where apostacy is punishable by death penalty considering that "while evidence that authorities lie in wait to punish an asylum applicant would certainly strengthen any petition- it is not evidence necessary to the 'well-founded fear' inquiry") (citing Osaghae v. INS, 942 F.2d 1160, 1164 (7th Cir. 1991) ("asylum is not limited to the notorious")). The advocate should also consider "the significant correlation between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized threat of persecution. -The more egregious the showing of group persecution-- the greater the risk to all members of the group-- the less evidence of individualized persecution must be adduced." Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995) (holding that BIA failed to consider Ethiopian applicant's membership and activities in Oromo Liberation Front in the context of persecution against her Oromo ethnic group considering that "members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole"). Likewise, "the severity of the discrimination, harassment, or violence directed at members of - (a particular group) will determine the kind of individualized showing that will be required of an asylum applicant. - The more the group to which an applicant belongs is discriminated against, harassed, or subjected to violence, the less the individualized showing an applicant must make to establish eligibility for asylum." Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994).

Additionally, they might adversely construe the time the person remained after the threatened persecution as undermining the subjective and objective bases for the applicant's fear. Gonzalez v. INS, 82 F.3d 903, 909 (9th Cir. 1996) (finding that although the applicant remained three years in Nicaragua before fleeing, thereby cutting against her claimed fear of threats and their realization, (citing Castillo v. INS, 951 F.2d 1117, 1122 (9th Cir. 1991) (five years residence without incident after one interrogation demonstrates a persecutor's lack of will or ability)), that when the threats were repeated with years of peace and she felt a renewed perception of danger, the diminution in the threat for a time did not negate that her fear was genuine and well-founded).

In the case of nongovernmental persecutors, some Asylum Officers or Immigration Judges will be less inclined to find the lack of an internal flight alternative where the applicant could have been safe in his/her country, unless it can be shown that the persecutor operates nationwide and there exists official or extra-official tolerance of the persecutor's activities.

Asylum claims by sexual minorities and people with HIV/AIDS predicated on a well-founded fear of future persecution alone thus can prove more challenging than establishing past-persecution. This approach requires special attention to the specificity and gravity of the threatened actions against the applicant, the time involved in departure, and the possibility of safe relocation inside the country.

C. Well-Founded Fear Of Persecution For Applicants Where There Is A Pattern And Practice Of Persecution Against Similarly Situated Groups Of Persons

TO THE LEGAL REPRESENTATIVE: In cases where the applicant cannot provide evidence that he/she would be "singled out individually" for persecution, the regulations provide for finding a well-founded fear of persecution where the applicant can demonstrate:

1. that there exists a pattern and practice of persecution on account of race, religion, nationality, membership in a particular social group or political opinion of groups of persons similarly situated to the applicant in the applicant's country; and
2. the applicant establishes his/her own inclusion in the group. 8 C.F.R. § 208.13(b)(2)(i); 8 C.F.R. § 208.16(b)(3).

As the regulations fail to specify a "pattern and practice of persecution," the Eighth Circuit has interpreted it to mean "something on the order of organized or systematic or pervasive persecution" but not "requiring a showing of persecution of all the members of the applicant's group." *Makonnen v. INS*, 44 F.3d 1378 (8th Cir. 1995) (holding that BIA erred as a matter of law requiring applicant to show all members of ethnic Oromo group to be persecuted to substantiate pattern-and-practice claim).

While this may appear to be the easiest means to establish asylum eligibility, most Asylum Officers and Immigration Judges appear least inclined to grant asylum under this approach. Notably, there are no published decisions by the Board of Immigration Appeals or Circuit Courts of Appeals granting asylum under this approach.

This may be due to the difficulty of proving such "a pattern and practice of persecution" against similarly situated individuals with extrinsic, objective evidence that reasonably would place the applicant at risk of the persecution. The Ninth Circuit considers that "evidence that the (particular) group has been targeted with discrimination, harassment or violence... is relevant to show that there is a pattern of persecution directed at the particular group, and that there is a reasonable likelihood that the applicant, as a member of that group, will be personally persecuted

if he is deported to his home country." Singh v. INS, 94 F.3d 1353, 1359 (9th Cir. 1996) (interpreting "pattern and practice" theory but conveniently not resolving whether particular evidence in Indo-Fijians' claim was sufficient to establish such a "pattern or practice" since applicant was eligible for asylum as victim of past persecution).

Additionally, the difficulty could be tied to the ever-feared "floodgates" effect of granting asylum to someone who has yet to be individually targeted, leading to a greater rise in such claims. Such a consideration by an asylum adjudicator is impermissible when considering that as a matter of humanitarian law, an asylum application is treated as confidential and adjudicated on its own merits on a case-by-case basis uninfluenced by foreign policy considerations. 8 C.F.R. § 208.6 on confidentiality provisions for asylum applications; Doherty v. U.S. DOJ, 908 F.2d 1108, 1111 (2nd Cir. 1990) *reversed on other grounds*, INS v. Doherty, 112 S. Ct. 719, 724 (1992). In reversing the denial of an Irish Republican Army member's motion to reopen deportation proceedings to seek asylum with additional evidence, the Second Circuit considered United States foreign policy interests an impermissible discretionary consideration for denial, considering that "(e)xamination of the history and purpose of the relevant (Refugee Act) legislation shows that Congress intended to insulate the asylum process from the influences of politics and foreign policy factors that had long dominated the refugee admissions process". Id. at 1111. The Supreme Court, however, reversed without reaching this issue. Also, consider, American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1989), challenging low rates of approval of asylum claims for Salvadorans and Guatemalans affected by impermissible foreign policy considerations considering that asylum-seekers from governments friendly to United States had higher approval rates than those from countries hostile to United States. The lawsuit lead to an unprecedented settlement agreement providing for de novo adjudication of asylum claims.

In the case of sexual minorities or people with HIV/AIDS, the legal representative and client should proceed cautiously and be certain to secure convincing, compelling evidence of such a pattern and practice before attempting to apply for asylum exclusively under this approach.

V. Withholding Of Removal As Companion (Alternate But More Difficult) Remedy To Asylum

TO THE CLIENT: There is another remedy in addition to asylum called "withholding of removal," also known as "restriction on removal," which can prevent your deportation and confer upon you valid immigration status. This remedy may be considered by Immigration Judges, though only by Asylum Officers in cases of population control (8 C.F.R. 208.16 (a)). "Withholding" is like asylum, but more difficult, since we have to prove that your life or freedom would be threatened if you were forced to return because of a protected reason like your sexual orientation or HIV status. The Judge would need to see evidence that it is "more likely than not" that your life or freedom would be threatened or that you suffered severe abuse or mistreatment in the past and that there is little evidence showing that you would still be safe if you returned. While you can acquire employment authorization if granted withholding, you cannot adjust to permanent residence after one year as you can with asylee status. You would

request withholding while you apply for asylum in the event asylum is denied or cannot be granted because you had been firmly resettled in another country or convicted of certain crimes.

TO THE LEGAL ADVOCATE: Withholding of removal, also known as "restriction on removal," is a companion, alternate remedy to asylum, but one that is significantly more difficult to attain and often less desirable for applicants. Withholding fulfills the United States' obligations as a signatory to the 1967 United Nations Protocol Related to the Status of Refugees barring "refoulement" (forced return) of a person to a country where "his/her life or freedom would be threatened" on account of one of the five protected grounds of race, religion, national origin, political opinion, or membership in a particular social group (codified in INA 243(h) and 8 C.F.R. 208.16).

The advocate thus should vigorously pursue withholding with the client as an alternate remedy to asylum only in conjunction with an asylum request. The legal representative never should recommend the client apply for withholding alone instead of asylum unless the client has an exceptionally strong claim under the withholding standard of proof and is statutorily barred from asylum eligibility (e.g. due to firm resettlement, aggravated felonies, etc.).

VI. Conclusion

This in-depth review serves to reveal to both the advocate and client what the salient issues might be in a case. These issues include:

1. whether the applicant's experiences or feared experiences rise to the level of persecution;
2. whether there is sufficient direct or circumstantial evidence to demonstrate the persecutor's motivations against the applicant on account of his/her sexual orientation or HIV-status;
3. whether the applicant could have safely relocated to another part of the country to escape the nongovernmental actor the government allegedly was unable or unwilling to control; and
4. whether the client might be barred from asylum due to firm resettlement in a third country, but might have a compelling claim for withholding of removal in removal proceedings.

The legal representative and the client might choose to tally the apparent strengths and weaknesses of the claim on a piece of paper. The advocate should always stress that no one can ever guarantee the results of a case, even with this review, since the ultimate decision lies with the Asylum Officer or Immigration Judge.

The advocate can conclude by discussing the risks of referral to removal proceedings and ultimate removal, and by helping the client weigh his/her personal interests in filing or not filing. For example, the legal representative should clearly communicate to the client that by applying

for asylum affirmatively before the Asylum Office, the client exposes him/herself to the Immigration and Naturalization Service and the real possibility of "removal" from the United States (that is, physical deportation, back to his/her homeland if he/she does not win asylum and is not in valid immigration status or entered without inspection).

Since January 1995, asylum claims have been under the regulatory requirement that a decision be rendered within six months of the initial filing date (unless the applicant has requested an extension).³³ The Asylum Office will generally schedule the asylum interview within a month of filing, and render the decision within two weeks of the interview. If not granted, the case will be referred to Removal Proceedings before an Immigration Judge where the Immigration and Naturalization Service seeks to "remove" and deport the client. In these proceedings, the client can renew his/her asylum claim before an Immigration Judge and the case will take several months. If denied, the client will be ordered to leave voluntarily with "voluntary departure" at his/her own expense or "deported" at government expense. The client can pursue one appeal to the Board of Immigration Appeals and one to the Circuit Court of Appeals which, while extending his/her time here, ultimately might fail in securing asylum. Therefore, the asylum-seeker must know that if he/she is unable to secure asylum or another immigration remedy in the interim, sooner or later, the client could be forced to return to his/her homeland.

With such a comprehensive explanation, the client undoubtedly will seek to defer to the legal representative for an ultimate appraisal of the potential claim and for a recommendation of whether or not to file. "But what would you do?" is the common plea of the client contemplating asylum to his/her advocate. The advocate can offer his/her perspective on the merits of the claim, but should be careful not to manipulate or overwhelm the client's decision-making. In addition, the advocate should temper such an appraisal and recommendation unless the claim is ostensibly frivolous or without merit and thus sanctionable or else statutorily barred. The legal representative can summarize the discussion for the client's benefit and offer the client more time to make a decision if needed, or even another consultation. The advocate should remind the asylum-seeker, however, that he/she has a time frame of one year from the date he/she first entered the U.S. to apply for asylum. Through this process, the client becomes empowered to solve his/her problem and decide whether or not to file for asylum. Once decided, the advocate should commend and support the client for her difficult decision.

A. Demarcating Roles And Forging An Effective Division Of Labor

If the client ultimately decides to file for asylum, the legal representative should fully and clearly explain their respective roles and negotiate a list of tasks both can undertake in case preparation. These include affidavit preparation, documentation and witness gathering, psychological referrals and testimony preparation. The advocate may clarify that his/her role is to represent the client to his/her best skill and ability but as it is the client's asylum claim, he/she will have to be actively involved. Some clients who view lawyers as authority figures have the unrealistic expectation that they can magically solve his/her case without the client's

³³ INA § 208(d)(5)(A)(iii).

participation. In such instances, the advocate should clarify the rationale and benefits of the client-centered approach. Indeed, it is the client's story, life and fears that the client (and not the advocate) will have to share directly with an Asylum Officer or possibly an Immigration Judge later on.

The advocate should inquire as to whether the client could write out his/her life story as a sexual minority or person with HIV/AIDS and describe incidents and fears discussed in the consultation. With review, the client's written life story could become his/her declaration in support of his/her asylum claim (see Chapter 4 on Affidavit Preparation). The legal representative should also ascertain the client's ideas for documentation and witnesses, both expert and personal, that would help substantiate both the client's own experiences and possibly a pattern and practice of persecution against sexual minorities and people with HIV/AIDS (see Chapter 4 on Documentation).

Additionally, the advocate should explore the client's possible interest in free or low-cost therapy from a psychologist or psychiatrist if he/she still suffers over the incidents he/she experienced and/or fears of being forced to return. Given the stigma of psychotherapy in most cultures, the legal representative might clarify that therapy is common and accepted in the United States. He/she may further clarify that, through therapy, some clients benefit through gaining skills or medications to cope better with their experiences, fears and lives (see Chapter 7: Further Resources for referrals to mental health professionals familiar with concerns of asylum-seekers).

Finally, the advocate should explain that, notwithstanding all the paperwork to be filed in the claim (such as his/her application and declaration, and supporting documentation), the client's testimony--what he/she will say at the interview or hearing--will be the most important feature of his/her claim. It must be credible (sufficiently detailed) and consistent with the application and declaration. Therefore, the legal representative should clarify that testimony-preparation will be extensive.

This discussion serves to inform the client of relevant tasks involved in case preparation so that he/she will understand their importance to securing asylum. Given barriers in language, education and access to information (e.g. documentation, witnesses), however, the advocate cannot expect that every client will be able to assume all tasks and, therefore, should adjust his/her expectations to the client's particular circumstances. In some cases, the advocate will be more involved in the preparation of the client's claim using oral interviews, available documentation, and personal and expert witnesses.

Appendix 1: Applicant Affidavit

**UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
ASYLUM OFFICE
LYNDHURST, NEW JERSEY**

IN THE MATTER OF:

(Applicant)

INS A

BRAZIL

**STATEMENT IN SUPPORT OF
APPLICATION FOR POLITICAL ASYLUM**

I hereby depose:

1. My name is (applicant). Born on November 23, 1961 in (city), (state), Brazil, I am a thirty four year old native and citizen of Brazil.
2. I am a homosexual. In Brazil, there was and is such intense hatred and violence against actual or suspected homosexuals by the government, its police, death squads and society that I had to flee to the United States. As a homosexual, I suffered public ridicule, sexual abuse by police and prisoners, and even domestic violence within my family. I struggled through my childhood and adolescence to hide my homosexuality, fearing rejection, violence and abuse from the police and others merely for this difference of mine.
3. I am also a person with HIV/AIDS. In my country, people with HIV and AIDS are called AIDS carriers and mistreated by the government and society. There is much blame against gays for AIDS and therefore they perceive male persons with AIDS as homosexuals and mistreat them more. The fact that I am a homosexual with HIV/AIDS makes me a greater target for future mistreatment in my country.

4. I fear if deported to Brazil my government and society will mistreat me as a homosexual male and person with HIV/AIDS. I believe that I face this mistreatment based on the serious experiences of abuse and mistreatment I lived through which made me flee as I now elaborate below as well as other people's experiences I am familiar with.

5. I am the fourth of eight brothers and sisters. My father is a shoe repairman and my mother, a housewife. I was more effeminate than most young boys growing up. As a kid in school, my peers ridiculed me at school and on the streets shouting "menina" ("girl") or "viado" ("faggot"). They'd sometimes shove me from the playground. I was too young to understand why I was different but knew that I was not as masculine as my brothers and male peers. I had no friends as a boy since my peers shunned or insulted me. I did not tell my family about these painful episodes because I did not want to alarm them that I was in fact wrongfully different and being mistreated for it. My family avoided discussing my difference.

6. In 1976, when I was fifteen years old, I started to work at a local grocery store during the day and attended school at night. While until then I had been ridiculed and ostracized because they thought I was homosexual, I had never given them any other reason to know that I was in fact homosexual.

7. In 1977, when I was sixteen years old and still working at the grocery store, a man by the name Jorge moved into town from a larger city and started working at the Post Office. In around May, 1977, I was in the town park when he approached me and persuaded me to have sexual relations with him in a dead end street. I say persuade since he was older and came from a big city and said that he was married. However, afterwards, he told (name), one of my classmates, that I had had sex with him. My classmate began to blackmail me, threatening to tell everyone in school how I was in fact a "viado" ("faggot") unless I brought him things from the store where I

worked such as cigarettes, beer and food. I complied lest he reveal my experience to my peers which would lead them to mistreat me even more as a proven homosexual.

8. In 1979, at age eighteen, my parents decided to move to a larger city (city name). I accompanied them because I could no longer take the ridicule and blackmail by my classmate and hoped that my life as a homosexual would be better there. Once there, I in fact met other homosexuals and thought things would be easier. However, I soon realized that in big cities the problems for homosexuals were even bigger as I now describe.

9. Still in school, my classmates suspected that I was gay and made my life miserable calling me not by my name but names like "flower", "bicha" ("faggot"). I became so distraught that I stopped going to school. I remember nights that I remained in the classroom to avoid being publicly humiliated outside by my peers. I in fact filed complaints with the school director's office to no avail since I was told that if I did not act so effeminate but like a man, I would not have these problems with my peers.

10. My friends and I never found peace on the streets since young heterosexual men would approach, insult and even attack us as "viados" ("faggots") and AIDS carriers. Even then there were gangs of men who would drive by us in the plaza and throw rotten eggs, water balloons, sticks, rocks at us shouting that we were faggots and AIDS carriers. The worst, most humiliating form of mistreatment was when they drove by spraying us with a fire extinguisher, making us scatter.

11. The police in Brazil, supposed to protect people, acted against the victim especially when they thought the victim was homosexual. We homosexuals could not defend ourselves against the police but only hold our heads down and listen to them in silence. For if we made them angry, they had this special mistreatment called "telephone", a technique where the police

officer opened his two hands, lifted us his arms and brought them down hitting the person's ears, causing intense pain and ringing in the ears. I recall that in 1986 the police applied the telephone to my friend (name) one night because they alleged that he was homosexual, out late at night and should be home and he spoke back to them. My friends and I therefore became more fearful of problems with the police.

12. I recall that in 1986, Police Detective (name) who frequented the local plaza with a local hospital nurse intimidating suspected homosexuals to get tested for HIV or else to get off the streets since they were probably infected. I avoided getting tested since I feared that they would disclose the results to others.

13. My first harrowing experience with the police occurred in early 1986 when I was coming home at night in (neighborhood), right in front of (school), when a man apparently drunk approached me and told me to walk with him. I told him I did not have time and tried to walk away from him. He proceeded to grab me, called me "a faggot" and told me not to do anything funny because he had a gun. He forced me to walk with him all the way up to (neighborhood), a sawmill, located at (name) on the other side of the train tracks. He proceeded to pull down his pants and forced me to perform oral sex on him at gunpoint. He then made me take off my clothes and raped me. Afterwards, he put his gun into my anus and told me to be still, otherwise he would pull the trigger. He warned me that if I told anyone, he'd kill me. He left me there at the sawmill alone, crying. I made my way home.

14. While angry, I feared reporting this experience to the authorities given his threat. I was scared to leave my home lest I encounter him and be subject to his abuse again. In June, I later learned who that man was when I saw his photograph in the Diario Do Rio Doce newspaper. His name was (name), he was an undercover member of the Policia Militar de Governador

Valadares, PMGV, the military police. The newspaper reported on his death. He was killed in retaliation for having allegedly killed a young couple with a hammer. When I realized that he had been a military police officer, I was even more thankful that I did not report him to the authorities. Now that he was dead, I felt a little safer but that would not last for long.

15. In around March, 1987, at around 9:30 p.m., my friends and I (names), also homosexuals, were gathered together in the plaza conversing with other homosexual friends when all of the sudden four police cars pulled up with two police officers in each car. They said to one another, "There are the faggots" and pointed their guns at us. They ordered us to get in their cars because the Delegate wanted to see us. We asked why but they refused to answer but said that we would soon know why. When we got to the police station, when we continued to ask why we were under arrest, the police officers continued to insult us as "viados" ("faggots"), ordered us to shut up and behave since otherwise we would be beaten.

16. The commanding officer directed us into a room and ordered us to get undressed down to our underwear and get in a line to be processed for the cell. At the head of the line there were two police officers holding a "cacete", a weapon made of hard rubber with a wooden handle. They ordered us to walk by them to the cell. Each who passed, they smacked us hard twice in the buttocks saying this was our stamp to get in the cell. Their smacks hurt me.

17. The commanding officer forced us into a 10' by 10' cell with a cement floor and six criminals telling the criminals "here comes your girlfriends, rape them and do what you want with them." He encouraged the criminals to sexually abuse us! The criminals clarified that they were in there for some time for different kinds of offenses from fights, car thefts and drugs. They then descended upon us pairing up, making us perform oral sex and raping us. I cried to myself during my experiences of rape and sexual abuse since I could not resist the abuse of the

two criminals I was paired up with in fear for the criminals' reprisals. I of course could not turn to my jailers for help since they had put me and my friends here and gave them license to abuse us in the first place.

18. At 6:30 a.m., when a guard came to the cell to check on us, we asked when we were to see the Delegate. The guard told us that it might not be until tomorrow if he decides to take the day off. I became petrified that I was to be detained without charges indefinitely at the mercy of these criminals and their sexual abuse.

19. Thankfully at 9:30 a.m., an officer finally came to bring us from the cell to see the Delegate. We were ordered up against the wall when the Delegate came in. In front of other officers, the Delegate insulted us as "viados" ("faggots") and asked us how we enjoyed the evening in the cell. He ordered us to walk across the room still in our underwear saying that we walked like faggots. He warned us that he did not want to hear anything about us or see us hanging out on the street, since the next time, we would not be released the following day but be kept in jail for our faggot ways. He then ordered us to get dressed and sent us out of the police station. "Look at the faggots walk," the Delegate and the officers laughed as we left. It was therefore now completely clear to me that the Delegate and police had detained me and my friends and allowed if not encouraged the criminals to sexually abuse us as punishment for our actual and suspected homosexuality.

20. I sustained bruises from the criminal's rape even in my rectum and I could not sit down for weeks from the pain. I did not seek medical attention for fear of being identified as a homosexual by the Doctor and mistreated. I did not report the Delegate and police's actions against me to the authorities since they were part of the authorities and could target me for greater reprisals. I was so humiliated by this experience that I did not even tell my family.

21. About one month after the arrest, on the Wednesday before Good Friday of 1987, at around 8:30 p.m., (names) and a few friends and I were walking on the streets when we saw two police cars approaching. The sight of the police sent us running for our lives given the Delegate's previous threat against us if they found us again. I could not escape too far but scrambled up a bushy tree from where I could not see much of what happened but could hear everything. I heard the police officers shout "stop". I heard one of my friends, (name), begging the officers to let him go because he had done nothing wrong. The police said that he looked like a faggot and that they would take him to the station. "Get in," they shouted to him and drove off. After they left, I got down from the tree thankful that I had not been discovered but panicked over the fate of (friend). I later learned that he had been detained overnight without charges.

22. At the end of February, 1988, I went to (city), (state), to spend Carnaval. On a Saturday night at around 12:30 a.m., I was walking in a park with an acquaintance when two police officers suddenly appeared. The officers demanded to know what we were doing. We claimed that we were only talking which was the truth. The officers called us liars since no two men would go to a park just to talk. They demanded to know who of the two was the "bicha" ("faggot"). We denied that we were faggots. They responded that they would take both of us to jail if we did not confess where we would be kept until Ash Wednesday. I decided to confess since I feared the abuse we would face in jail. They ordered my acquaintance to leave.

23. When I asked whether I could go now, they responded, "Not before you give us something in return." The officers brandished their guns at me and ordered me to perform oral sex on both of them. I complied since I feared that they could punish me further or even disappear me since I was alone. The abuse lasted around 30-35 minutes. Afterwards, they released me, telling me "Go, but don't look back or you're dead." As I walked from the park, I

shivered in fear that they would shoot me in the back even as I did not look back at them. I could not report this abuse to the police scared that the police would then identify me as "viado", lock me up and subject me to greater mistreatment.

24. Later, back in (city), in around June, 1988, I was returning home late at night at around 1 a.m., when two police officers stopped me and asked where I was coming from. I told them the truth that I was coming from a bar called (name). As that bar had the reputation of being frequented by homosexuals, they assumed I was a homosexual and began to ridicule me. They told me that I was a faggot, looking to get "fucked", and that they would take me into the station to let the prisoners have fun with me. As I was afraid that they would realize this threat the longer I stayed with them, I told them I had to get home to go to work the next morning and began to walk away. One officer took his cacete in rage and smacked my left hand threatening me to get out of their sight, faggot! I walked quickly home.

25. In July, 1988, my friend (name) and I were walking home one night when a man stopped his car and offered us a ride home. As he was not the police, we did not fear him but thought he would bring us home. However, when we were in the car, he told us instead that he was taking us to (name of waterfall), a waterfall located off the highway connecting the cities of (name) and (name). We told him it would be better for him to take us home but he insisted on going to the waterfall.

26. When we got there, the area was deserted. He said he wanted to see something new and different. We begged him to take us home instead. He replied that he would tell us what we were going to do. He said that he wanted to watch us having sex with each other. As we were friends, I told him that we were cousins and that it was not right to do such a thing to hopefully

deter him. However, he brandished a gun and said that we were faggots, and that he was losing patience with us and we should get started.

27. (Friend's name) and I pretended to be involved but he was not convinced. He got angry and said that "You'll pay for this, faggots." I was scared that he'd kill us in cold blood but instead he got in his car, told us we'd be stuck there now and sped off. Thankful that he did not kill us, (name) and I nonetheless had to spend the rest of the night in the bushes and wait until morning to find a ride home.

28. By this time, I not only felt cornered by the years of ridicule, threats and abuse from the police and civilians but my own brother, (name), who hated me for my homosexuality. (Brother's name) was six years younger than me and had been living at home with us. He made the last two years hell at home for me because of my homosexuality. He threatened me and tried to physically attack me. In early 1988, he came after me while I was in the shower waving a block of wood. He shouted he was going to kill me for being a "viado" ("faggot") and disgracing the family. I ducked and he broke the bathroom window instead and the wall. I pretended to faint in fright so that he would not hurt me and my brother in law had to restrain him.

29. When I complained to my family about his threats and mistreatment, my family said that there was little they could do, that I knew how his character was, and that maybe I should leave for my own good. I hoped for them to kick (brother) out instead but they could not protect me from his abuse.

30. I realized I should in fact flee for safety from the police, gangs, civilians and my brother, because of my homosexuality before it became too late. I decided on the United States. For I had seen news coverage on the gay and lesbian pride parade in New York and realized that in the United States homosexuals had more safety and freedom than in Brazil. I had also heard from

homosexual friends who had traveled to the United States that the situation was markedly better for people like us here. After all the abuse I endured in my city, I hardly believed that I could find safety or freedom anywhere else in Brazil. My parents and two sisters helped me finance my flight from Brazil. I left in early August, 1988 on a tourist visa to Mexico and entered the United States without inspection on August 20, 1988 by (city).

31. In January, 1996, at (community health center), I tested HIV-positive. The news devastated me partly since I always took precautions except when the police and criminals in Brazil sexually abused me against my will. I panic just thinking about being deported to Brazil as a homosexual with HIV. It is my understanding that there is intense discrimination against people with HIV and AIDS in Brazil. Because of poor information about AIDS, people with HIV and AIDS are treated unfairly. Those who have the disease are ostracized and treated like lepers. I recall that many times while in Brazil since people think homosexuals are responsible for AIDS and are AIDS carriers, people who suspected that I was a homosexual insulted and threatened me as an AIDS carrier even when I was HIV-negative. Now that I am HIV-positive, I believe they will try to hurt me anyway possible by not treating me in the hospital, refusing to give me employment, and not protecting me from police or gang violence.

32. I also fear for my life if deported because I am homosexual considering the abuse I already experienced as a homosexual and considering the rise of the death squads that have been killing homosexuals with impunity. I have heard from my friends in Brazil of several people in my city who were assassinated because of their homosexuality and HIV status. There was (name), age twenty seven, an acquaintance of mine, whose body was found dismembered at a gas station in town. It is believed that he was murdered because he was HIV-positive. There was also (name), a homosexual, who on April 28, 1996, was assassinated with his arms and legs

broken under bizarre circumstances. The alleged assassin, his supposed lover, was acquitted, as is the usual case that the police press charges against a supposed lover covering up crimes of hatred against homosexuals. I have also heard that the situation for gays has become so tense that homosexuals avoid going out at night lest they become victims of abuse or violence.

33. To date, I still experience nightmares over what happened to me with the police, gangs, criminals and society. However, I wake up and am thankful for having found real safety in the United States.

34. I did not apply for political asylum until now in the United States since I did not believe that I could qualify for political asylum as a homosexual fleeing abuse and mistreatment and as a person with HIV/AIDS until I conferred with my social worker about the problem of my immigration status and she referred me to American Friends Service Committee (AFSC) Immigrant Rights Program in Newark, New Jersey. Chris Nugent, Accredited Representative of AFSC, has been working with me several days to prepare this declaration which presents an accurate and true description of the abuse and mistreatment I suffered as a suspected and actual homosexual in Brazil and my fears if deported as a homosexual with HIV/AIDS.

35. It is my hope that after so much abuse and mistreatment as a homosexual including physical and sexual abuse by the police and criminals and the prospect of even more abuse and mistreatment as a homosexual with HIV/AIDS if deported to Brazil, that the Asylum Office will consider granting me political asylum in their discretion. I thank you for your consideration of my application.

CHAPTER 3

Building Blocks Of The Application: Preparing An Application For Political Asylum

PLEASE NOTE: The following information refers to parts of INS Form I-589, the Application for Asylum and Withholding of Removal. The INS released an updated version of form I-589 on 10/18/2001, and all applicants must use the updated form as of July 2002. You can find the updated form on page 81 of this handbook. However, the information below (pages 61-80) refers to the previous of the form, so references to question numbers may be inaccurate. The information itself will still be useful to those completing the new form.

When submitting your application, please be careful to check the date at the bottom of the I-589 form. After June 30th 2002, the INS will only accept the I-589 version dated 10/18/2001.

I. Introduction

The Application for Asylum and Withholding of Removal is filed with Regional Service Centers (see Appendix 1 for listing of Service Centers and Asylum Offices) using Form I-589 (see Appendix 2). The administrative adjudication of an I-589 application pertains only to the application for asylum. An asylum-seeker will be scheduled for an interview within 45 days after filing the asylum application. 8 U.S.C. 1158(a)(5)(A)(ii). If an individual is placed in "Removal Proceedings" then this form may be used as an application for both asylum and withholding of removal.

The purpose of this chapter is to guide the applicant (or legal representative) in the preparation of the application itself.

II. Form I-589

Form I-589 has been recently revised to reflect changes in asylum law that were included in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. On the bottom of the first page of the application itself look for the notation "(Rev. 01-05-98)" indicating that this form is the revised version published on May 1, 1998. Please note that as of July 1, 1998, applicants must use the May 1, 1998, version of the form. Old forms, which are now unusable, have a notation in the bottom left corner indicating an earlier date.

The form itself is divided into seven parts. When this application is filed administratively (for applicants not in Deportation or Removal Proceedings) the applicant must complete Parts A through E. If this application is prepared by an attorney or other representative on behalf of the applicant, the legal representative must complete Part F and must file a Form G-28 (Entry of Appearance as Attorney of Record) to receive notice of the interview.

A. Part A: "Information About You"

The first part of the application requests biographical information about the applicant. This section collects information which may form an important part of the applicant's claim. As with every part of the application, care must be taken to answer these questions correctly. Wherever the question asks for information that does not apply to the applicant or for which there is no answer the correct answer is "not applicable" or "none." All questions on the Form I-589 must be answered. If an applicant fails to answer a question, the Service Center may reject and return the application.

1. Alien Registration Number (A#). The "A" number is the number assigned to people who have ever had a case with INS or the Immigration Court including people who have become legal permanent residents, people who have ever been in proceedings before the Immigration Court or have been deported or taken voluntary departure, and people who have filed an application for asylum. The "A" number is a 8 digit number. Most applicants applying for asylum for the first time will not have an "A" number at the time the application is filed. If the applicant does not have an "A" number, the correct answer here is "none."

2. Social Security Number. Many aliens seeking asylum will not have a valid social security number in his/her name. If so, the correct answer is "none" since the application asks only for the applicant's social security number. If the alien possesses a valid social security number issued to him/her, then this number must be entered in this space.

3. Complete Last Name. This refers to the applicant's family name or surname, including two last names such as "Mendez-Robles." If there is any doubt as to which part of an applicant's name is the surname, it may be easiest to refer to the applicant's passport or other identification document. To avoid confusion, it may be helpful to enter the applicant's last name in all capital letters to distinguish this part from the applicant's first and middle names and to repeat this style throughout the application.

4, 5. First Name, Middle Initial. This refers to the applicant's first or given name. Again, if there is any doubt as to what part of the applicant's name is the first name, it may be helpful to refer to the applicant's passport or other identification documents.

6. Aliases. Here you should include all aliases, nicknames, previous names or other versions of your real name by which you are known or which you have ever used.

7. Residence in the U.S. This should be an address where the applicant resides. The address entered in response to this question also determines which asylum office has jurisdiction (power and control) over the applicant's application. It is therefore important that this information is correct and that the Immigration Service is notified of any changes to the applicant's address after the filing of the application.

8. Mailing address in the United States. This should be an address where the applicant lives and receives mail. The applicant will receive written notice that the INS has received the asylum application and written notices of the interview and future proceedings at this address.

13, 14. Present Nationality (Citizenship). Applicant should enter the present country of nationality/citizenship in this space. **Nationality at Birth.** Applicant should enter the country of nationality at birth, even if it is the same as present nationality.

15, 16. Race/Ethnic or Tribal Group, Religion. These sections should be completed if the applicant is a member of such a group or religion regardless of whether the applicant's claim is based upon this characteristic.

17. Immigration Status. The information requested in this section may provide the Immigration Service with significant facts in evaluating the application. Therefore, the information must be correct so the INS can process the application correctly.

The Immigration Service has jurisdiction over the applicant's administrative asylum application only if the applicant is not in removal proceedings i.e. if a "Notice to Appear" ("NOA") has not been served on the applicant. The "Notice to Appear" is a document that INS files with the Immigration Court and gives a person a copy of which lists allegations and charges against the person that could make the person removable (deportable) from the United States. If the applicant has been served with a NOA this application must be filed to seek the defensive relief from removal and not with the Regional Service Center of the Immigration Service. After a NOA has been issued, it is the Immigration Court that has jurisdiction (power and control) over the asylum seeker's case in removal proceedings. A person in removal proceedings is known as "respondent." The asylum seeker will appear at a "Master Calendar Hearing" and will be given an opportunity to request relief from removal, including asylum. The asylum-seeker may file an application for asylum at the Master Calendar hearing or request some time to file the application. (If the applicant has been referred by the Asylum Office to the Immigration Court after the Asylum Office does not grant asylum, the applicant need not re-file the application, but may simply refer the Court to the application already submitted. If a previous application for asylum before Asylum Office has not been filed, the applicant must file the application with the Immigration Court and District Counsel (along with the certificate of service) of the Immigration Service once such relief is requested at a Master Calendar hearing before a presiding Immigration Judge. The court refers the application to the U.S. State Department for a non-binding advisory as to the country conditions. (Similarly, some applicants may have been served before April 1, 1997 with an "Order to Show Cause" and placed in either "exclusion" or "deportation" proceedings. Once an Order to Show Cause has been issued the Immigration Court will have jurisdiction over the asylum-seeker and an application for asylum will have to be filed with the District Counsel and the Immigration Judge.)

18. The Date of Exit From Applicant's Country (a) should be given as the date when applicant left the his/her country last time. This date is important to determine whether the applicant traveled through or resided in other countries before finally arriving in the U.S. and if so, whether the applicant had meaningful opportunity to seek asylum in such countries.

The Date of Last Arrival in the United States (b) should be given as the date of last entry. Many applicants will still be in possession of the white card given to them upon entry known as the I-94 Departure Record card (or green I-94W Departure Record) which records the

date and port of entry. In many cases, date of entry is easily determined. In some cases, where the alien has been in the United States continuously for a long duration but has departed and re-entered one or more times. The answer to this question in this case will still be the date of last entry. If the applicant last entered the United States without being inspected by an Immigration Officer at a port of entry ("Entered Without Inspection") then the date given should be the date on which the applicant last entered. If the specific date is not known to the applicant, as is often the case when the applicant has entered without inspection and/or many years have passed since entry, the applicant should attempt to establish with the greatest accuracy possible the date on which the last entry took place. If this cannot be done, it would be preferable to offer an approximate date using the words "on or about." If even an approximate date of entry cannot be ascertained (e.g. if applicant entered the country as a young child and has no way of learning the approximate date of entry) then the appropriate answer would be "unknown." It is important to note that under the changes in the law in 1996, an individual seeking asylum must file an application within one year of last arrival in the United States. Therefore, the answer to this question may determine whether or not the applicant is eligible to file an application for asylum. (Note: an applicant whose last arrival in the United States occurred before April 1, 1997 has until April 1, 1998 to file for asylum. All individuals arriving on or after April 1, 1997 have one year from date of last arrival to file for asylum. Interim regulations offer some narrow exceptions to the filing deadline which allows for late filing in cases of certain "changed" or "extraordinary" circumstances which relate to the delay. (See this chapter, Part D, Question 7.)

Place of Last Arrival (c) is usually easily determined. Most applicants will still have this information recorded on the Departure Record card or in their passport. Applicants who have entered without inspection (or who are no longer in possession of the I-94 Departure Record card) can usually identify the general geographic area at which they crossed the border and entered the United States.

Status When Admitted (d). The applicant's status when admitted is usually easily identified by reference to the Departure Record or passport. Most applicants will have entered originally on a non-immigrant status, for example, as a visitor for business or pleasure (B) exchange visitor (J), student (F), professional worker (H), journalist (I), crew member (D), religious worker (R), or visa waiver tourist. Some applicants will have entered without inspection and therefore will have not entered on any lawful status. In such a case the correct response to this question is simply, "EWI" or "entered without inspection." Expiration of status (f) refers to the expiration of the permitted stay on such status. For example, an alien admitted to the United States as a visitor on a B-2 visa for six months would designate the end of the time period allowed to remain in the United States as the expiration date (unless it had been extended) and not the expiration of their visa (a B-2 visa may be valid for entries as a visitor for many years in some instances).

Have you previously entered in the U.S.? (g) should lists the dates/places/status that the applicant traveled to the United States on various occasions . Note that if the applicant has been in the United States before the most recent arrival and voluntarily departed without seeking asylum here, the Asylum Officer may question why the applicant did not seek asylum in that instance. In other words, the Asylum Officer may want more information about the circumstances if the applicant has been in the United States on previous occasions and has left,

particularly if the applicant has returned to the country from which he/she is now seeking asylum.

19, 20, 21. Languages. If the applicant is fluent in English, check the (yes). If the applicant is not fluent in English, it is important to designate the language in which the applicant can best communicate since this will notify the Immigration Court to provide an interpreter in that language (should the applicant be referred for removal proceedings). If the applicant is not able to conduct the interview before Asylum Officer in English, then the applicant must be accompanied by an interpreter at the interview. It is the applicant's responsibility to provide an interpreter at the interview before the Asylum Officer. The Asylum Office will not provide an interpreter. (If the applicant is before an Immigration Judge the Immigration Court will provide an interpreter.) It is important to bear in mind that the applicant must feel comfortable in communicating in the language chosen for the interview so that he/she understands the questions and is able to provide correct information. Any confusion caused due to language barriers may have a negative effect on the asylum application.

22. Have you ever filed an application for asylum or withholding of deportation or withholding of removal? The response to the question of whether an applicant has previously applied for asylum or withholding of deportation may be extremely important in the adjudication of this application. If the applicant has never before filed such an application, then the obvious correct answer is simply to check the "no" box. In some cases, an applicant is filing an application because they have been previously included in an application by a spouse or a parent, but no longer qualify as an unmarried child under twenty-one and must now file a separate application.

In other cases, however, the applicant has previously filed an application (yes). This application may still be pending with the Immigration Service or may have been denied administratively (denial by the asylum office.) In either case, a subsequent application for asylum must fully explain the circumstances surrounding the previous application and the disposition or status of the previous application. This explanation may be incorporated in the applicant's affidavit, particularly if it is a lengthy explanation and if it helps explain other parts of the case such as a person's own fear to return.

It is worth noting here that many individuals with true sexual orientation based asylum claims may previously have had weak, frivolous or fraudulent asylum applications filed on their behalf. These previous applications may have been filed by an attorney or representative in order to obtain employment authorization for the alien without fully explaining the nature of the documents being filed. It is, therefore, vital that an applicant fully explain his/her reasoning behind the previous application, particularly if it was a frivolous application filed by an attorney or representative on behalf of the applicant. Applicants who find themselves in this situation will have provide detailed and truthful explanation of the circumstances underlying the previous application to establish the veracity and credibility of the current claim. Often applicants may have been unaware that their well-founded fear of sexual orientation based persecution may qualify them for asylum or they may have been wrongly advised by attorneys or non-attorney practitioners who may themselves have been homophobic or who may have filed weak or frivolous asylum applications in the past in order to obtain employment authorizations.

23. Enter name of country which issued last passport or travel document. Attach a copy of your passport, front and back cover and every page. Be sure to remove any stapled or loose papers from the passport so that every page is clearly visible. Also be sure that the copies of the various stamps or visas entered into the passport are clearly visible. If the applicant has an I-94 Departure Record card stapled into the passport, it might be helpful to remove it from the passport and to copy it both front and back and attach the copy with the copy of the passport.

24. Passport No. Enter the passport number of your current or most recent passport (even if expired).

25. Expiration date. Enter the month, day and year of expiry of your current or most recent passport (even if it is now expired).

26. Address. Enter address at which you last resided before your arrival in the United States and the amount of time you lived there.

27, 28, 29, 30. Education/Residences/Employers/Parents. The current I-589 form asks for personal history including information about applicant's parents, applicant's education, addresses at which the applicant resided for the past five years, and the applicant's employment (including unauthorized employment) for the past five years.

B. Part B

This part of the application asks for information about the applicant's spouse and children. Most applicants for asylum based on sexual orientation will not be married or have children. For those applicants who are married, the section for the applicant's spouse must be completed, whether or not the applicant's spouse is included as part of the this application. If the applicant is not married, check the box on the top line and proceed to the Question 2 which asks about children. If the applicant has no children simply write "none."

A note on married lesbian and gay applicants. Some lesbian and gay asylum applicants may be married. It is important to realize that a sexual orientation based asylum application is in fact an application for asylum based on a well-founded fear of persecution on the basis of membership in a particular social group (i.e. homosexuals). If an applicant is married, this could confuse or contradict the applicant's claim that he/she is lesbian or gay. It is, therefore, important to address this confusion in the text of the application or the attached affidavit. The applicant should explain in great detail their own consciousness of their homosexuality (personal feelings or beliefs about being lesbian or gay) and the circumstances behind their marriage. This can be backed up with evidence about the social construction of gender roles in the country of origin or with information about prevailing social or religious mores which may explain why a lesbian or gay applicant may be married. Again, what may seem perfectly understandable to the applicant or the attorney/representative may pose a difficulty to the adjudicating Asylum Officer and is best addressed in detail in the application.

C. Part C

In Part C of the application, the applicant is expected to lay out in detail the basis for this claim. A limited amount of space is offered on the application to answer the seven basic questions that ask the reasons for this application. In many cases it will not be possible to fully answer these questions in the space provided and it is acceptable to attach pages upon which the answers are continued using neat and effective responses (i.e. if you are continuing the answer to question 2 on page 4 of your attached statement make this notation on both the application and the attached statement).

There are three common approaches to answering the questions in Part C. One is to answer each of the seven questions separately and present your case through specific responses to each question. A second way to achieve the same goal is to prepare a detailed written applicant affidavit, or sworn or affirmed personal declaration, which sets out the basis of the case in first-person narrative form, answering the questions in the application but not necessarily in the order in which they have been formulated. A third approach is to provide concise, pointed answers to the questions and then write (see attached Declaration).

Let us first review the questions in Part C and then discuss the concept of the affidavit (see Chapter 2). There are no specific "rules" governing the answers to the questions in Part C, but the applicant should understand that these questions are meant to invite the kind of information that enables the Asylum Officer to effectively evaluate the claim. A strong case for asylum could be denied if the information given in response to these questions was insufficient or if the applicant fails to answer the questions properly. Ultimately it serves both the applicant's and the Asylum Officer's interests for these questions to be answered in such a way that the applicant meets the burden of proof of a well-founded fear of persecution and meets the various thresholds of eligibility for a grant of asylum.

It is suggested that in preparing a response to Part C the applicant should first read through all the questions. Notice, for example, that some questions ask more generally about the basis for the application while other questions delve more deeply into specific events or issues.

1. Why are you seeking asylum? It usually is helpful to answer to this question by describing in general terms the basis for the application. This is the first opportunity in the application to give the Asylum Officer the context and basis of the applicant's well-founded fear of persecution. Since this is a sexual orientation based claim, it would be appropriate to answer this question by describing the applicant's fear of persecution, the applicant's membership in a particular social group of "homosexuals" (or "gay men" or "lesbians") and the reason the applicant is applying for asylum at this time. This question can be answered succinctly on this page or as part of a broader discussion of the applicant's lesbian or gay identity in an attached affidavit. An applicant may be well-advised to write a detailed chronological autobiography explaining the development of his/her self-identification as lesbian or gay and the realization of what this self-identification meant in terms of the treatment of lesbians and gays in the country of origin. This places the fear of persecution in context and allows the Asylum Officer to get inside the mind of the applicant.

In some cases, the applicant may have a well-founded fear of persecution without ever having been directly subjected to anti-gay persecution. For example, this happens when an applicant has remained "closeted" or has concealed their identity as gay or lesbian in order to avoid persecution or when the applicant has left the country of origin as a young person and has "come out" as a gay man or lesbian only after arriving in the United States. Even without personally experiencing persecution, an applicant may experience or feel a fear of persecution if forced to return to the country of origin. Because of the complexity of sexual orientation as an identity it is necessary to explain in careful detail what it means to "come out," how the fear of persecution developed, and what it is based on. It is necessary to explain specifically how the applicant became fearful of the consequences of being gay, especially if they had no personal experience with anti-gay persecution. In some cases, the applicant may have become aware of the persecution of other gay men or lesbians because of incidents in which friends or acquaintances had been victims of persecution, or when such incidents happened to strangers and were reported in the media or documented in other sources. (The same could be said for a well-founded fear of persecution because of HIV status. Often applicants have no experience with such persecution because they only learned of their HIV+ status after leaving their country. Still, by drawing on sources other than personal experience it is possible for an HIV+ applicant to develop a well-founded fear of persecution.)

In the process of writing or relating a chronology of events and biographical narrative, the applicant should take care to remain focused on responding to the questions asked on the I-589 form (especially Part C and, if applicable, Part D) and on expressing the basis of the applicant's well-founded fear of persecution. While it may be useful to provide some detail of the applicant's family life, childhood and upbringing, it is equally useful to keep in mind that the Asylum Officer will not be pleased to read a large volume of irrelevant information. However, it may be important, if the applicant has suffered mistreatment in his/her upbringing (including by family members) because of his/her sexual orientation, that relevant biographical information should be included here. Concentrate on such details as are necessary to establish a personal profile of the applicant which supports a finding that the applicant is of good moral character and credible, and that help the Asylum Officer understand the subjective fear that is the basis of the application. (Some details may have a negative impact. For example, a description of the socio-economic status of the applicant and/or the applicant's family may help reinforce the misconception that the applicant is not applying for asylum to remain in the United States to avoid persecution, but primarily for economic reasons. Such information or circumstances should be explained fully so as to counter wrong conclusions.) Remember that the Asylum Officer may not have had a lot of experience with issues that relate to homosexuality. This personal history may also provide an opportunity to explain some basic facts about being gay and coming out. (e.g. Interviewers sometimes ask: How did you know you were homosexual? Applicant might respond: I realized as a teenager that I was attracted to members of the same sex.) The applicant may want to explain his/her personal reaction to this realization, and whether or not this information was shared with parents, siblings, or friends. Gay and lesbian sexual orientation is a fundamental part of an individual's identity and does not depend on an individual's involvement in a specific lifestyle, sexual acts, or particular mannerisms. The nature of the applicant's identity and sexual orientation should be explored in a candid way in this narrative (see Chapter 2).

In summary, once a chronological biography has been written, the applicant should take care to assert that this application is based on a specific fear of persecution. This means that the applicant should characterize the basis of the fear, cite the source of the knowledge of country conditions and express generally what he/she fears would happen if forced to return to the country of origin. Question 1 offers the applicant the opportunity to make the claim that he/she indeed possesses a well-founded fear of persecution on the basis of sexual orientation.

2. Have you or any member of your family ever belonged to or been associated with any organizations or groups in your home country? This question is usually most relevant to someone who is claiming persecution based on their political opinion or affiliation with a certain political organization. In the case of sexual-orientation based claims, if the applicant was a member of a lesbian or gay organization and for that reason was targeted for persecution then the applicant may have a dual claim based on sexual orientation and political opinion. The applicant should list any or all associations or memberships with gay, lesbian or HIV organizations in United States or in his/her home country along with corroborating evidence of such membership such as letters, etc. In some countries there is documented proof that the government (or groups which the government is unable or unwilling to control) mistreat or otherwise persecute gays and lesbians associated with certain groups. If the applicant is a member of such an organization, the applicant may fear persecution for that reason as well. It may be useful to answer these questions as fully as possible even it is not readily apparent why the question is being asked. (For example, if a gay man was a journalist or a member of a human rights group in his country he may fear that he is additionally vulnerable as a political opponent of the state.) It should be noted here that a lesbian or gay man may be viewed as an enemy of the state (or an enemy of God) just for being gay in certain countries where homosexuality is severely punished because it is believed to undermine the good order of society. (Keep in mind that an applicant who has become politically active in the United States, for example as a "gay rights activist" may have difficulty in returning to the country of origin because of the danger that the applicant might face as a champion of the rights of lesbians, gay men, etc. This may be true because the applicant is known for having become politically active in the United States or because the applicant would continue to be politically active in opposing the maltreatment of lesbians and gay men if returned to the country of origin. In this way, a sexual orientation based claim may also include a claim based on political opinion for applicants who have become politically active after coming to the United States. (Two examples: Chinese gay activist granted asylum in New York in 1996 and Iranian lesbian feminist granted asylum in San Francisco in 1995.)

On the other hand, it is important for the attorney or representative to realize that potential applicants for asylum based on sexual orientation persecution often labor under the misconception that they must have been politically active in order to "qualify" for asylum, particularly since asylum is commonly referred to as "political asylum." This, of course, is not true but it confuses many would-be applicants, leading them to conclude that their fear of persecution, if not based on political opinion, is not relevant to an asylum claim. One need not have been politically active either in the country of origin or in the United States to seek asylum.

If answering YES to Question 3 it is helpful to follow the instructions to carefully and detail the facts of the applicant's association with the relevant organization and the nature of the

organization. If the applicant fears persecution because of a family member's affiliation with an organization or group then this should be explained in detail as well.

3. Have you or any member of your family ever been mistreated or threatened by the authorities of your home country or by a group(s) controlled by the government, or by a group(s) which the government of your home country is unable or unwilling to control? This question is designed to elicit the complete detailed account of persecution which has occurred. Note that the question requests information (who, what, when, where and why) about each instance of persecution as well as the identity of witness(es) who could corroborate this application. This question may have already been addressed in response to Question 1 and 2. In this question the applicant should take care to designate the basis for the persecution. If this is sexual orientation based persecution the applicant should check the box for "membership in particular social group." If this is an application for asylum based on multiple grounds then the applicant should check all the appropriate boxes.

It is important to note that this question specifically asks for information about mistreatment or threatened harm by official authorities and by those non-state actors which the government is unable or unwilling to control. These non-state actors may be vigilante groups, religious authorities, paramilitary groups, guerilla groups, neighborhood gangs, death squads, criminal organizations, and even members of the applicant's family. Threats or violence perpetrated by these non-state actors is relevant to an application for asylum if the applicant believes that the law enforcement authorities are unwilling or unable to offer protection. For instance, in some countries a member of the family discovered to be homosexual may be brutally beaten, lashed or even killed by family members or religious authorities. There is no protection from this treatment because the family has the authority to do as the family deems necessary in such a case. The same may be said for religious authorities who may impose their own punishments on homosexuals who are turned in by their neighbors or family members. When the government is not the feared persecutor, applicant must show that he/she could not have reasonably relocated and lived safely elsewhere in the country and threat or violence is prevalent throughout the country.

4. Have you or any member of your family ever been arrested, detained, interrogated, convicted and sentenced or imprisoned in your country, any other country or in the U.S.? The answer to this question may have already been included earlier in answers to previous questions. Regardless, the purpose of this question is to focus directly on whether the applicant (or a member of the applicant's family) has ever been subject to any of these actions. The answer to this question may reveal to the Asylum Officer whether or not the applicant has ever been "legitimately" arrested for a crime which the applicant committed. (For further discussion on criminal bars to applying for asylum, see Chapter 2.III.B.6.a.4). More importantly, especially in an asylum application before asylum office, this question will elicit any details about arrest, detention, interrogation, conviction, sentencing and imprisonment which were carried out against the applicant as part of the persecution of the applicant for one of the enumerated grounds.

In some sexual orientation based cases, applicants have been previously arrested, charged and convicted of violating laws prohibiting homosexuality or homosexual sexual conduct. These

"prosecutions" for private sexual activity between consenting adults may in fact be persecution. (For further discussion of prosecution as persecution, see Chapter 2.III.B.3.) Attorneys should sensitize themselves to the probability that these episodes may be embarrassing to the applicant, but may be important to the claim.³⁴ On the other hand, it may be more difficult to argue that criminal prosecution for lewd behavior or public sex acts constitute persecution unless the police activity is persecutory, for example, targeted at homosexuals, excessive, brutal, or involves extra-judicial punishments like rape, torture or extortion.

5. Do you fear being subject to torture in your home country? This question has been added to the revised I-589 form because of changes in the law which have created heightened asylum protection for victims of torture. In the Supplementary Information preceding the Interim Regulations implementing the 1996 Immigration Reform Act, the INS recognizes its obligations under the international Torture Convention. Under this international human rights treaty, no individual shall be forcibly returned to face torture. If the applicant was tortured in the country of origin then the applicant should provide detailed account of each occurrence including the identity of the torturers, the date and location of the torture, the method of torture used and the identity of any witnesses to the torture. A victim of torture may have lasting physical or emotional injury as a result and may have sought medical attention or professional counseling. If the torture has left lasting scars, whether physical or emotional, the applicant should consult with a physician and/or mental health professional (as appropriate) for an evaluation of the applicant's condition. Also, in support of the applicant's account of torture, attach any documentation that evidences a pattern of torture in the country of origin targeted at specific groups. Please see Chapter 6 of this handbook for a fuller discussion of Convention Against Torture claims.

6. What do you think would happen to you if you returned to the country from which you are claiming persecution? In answering this question the applicant should be prepared to describe specifically what he/she fears would happen if forced to return to the country of origin. It is very important that in answering this question that the applicant avoid vague generalizations and avoid a lengthy discussion of those consequences which do not rise to the level of persecution (see Chapter 2 for discussion of "persecution"). There is a tendency, for example, for applicants to focus more on such personal consequences as excommunication from family, social ostracism, the lack of any chance of entering into a fulfilling relationship because these consequences are considered extremely painful and emotionally devastating to the applicant. At the same time, the applicant may have an even greater fear of being arrested, brutalized, sexually abused, jailed, extorted, beaten, tortured, raped or killed by the police or by individuals or groups against which they will not be able to seek protection, but the applicant may be less comfortable about describing these horrible consequences. It is useful to keep in mind that the Asylum Officer (i.e. interviewing Asylum Officer or Immigration Judge) must conclude that the applicant fears persecution. Although it may be understandable that the applicant is reluctant to articulate these grave consequences, especially when they include issues involving sexual abuse, it is not helpful to the application to avoid mentioning them if they are relevant to the case. In fact, applicants often are afraid to admit to themselves the worst of what might in fact happen to them if they are forced to return. A skilled advocate will attempt to

³⁴ For a discussion of the prosecution/persecution dichotomy for lesbian and gay asylum seekers, see Shannon Minter, "Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity," 25 Cornell International Law Journal 771 (1993).

support the applicant in articulating these specific fears and suggest that the applicant may benefit from counseling if their fears are so great as to produce extreme anxiety or other difficulties for the applicant (see Chapter 7: Further Resources).

If the applicant's well-founded fear of persecution is based on personal experience or on experience of friends or acquaintances it is appropriate to provide detailed accounts in support of the applicant's claim that these are likely to be the consequences faced upon return to the country of origin. The applicant should provide as much information as possible in describing each event, including: date that the event took place (exact or approximate); place where the event took place; description of the relevant parties including a description and the identity of the persecutors (if possible), and; the identity of any witnesses.

The applicant should also attach supporting documentation which either specifically corroborates their description of events or provide general information which would support a conclusion that the applicant's story is credible. Supporting documentation (discussed in Chapter 4) may include statements by witnesses or family members, expert witness affidavits, and documentation from other sources which relate generally or specifically to country conditions. Although supporting documentation is important in asylum applications, the applicant's credibility is of paramount consideration to the Asylum Officer's evaluation of the claim.

If the applicant's fear of persecution is based on information about country conditions obtained from other sources (and not based on personal experience or experience of friends or acquaintances) then documentation becomes extremely important in support of the claim. Again, in answer to this question, the applicant must articulate exactly what he/she fears would happen if the applicant returned to the country of origin, even if the applicant does not or cannot base this fear on first-hand experience or knowledge of experiences of friends or acquaintances. (For example, if copious reliable documentation is available which confirms the torture and/or execution of homosexuals in the applicant's country this would reasonably lead the applicant to fear torture and/or execution returning. The applicant need not have experienced such a punishment or have personal knowledge that this has happened to others. The documentation supplies a reasonable basis for this fear.)

7. Describe in detail your trip to the United States from your home country. The applicant should supply a detailed chronology of the trip from the country of origin to the United States. This will be simple if the applicant went directly from one country to another and can recall the dates, times and methods of transportation used (attach documentation of travels if available). In some cases, however, applicants have traveled through many countries before entering the United States. It is vital that the applicant begin this detailed chronology by taking a step back to the time immediately before the applicant departed from the country of origin. Useful questions to consider are: What were the circumstances which led to the applicant's departure? Did the applicant flee from a specific threatening situation? What was the relationship between the applicant's fear of persecution and the decision to flee? What kind of visa (if any) did the applicant have and what was the applicant's intent when applying for the visa to come to the United States? If the applicant traveled through any other countries on the way to the United States, why didn't the applicant seek asylum in any of those countries? What kind of

status did the applicant have in order to enter and remain in those countries? Detail the date of entry and the duration of time and type of status for each country the applicant traveled through.

In answering this question, the applicant should be aware that the Asylum Officer will be looking for evidence that the applicant was not "firmly resettled" in another country before coming to the United States. The 1996 reforms made "firm resettlement" a statutory bar to eligibility for asylum. (For discussion of "firm resettlement" as a bar to asylum, see Chapter 2.III.B.6.a). If an asylum applicant left the country of origin and was firmly resettled in another country which the applicant subsequently left to come to the United States, the Asylum Officer may conclude that the applicant is not eligible for asylum since the applicant has the right to return to reside in a safe third country. "Firm resettlement" generally means that the individual was offered legal permanent resident status, citizenship, or other permanent residence status in the country to which the individual first fled.³⁵

D. Part D: Additional Information About Your Application For Asylum.

If an applicant can answer all the questions below by checking NO that means that the applicant is not facing any substantive issues that may jeopardize the applicant's eligibility for asylum. However, if the applicant has to answer any of the questions in the affirmative then the applicant should prepare a detailed explanation to be attached or to be included in the applicant's affidavit. (With one exception: Question 6, which asks whether the applicant is filing the application more than one year after arrival in the United States, does not have to be answered by any applicant filing on or before April 1, 1997. If the application is filed on or before April 1, 1997 an affirmative response to this question cannot render the applicant ineligible for asylum.) Explanations may mitigate against a finding that the applicant is ineligible for asylum. Where possible, these explanations should be back up with supporting documentation.

1. Do you or your spouse or child(ren) now hold, or have you ever held, permanent residence, or citizenship in any other country other than the one from which you are now claiming asylum? This question should be answered accurately. If the answer is yes, but the applicant can no longer return to reside in that third country it is very important that the applicant attach an explanation with documentation to prove that firm resettlement has not occurred. Remember that like Part C Question 6 the answer to this question directly relates to the applicant's eligibility for asylum. As has been stated above, firm resettlement renders an applicant by law ineligible to seek asylum.

2. Have you, your spouse or child(ren) ever filed for, been processed for, or been granted refugee status or asylum by the U.S. government? If YES, your answer should include an explanation of the decision and what happened to any status conveyed as a result. If the answer to this question is yes, then it is very important to explain the circumstances behind this other asylum case. If a case is pending but the applicant is now attempting to file another

³⁵ Firm resettlement does not apply to withholding of removal. Also, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provides that an alien is ineligible to seek asylum if he/she may be removed pursuant to a bilateral or multilateral treaty and the Attorney General does not want to allow the applicant to file based on a determination that it is in the public interest.

application then the full circumstances surrounding the filing of the previous application must be explained. As was suggested in the answer to Part A Question 18, if the applicant has a pending but frivolous application which was filed on the applicant's behalf by someone else these facts are relevant to establishing whether or not the applicant's credibility is damaged by the existence of a previous application. (A substantively frivolous case for asylum in which the basis for claiming asylum had no basis in fact or was not based on a well-founded fear of persecution.)

3. Have you, your spouse or child(ren), or parents otherwise ever filed for, been processed for, or been granted or denied refugee status or asylum by any other country? If YES your answer should include an explanation of the decision and what happened to any status conveyed as a result. If the applicant previously sought asylum and was granted asylum in another country, voluntarily left (maintaining the right to return), came to the United States and filed for asylum, it is likely that the Asylum Officer will view the applicant as having firmly resettled in that country. If the Asylum Officer draws this conclusion, the applicant may be determined to be ineligible for asylum. The Asylum Officer will look for information as to the basis of the claim (documentation is helpful) if it was granted or denied. Often individuals fleeing persecution on the grounds of sexual orientation have no idea that they may be eligible for asylum on this basis and may only learn of that possibility after arriving in the United States. If the applicant previously filed for asylum but did not assert a well-founded fear of persecution based on sexual orientation, then this question provides an opportunity to explain why the applicant did not make a claim on this basis in the previous application.

4. Have you, your spouse or child(ren) ever caused harm or suffering to any person because of his or her race, religion, nationality, membership in particular social group or political opinion or ever ordered or assisted in such acts? If YES, describe each such incident and your own involvement in it. An applicant for asylum (and withholding) is ineligible if the applicant has ordered, incited or assisted in acts of persecution against others unless the applicant did so involuntarily and under duress. The applicant answering this question in the affirmative must explain the exact circumstances involved in each incident. The applicant should explain how such events came to take place and should describe his/her subjective state of mind and intent when participating in such events.

5. After having left your country for the reasons described, have you returned to your country of claimed persecution? If YES, please describe in detail the circumstances (date, purpose, duration of visit). If the applicant answers this question affirmatively it is important that the applicant address the seeming contradiction between applying for asylum because of a well-founded fear of persecution and returning to the country of claimed persecution after the initial departure. There are many reasons why the applicant may have visited that country, but any explanation should include information such as specific dates, length of stay, activities during stay, purpose of visit, specific locations visited which will help the Asylum Officer effectively evaluate whether these visits undermine the applicant's claim of a fear of persecution.

6. Are you filing this application more than one year after your last arrival in the United States? If YES, you must attach an explanation of why you did not file within the first year after your arrival. Describe any change(s) in circumstances since our arrival which resulted

in your decision to apply for asylum at this time or any extraordinary circumstance which prevented you from applying earlier. Failure to adequately explain such changed or extraordinary circumstances may result in ineligibility to apply for asylum.

Background: The addition of this question to the I-589 form represents the single greatest change to asylum filing rules under the 1996 immigration reforms. Under the new law all asylum applicants must file their applications for asylum within one year of their last arrival in the United States. The law went into effect on April 1, 1997. The Immigration Service published regulations in March 1997 clarifying the effect of this filing deadline on those individuals who had entered the United States prior to April 1, 1997. Under these Interim Regulations³⁶, all individuals who had last entered the United States on or before April 1, 1997 must file their applications for asylum on or before April 1, 1998. Only those applications filed on or after April 2, 1998 are subject to the one-year filing deadline. All individuals who have last entered the United States since April 1, 1997 have one year to file their applications for asylum.

This question anticipates that some applicants will attempt to file applications for asylum after having been in the United States more than one year since their last arrival. Anyone filing this application on or before April 1, 1998 cannot be determined to be ineligible for late filing no matter how much time has passed since their last entry.

The INS Interim regulations do offer some exceptions from the harsh filing deadline. These exceptions fall under two categories: "changed circumstances" and "exceptional circumstances." The regulations state that if an applicant cannot prove by "clear and convincing evidence" that the application was filed within one year of last entry than an Asylum Officer or immigration judge will decide if the applicant qualifies for an exception to the one-year rule. For a detailed discussion of regulations on one-year filing deadline and exception, please see the addendum attached to the handbook.

Changed circumstances: The INS regulations state that an application may be accepted beyond the one year deadline if the late filing was caused by "changed circumstances," i.e. circumstances materially affecting the applicant's eligibility for asylum. These may include changes in conditions in the applicant's country of nationality or, if the person is stateless, changes in the country of last habitual residence. These can also be changes in objective circumstances relating to the applicant in the United States, including changes in applicable U.S. law, that create a reasonable possibility that applicant may qualify for asylum. The applicant shall apply for asylum within a reasonable period given those "changed circumstances." § 208 (a)(2)(D).

Extraordinary Circumstances: Another exception to the one year deadline is slightly more broad. This is the exception for "extraordinary circumstances" which pertain more to the conditions affecting the applicant's subjective state. An exception for late filing because of extraordinary circumstances is limited to those circumstances which are directly related to the delayed filing. The exception also requires that the applicant file "within a reasonable period"

³⁶ 8 C.F.R. 208.4 (a)(2)(ii). For full citations of the prohibitions on filing asylum applications, see Appendix 3 at the end of this chapter.

given those circumstances. The applicant must prove the circumstances were out of the applicant's control and that if it were not for those circumstances the application would have been filed within the one year deadline. The extraordinary circumstances include: serious illness or mental or physical disability of significant duration, including any effects of persecution or violent harm suffered in the past, provided the illness or disability happened during the one-year period after arrival; legal disability, for example, if the applicant was an unaccompanied minor child or suffered some mental impairment; ineffective assistance of counsel; the applicant was in temporary protected status; the applicant submitted an asylum application prior to the expiration of the deadline but it was rejected for corrections and the applicant re-filed the application within a reasonable period. Included in § 208 (a)(2)(D).

E. Part E: Signature

The applicant must sign and date the application, attach two photographs and write his/her name in the applicant's native alphabet below the signature. The applicant should read the certification written above the signature line which indicates the penalties for false statement of material fact and the applicant should carefully read the "WARNING" that applicants for asylum may be subject to removal (i.e. deportation) if asylum and withholding claims are not granted. If the applicant has any doubt about the risk of filing this application he/she should consult with an experienced attorney and discuss these issues further.

F. Part F

If the applicant is represented by an attorney, the attorney should complete and sign this part.

G. Part G

The applicant will be asked to complete and sign this part at the interview or before the Immigration Judge re-affirm that the application and documentation attached are true.

H. Other Concerns

1. When Can An Asylum Applicant Apply For Employment Authorization?

Filing an application for asylum no longer brings with it the automatic eligibility for legal authorization to work. Applicants who filed asylum applications before January 4, 1995 are eligible for employment authorization from the time the asylum application was filed. Applicants who filed asylum applications on or after January 4, 1995 but before April 1, 1997 become eligible to apply for employment authorization once their case has been pending (not

including any time accrued because of delay caused by the applicant) for 150 days. An applicant whose asylum case has been denied by a judge within 150 days is not eligible for employment authorization. It must be noted that the changes in law in 1996 have virtually made the employment authorization impossible as the interview is scheduled within 45 days from the date of filing asylum application and a decision within 12 weeks. The 1996 Immigration Reform legislation extends the time that an asylum applicant must wait until eligible for employment authorization to 180 days for those applications filed on or after April 1, 1997. Under the current regulations, once an application has been pending for 150 days, but the Immigration Service is not permitted to issue employment authorization until the expiration of 180 day period from time of filing. An applicant becomes eligible for employment authorization once the application for asylum is granted or once the application has been granted or given "Recommended Approval" (use form I-765 and file with the appropriate INS Service Center).³⁷ (For more information on employment authorization, see Chapter 5).

2. Approval, Recommended Approval Or Denial

After an interview before Asylum Officer, an application may be approved or the applicant may be given a "recommended approval" if the applicant's fingerprints have not yet "cleared" the background check. If the Asylum Officer does not conclude that the applicant is eligible for a grant of asylum, the Officer will issue a Notice of Intent to Deny, if the applicant is in lawful status.³⁸ If the applicant is not in lawful status, the INS will issue a Notice to Appear at an Immigration Court Removal Proceeding, and will provide the applicant with the opportunity to respond to the reasons he/she seeks to deny asylum in writing with or without additional evidence. The applicant should respond with detailed and logical arguments referring, where appropriate to the application and its attached supporting documentation. After the applicant's response to the Notice of Intent to Deny, the Officer may reconsider and grant asylum or issue a letter denying asylum. See Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and Employment Authorization, 59 FR 62284, 62294 (Dec. 5, 1994). Once served with a Notice to Appear, the applicant becomes a respondent in removal proceedings and may renew the claim for asylum and withholding of removal as requests for defensive relief before an Immigration Judge.

³⁷ 8 C.F.R. 208.7 (a)

³⁸ Immediate referral to removal proceedings before an Immigration Judge does not result for asylum applicants who are in lawful immigration status at the time the application is decided. 8 C.F.R. § 208.14(3). However, the exception lies in that the Executive Office for Immigration Review has exclusive jurisdiction over asylum claims made by all crew members, entering stowaways or people admitted under the Visa Waiver pilot program who have remained longer than authorized or have violated other terms of their visas. 8 C.F.R. § 208.2(b)(1)(i)-(v).

Appendix 1: Regional Service Centers And Asylum Offices

Applications are to be sent to the addresses below:

Northern Service Center

850 S. Street
Lincoln, NE 68508
(402) 437-5218 (public inquiry number)

Jurisdiction: Alaska, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

Southern Service Center

7701 North Stemmons Freeway
Dallas, TX 75247-7701
(214) 767-7769 (public inquiry number)
(214) 767-7405 (fax inquiry number)

Note: Mailing address for applications:

PO Box 152122
Irving, TX 75015-2122

Jurisdiction: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas.

Eastern Service Center

75 Lower Welden St.
St. Albans, VT 05479-0001
(802) 527-3160 (public inquiry number)

Jurisdiction: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, and West Virginia.

Western Service Center

24400 Avila Road
Laguna Niguel, CA 92656
(714) 643-4880 (public inquiry number)

Jurisdiction: Arizona, California, Hawaii, and Nevada.

Interviews will take place at the following sites:

Arlington, VA

Joe Paul Saunier, Acting Director
1500 Wilson Blvd., Lobby Level
Arlington, VA 22209
(703) 525-8141
fax: (703) 812-8455

Jurisdiction: District of Columbia, the western portion of Pennsylvania currently within the jurisdiction of the Pittsburgh suboffice, and the states of Maryland, Virginia, West Virginia, North Carolina, Georgia, Alabama, and South Carolina.

Chicago, IL

Robert Esbrook, Director
401 S. La Salle St., 8th Floor
Chicago, IL 60605
(312) 353-9607; 9608; 9609; 9610
fax: (312) 886-0204

Jurisdiction: Illinois, Indiana, Michigan, Wisconsin, Minnesota, North Dakota, South Dakota, Kansas, Missouri, Ohio, Iowa, Nebraska, Montana, Idaho, and Kentucky.

Houston, TX

Marie Hummert, Director
Street Address:
509 North Belt St., 4th Floor
Houston, TX 77060
(281) 820-2152; 1843; 2346
also - (281) 847-7985; 7986
fax: (281) 847-7984

Mailing Address:
PO Box 67026
Houston, TX 77267-0262

Jurisdiction: Louisiana, Arkansas, Mississippi, Tennessee, Texas, Oklahoma, New Mexico, Colorado, Utah, and Wyoming.

Los Angeles, CA

Ann St. Denis, Director
Street Address:
290 S. Anaheim Blvd.
Anaheim, CA 92805
(714) 635-0126 ext. 206
fax: (714) 635-9136

Mailing Address:
PO Box 65015
Anaheim, CA 91815-5015

Jurisdiction: Arizona, the southern portion of California (as listed in 8 C.F.R. 00.4(b)(16) and 100.4(b)(39), and the southern portion of Nevada currently within the jurisdiction of the Las Vegas suboffice.

Miami, FL

Erich Cauler, Director
77 S.E. 5th St., 3rd Floor
Miami, FL 33131
(305) 530-6076 ext. 310
fax: (305) 530-6070

Jurisdiction: Florida, the Commonwealth of Puerto Rico, and the United States Virgin Islands.

Newark, NJ

Susan Dibbins, Acting Director
1200 Wall St. West, 4th Floor
Lyndhurst, NJ 07071
(201) 531-0555
fax: (201) 531-1877

Jurisdiction: New York state, excluding the jurisdiction of the Albany suboffice, the Buffalo district office and the boroughs of Manhattan and the Bronx.

Rosedale, NY

Patricia Trubiano, Director
One Cross Island Plaza
Rosedale, NY 11422
(718) 723-5954; 6361 ext. 296
fax: (718) 723-1121

Jurisdiction: New York state, within the boroughs of Manhattan and the Bronx in the City of New York; the Albany suboffice; jurisdiction of the Buffalo district office; Pennsylvania, excluding the jurisdiction of the Philadelphia suboffice; and Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

San Francisco, CA

Lawrence Crider, Director
Street Address:
75 Hawthorne St., 3rd Floor
San Francisco, CA 94105
(415) 744-8411 ext. 636
fax: (415) 744-8409

Mailing Address:

PO Box 77530
San Francisco, CA 94107

Jurisdiction: The northern part of California as listed in 8 C.F.R. 100.4(b)(13), the portion of Nevada currently under the jurisdiction of the Reno suboffice, and Oregon, Washington, Alaska, and Hawaii and the Territory of Guam.

Instructions for Form I-589
Application for Asylum and for Withholding of Removal

Purpose of This Form.

This form is used to apply for asylum in the United States (U.S.) and for withholding of removal (formerly called "withholding of deportation"). This application may also be used to apply for protection under the Convention Against Torture. You may file this application if you are physically present in the United States and you are not a United States citizen.

NOTE: You **must** submit an application for asylum within one (1) year of arriving in the United States, unless there are changed circumstances that materially affect your eligibility for asylum or extraordinary circumstances directly related to your failure to file within one (1) year. (See Instructions, Part 1: Filing Instructions, Section V, "Completing the Form," Part C, for further explanation.)

You may include in your application your spouse and your unmarried children who are under 21 years of age and physically present in the United States. Married children and children 21 years of age or older must file a separate Form I-589 application. If you are granted asylum, you may file a petition Form I-730, Refugee and Asylee Relative Petition, OMB No. 1115-0121, for your spouse and/or any unmarried children under the age of 21 whom you did not include in your application.

This instruction pamphlet is divided into two (2) sections. The first section has filing instructions. It discusses basic eligibility criteria and will guide you through filling out and filing the application. The second section describes how your application will be processed. This section also describes potential interim benefits while your application is pending.

Please read these instructions carefully. The instructions will help you complete your application and understand how it will be processed. If you have questions about your eligibility, completing the form, or the asylum process, you may wish to consult an attorney or other qualified person to assist you. (See Instructions, Part I, Filing Instructions, Section IV, "Right to Counsel.")

Additional information concerning asylum and withholding of removal is available on the following websites: Immigration and Naturalization Service: <http://www.ins.usdoj.gov> and Executive Office for Immigration Review: <http://www.usdoj.gov/eoir/>

WARNING: Applicants who are in the United States illegally are subject to removal if their asylum or withholding claims are not granted by an Asylum Officer or an Immigration Judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings, even if the application is later withdrawn. Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act (Act). See Section 208(d)(6) of the Act and 8 CFR 208.20.

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PART 1: FILING INSTRUCTIONS

I. Who May Apply and Filing Deadlines

You may apply for asylum irrespective of your immigration status, and even if you are in the United States unlawfully.

You MUST file this application within one (1) year after you arrived in the United States, unless you can show that there are changed circumstances that materially affect your eligibility for asylum or extraordinary circumstances directly related to your failure to file within one (1) year. (See Instructions, Part 1: Filing Instructions, Section V, "Completing the Form," Part C, for further explanation of this requirement.)

If you have previously been denied asylum by an Immigration Judge or the Board of Immigration Appeals, you must show that there are changed circumstances that affect your eligibility for asylum.

The determination of whether you are permitted to apply for asylum will be made once you have had an asylum interview with an Asylum Officer or a hearing before an Immigration Judge. Even if you are not eligible to apply for asylum for the reasons stated above, you may still be eligible to apply for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (Act) or the Convention Against Torture before the Immigration Court.

II. Basis of Eligibility

A. Asylum

In order to qualify for asylum, you must establish that you are a refugee. A refugee is a person who is unable or unwilling to return to his or her country of nationality, or last habitual residence in the case of a person having no nationality, 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.

If you are granted asylum, you and any eligible dependents included in your application will be permitted to remain and work in the United States and may eventually adjust to lawful permanent resident status. **If you are not granted asylum, the Immigration and Naturalization Service (INS) may use the information you provide in this application to establish that you are removable from the United States.**

B. Withholding of Removal

Your asylum application is also considered to be an application for withholding of removal under section 241(b)(3) of the Act, as amended. It may also be considered an application for withholding of removal under the Convention Against Torture if you checked the box at the top of page 1 of this application. If asylum is not granted, you may still be eligible for withholding of removal. Regardless of the basis for the withholding application, you will not be eligible for withholding if you 1) assisted in Nazi persecution or engaged in genocide, 2) have persecuted another person, 3) have been convicted by a final judgment of a particularly serious crime and therefore represent a danger to the community of the United States, 4) are considered for serious reasons to have committed a serious non-political crime outside the United States, or 5) represent a danger to the security of the United States. (See section 241(b)(3) of the Act; 8 CFR 208.16.)

i. Withholding of Removal under Section 241 (b)(3) of the Act

In order to qualify for withholding of removal under section 241(b)(3) of the Act, you must establish that it is more likely than not that your life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, in the proposed country of removal.

If you obtain an order withholding your removal, you cannot be returned to the country in which your life or freedom would be threatened. This means that you may be removed to a third country in which your life or freedom would not be threatened. Withholding of removal does not apply to any spouse or child included in the application. They would have to apply for such protection on their own. If you are granted withholding of removal, this would not give you the right to bring dependents to the United States. It also would not give you the right to become a lawful permanent resident of the United States.

ii. Withholding of Removal under the Convention Against Torture

The Convention Against Torture refers to the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

To be granted withholding of removal to a country under the Convention Against Torture, you must show that it is more likely than not that you would be tortured in that country.

"Torture" is defined in Article 1 of the Convention Against Torture and at 8 CFR 208.18(a). For an act to be considered torture, it must be an extreme form of cruel and inhuman treatment; it must cause severe physical or mental pain and suffering; and it must be intended to cause severe pain and suffering. Torture is an act inflicted for such purposes as obtaining from the victim or a third person information or a confession, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind. Torture must be inflicted by or at the instigation of a public official or someone acting in an official capacity, or it must be inflicted with the consent or acquiescence of a public official or person acting in an official capacity. The victim must be in the custody or physical control of the torturer. Torture does not include pain or suffering that arises from or is incidental to lawful sanctions.

Form I-589, Application for Asylum and for Withholding of Removal, will be considered an application for withholding of removal under the Convention Against Torture if you tell the Immigration Judge that you would like to be considered for withholding of removal under the Convention Against Torture or if it is determined that the evidence you present indicates you may be tortured in the country of removal. To apply for withholding of removal under the Convention Against Torture, you must check the box at the top of page one (1) of the application and fully complete the Form I-589. You should include a detailed explanation of why you fear torture in response to Part B, Question 4 of the application. In your response you should write about any mistreatment you experienced or any threats made against you by a government or somebody connected to a government.

Only Immigration Judges and the Board of Immigration Appeals may grant withholding of removal or deferral of removal under the Convention Against Torture. If you have applied for asylum, the Immigration Judge will first determine whether you are eligible for asylum.

under section 208 of the Act and for withholding of removal under section 241(b)(3) of the Act. If you are not eligible for either asylum or withholding of removal under section 241(b)(3) of the Act, the Immigration Judge will determine whether the Convention Against Torture prohibits your removal to a country in which you fear torture.

Article 3 of the Convention Against Torture prohibits the United States from removing you to a country in which it is more likely than not that you would be subject to torture. The Convention Against Torture does not prohibit the United States from returning you to any other country where you would not be tortured. This means that you may be removed to a third country, in which you would not be tortured. Withholding of removal does not allow you to adjust to lawful permanent resident status or to petition to bring family members to come to, or remain in, the United States.

C. Deferral of Removal under the Convention Against Torture.

If it is more likely than not that you will be tortured in a country but you are ineligible for withholding of removal, your removal will be deferred under 8 CFR 208.17(a). Deferral of removal does not confer any lawful or permanent immigration status in the United States and does not necessarily result in release from detention. Deferral of removal is effective only until it is terminated. Deferral of removal is subject to review and termination if it is determined that it is no longer more likely than not that you would be tortured in the country to which your removal is deferred or if you request that your deferral be terminated.

D. Legal Sources Relating to Eligibility

The documents listed below are some of the legal sources relating to asylum, withholding of removal under section 241(b)(3) of the Act, and withholding of removal or deferral of removal under the Convention Against Torture. These sources are provided for reference only. You do not need to refer to them in order to complete your application.

- Section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42) (defining "refugee");

- Section 208 of the Act, 8 U.S.C. 1158 (regarding eligibility for asylum);
- Section 241(b)(3) of the Act, 8 U.S.C. 1231 (b)(3) (regarding eligibility for withholding of removal);
- Title 8 of the Code of Federal Regulations, section 208, et. seq.;
- Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as ratified by Sec. 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 and 8 CFR 208 as amended by the Regulations Concerning the Convention Against Torture: Interim Rule, 64 FR 8478-8492 (February 19, 1999) (effective March 22, 1999); 64 FR 13881 (March 23, 1999);
- The 1967 United Nations Protocol Relating to the Status of Refugees;
- The 1951 Convention Relating to the Status of Refugees; and
- Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1992).

III. Confidentiality

The information collected will be used to make a determination on your application. It may also be provided to other government agencies (federal, state, local and/or foreign) for purposes of investigation or legal action on criminal and/or civil matters and for issues arising from the adjudication of benefits. However, no information indicating that you have applied for asylum will be provided to any government or country from which you claim a fear of persecution. Regulations at 8 CFR 208.6 protect the confidentiality of asylum claims.

IV. Right to Counsel

Immigration law concerning asylum and withholding of removal or deferral of removal is complex. You have a right to provide your own legal representation at an asylum interview and

during immigration proceedings before the Immigration Court, at no cost to the United States Government. If you need, or would like, help in completing this form and preparing your written statements, assistance from pro bono (free) attorneys and/or voluntary agencies may be available. Voluntary agencies may help you for no fee or for a reduced fee and attorneys on the list may take your case for no fee. If you have not already received from INS or the Immigration Court a list of attorneys and accredited representatives, you may obtain a list by calling 1-800-870-FORM (3676) or visiting the United States Department of Justice, Executive Office for Immigration Review (EOIR) website at:
<http://www.usdoj.gov/eoir/probono/states.htm>.

Representatives of the United Nations High Commissioner for Refugees (UNHCR) may be able to assist you in identifying persons to help you complete the application. The UNHCR website provides useful country conditions information and also has links to other reliable sources. You may also, if you wish, forward a copy of your application and other supporting documents to the UNHCR. (For instructions on where to file the original, please see Instructions, Part 1: Filing Instructions, Section XII. "Where to File." The current address of the UNHCR is:

United Nations High Commissioner for
Refugees
1775 K Street, NW, Suite 300
Washington, DC 20006
Telephone: (202) 296-5191
Website: <http://www.unhcr.ch>

Calls from Detention Centers and Jails: Between the hours of 2:00 and 5:00 p.m. (Eastern Standard Time), Monday through Friday, asylum-seekers in detention centers and jails may call UNHCR collect at (202) 296-5191 or may call UNHCR's toll-free number at (888) 272-1913.

V. Completing the Form

Type or print all of your answers in black ink on the Form I-589. Your answers must be completed in English. Forms completed in a language other than English will be returned to you.

Provide the specific information requested about you and your family. **Answer ALL of the questions asked.** If any question does not apply to you or you do not know the information requested, answer "none," "not applicable," or "unknown." Provide detailed information and answer the questions as completely as possible. If you need more space, attach the Supplement A or B Forms (included in the application package) and/or an additional sheet(s) indicating the question number(s) you are answering. You are strongly urged to attach additional written statements and documents that support your claim. Your written statements should include events, dates, and details of your experiences that relate to your claim for asylum.

NOTE: Please put your Alien Registration Number (A#), (if any), name (exactly as it appears in Part A.I. of the form), signature, and date on each supplemental sheet and on the cover page of any supporting documents.

You will be permitted to amend or supplement your application at the time of your asylum interview before an Asylum Officer and at your hearing in Immigration Court by providing additional information and explanations about your asylum claim.

Part A. I. Information about You

This Part asks for basic information about you. Alien Registration Number (A#) refers to your INS file number. If you do not already have an A#, the INS will assign one to you. You must provide your residential street address in the United States in Part A. I., Question 7, of the asylum application. You may also provide a mailing address, if different from the address where you reside, in Question 8. In Question 12, use the current name of the country. Do not use historical, ethnic, provincial, or other local names.

If you entered the country with inspection, the I-94#, referred to in Question 18b, is the number on Form I-94, Arrival-Departure Record, OMB No. 1115-0077, given to you when you entered the United States. In Question 18c, enter the date and status as it appears on the Form I-94. If you did not receive a Form I-94, write "None". If you entered without being inspected by an immigration officer, write "No Inspection" in Question 18c in the current status or status section.

Part A. II. Spouse and Children

You should list your spouse and all your children in this application regardless of their age, marital status, whether they are in the United States, or whether or not they are included in this application or filing a separate asylum application.

You may ask to have included in your asylum application your spouse and/or any children who are under the age of 21 and unmarried, if they are in the United States. Children who are married and/or children who are 21 years of age or older must file separately for asylum by submitting their own asylum application (Form I-589).

If you apply for asylum while in proceedings before the Immigration Court, the Immigration Judge may not have authority to grant asylum to any spouse or child included in your application who is not also in proceedings.

When including family members in your asylum application, you MUST submit one additional copy of your completed asylum application and primary documentary evidence establishing your family relationship, for each family member, as described below.

- If you are including your spouse in your application, submit three (3) copies of your marriage certificate, and three (3) copies of proof of termination of any prior marriages.
- If you are including any unmarried children under 21 years of age in your application, submit three (3) copies of each child's birth certificate.

If you do not have and are unable to obtain these documents, you must submit secondary evidence. Secondary evidence includes, but is not limited to, medical records, religious records, and school records. You may also submit an affidavit from at least one (1) person for each event you are trying to prove. Affidavits may be provided by relatives or others. Persons providing affidavits need not be United States citizens or lawful permanent residents.

Affidavits must:

- fully describe the circumstances or event(s) in question and fully explain how the person acquired knowledge of the event(s);

- be sworn to, or affirmed by, persons who were alive at the time of the event(s) and have personal knowledge of the event(s) (date and place of birth, marriage, etc.) that you are trying to prove; and
- show the full name, address, date, and place of birth of each person giving the affidavit, and indicate any relationship between you and the person giving the affidavit.

If you submit secondary evidence or affidavits, you must explain why primary evidence (e.g., birth or marriage certificate) is unavailable. You may explain the reasons primary evidence is unavailable using the Supplement B Form or additional sheets of paper. Attach this explanation to your secondary evidence or affidavits.

If you have more than four (4) children, complete the Supplement A Form for each additional child, or attach additional pages and documentation providing the same information asked in Part A. II. of the Form I-589.

Part A. III. Information about Your Background

Please answer questions 1 through 5, providing details as requested for each question. Your responses to the questions concerning the places you have lived, your education, and employment histories should be in reverse chronological order starting with your current residence, education, and employment, working back in time.

Part B. Information about Your Application

This Part asks specific questions relevant to eligibility for asylum, for withholding of removal under section 241(b)(3) of the Act, or for withholding of removal under the Convention Against Torture. At question 1, please check the box(es) next to the reason(s) that you are completing this application. For all other questions, please check "Yes" or "No" in the box provided. If you answer "Yes" to any question, explain in detail using the Supplement B Form or additional sheets of paper as needed. You should clearly describe any of your experiences, or those of family members or others who have had similar experiences, that may show that you are a refugee.

If you have experienced harm that is difficult for you to write down and express, you should be aware that these experiences may be very important to the decision-making process regarding your request to remain in the United States. At your interview with an Asylum Officer or hearing with an Immigration Judge, you will need to be prepared to discuss the harm you have suffered. If you are having trouble remembering or talking about past events, it is suggested that you talk to a lawyer, an accredited representative, or a health professional who may be able to help you explain your experiences and current situation.

Part C. Additional Information about Your Application

Check "Yes" or "No" in the box provided for each question. If you answer "Yes" to any question, explain in detail using the Supplement B Form or additional sheets of paper as needed.

If you answer "Yes" to question 5, you must explain why you did not apply for asylum within the first year after you arrived in the United States. The government will accept as an explanation certain changes in the conditions in your country, certain changes in your own circumstances, and certain other events that may have prevented you from applying earlier. For example, some of the events the government might consider as valid explanations include, but are not limited to, the following:

- You have learned that human rights conditions in your country have worsened since you left;
- Because of your health, you were not able to submit this application within a year after you arrived;
- You previously submitted an application, but it was returned to you because it was not complete, and you submitted a complete application within a reasonable amount of time.

Federal regulations specify some of the other types of events that may also qualify as valid explanations for why you filed late. These regulations are found at 8 CFR 208.4. The list in the regulations is not all-inclusive, and the government recognizes that there are many other circumstances that might be acceptable reasons for filing more than one year after arrival.

If you are unable to explain why you did not apply for asylum within the first year after you arrived in the United States, or your explanation is not accepted by the government, you may not be eligible to apply for asylum, but you could still be eligible for withholding of removal.

Part D. Your Signature

You must sign your application in Part D and respond to the questions concerning any assistance you received to complete your application, providing the information requested. Sign after you have completed and reviewed the application.

If it is determined that you have knowingly made a frivolous application for asylum, you can be permanently ineligible for any benefits under the Immigration and Nationality Act. According to regulations at 8 CFR 208.20, an application is frivolous if any of its material elements is deliberately fabricated. (See Instructions, Part 1: Filing Instructions, Section IV, "Right to Counsel," in the event that you have any questions.)

Part E. Signature of Person Preparing Form If Other than You

Any person, other than an immediate family member (your spouse, parent(s), or children) who helped prepare your application must sign the application in Part E and provide the information requested.

Penalty for Perjury. All statements in response to questions contained in this application are declared to be true and correct under penalty of perjury. You and anyone, other than an immediate family member, who assists you in preparing the application must sign the application under penalty of perjury. Your signature is evidence that you are aware of the contents of this application. Any person assisting you in preparing this form, other than an immediate family member, must include his or her name, address, telephone number, and sign the application where indicated in Part E. Failure of the preparer to sign will result in the application being returned to you as an incomplete application. If the INS later learns that you received assistance from someone other than an immediate family member and the person who assisted you **willfully** failed to sign the application, this may result in an adverse ruling against you.

Title 18, United States Code, Section 1546, provides in part:

Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement shall be fined in accordance with this title or imprisoned not more than five years, or both.

If you knowingly provide false information on this application, you or the preparer of this application may be subject to criminal penalties under Title 18 of the United States Code and to civil penalties under Section 274C of the Immigration and Nationality Act, 8 U.S.C. 1324c.

Part F. To Be Completed at Interview or Hearing

Do not sign your application in Part F before filing this form. You will be asked to sign your application in this space at the conclusion of the interview regarding your claim.

NOTE: You must, however, sign Part D of the application.

VI. Required Documents and Required Number of Copies that You Must Submit with Your Application

You must submit the following documents to apply for asylum and withholding of removal:

- **The completed, signed original and two (2) copies of your completed application** Form I-589, and the original and two (2) copies of any supplementary sheets and supplementary statements. If you choose to submit additional supporting material (See Instructions, Part 1: Filing Instructions, Section VII, "Additional Documents that You Should Submit," page 9), you MUST include three (3) copies of each document. You should make and keep one (1) additional copy of the completed application for your own records.

- **One (1) color passport-style photo** of yourself and each family member listed in Part A. II. who is included in your application. These photos should be taken no more than 30 days before submission of your application to the INS.

Using a pencil, lightly write each person's complete name and INS A number, if known, on the back of his or her photos. The photos must:

- be taken with a white background, be un-mounted, be printed on thin paper, have a glossy finish, and not be retouched;
 - not be larger than 1 1/2 x 1 1/2 inches, with the distance from the top of the head to just below each person's chin about 1 1/4 inches.
 - **Three (3) copies of all passports or other travel documents** (cover to cover) in your possession, and three (3) copies of any U.S. Immigration documents, such as an I-94 Arrival-Departure Record, for you and each family member who you want included in your application, if you have such documents.
 - If you have **other identification documents** (for example, birth certificate, military or national identification card, driver's license, etc.), it is recommended that you submit three (3) copies with your application and bring the original(s) with you to the interview.
 - **Three (3) copies of primary or secondary evidence of relationship**, such as birth or school records of your children, marriage certificate, or proof of termination of marriage, for each family member listed in Part A. II. who you want to have included in your application.
- NOTE:** If you submit an affidavit, you must submit the original and two (2) copies. (For affidavit requirements, see Instructions, Part 1: Filing Instructions, Section V, "Completing the Form," Part A. II., page 6.)
- **One additional copy of your completed application** Form I-589, with supplementary sheets and supplementary statements, for each family member listed in Part A. II. who you want to have included in your application.

It is recommended that any documents filed with this application be photocopies but, please be advised, if you choose to send an original document, the INS or Immigration Court may keep that original document for its records.

Translation of documents not in English is required. Any document in a language other than English must be accompanied by an adequate English translation that the translator has certified as complete and correct, and by the translator's certification that he or she is competent to translate into English the language used in the document.

VII. Additional Documents that You Should Submit

If they are available to you, you should submit documents evidencing (1) the general conditions in the country from which you are seeking asylum, and (2) the specific facts on which you are relying to support your claim. If documents supporting your claim are not available or you are not providing them at this time, you must explain why using the Supplement B Form or additional sheets of paper. Supporting documents may include, but are not limited to country condition reports, newspaper articles, affidavits of witnesses or experts, medical and/or psychological records, doctors' statements, periodicals, journals, books, photographs, official documents, or personal statements.

If you have difficulty discussing harm you have suffered in the past, you may wish to submit a health professional's report explaining this difficulty.

VIII. Fee

There is no fee for filing this application.

IX. Fingerprints

Applicants for asylum are subject to a check of all appropriate records and other information databases maintained by the Attorney General and by the Secretary of State. You and all of your dependents fourteen (14) years of age or older listed on your asylum application must be fingerprinted and photographed. You and your dependents will be given instructions on how to complete this requirement.

You will be notified in writing of the time and location of the Application Support Center or the designated Law Enforcement Agency where you must go to be fingerprinted and photographed. Failure to appear for a scheduled fingerprinting may delay eligibility for work authorization and/or result in an Asylum Officer dismissing your asylum application or referring it to an Immigration Judge. For applicants before an Immigration Judge, such failure will make the applicant ineligible for asylum and may delay eligibility for work authorization.

X. Organizing Your Application

Put your application together in the following order, forming one (1) complete package (if possible, secure with binder clips and rubber bands so that material may be easily separated):

- Your original Form I-589, with all questions completed, and the application signed by you in Part D, and signed by any preparer, in Part E; and
- One (1) passport-style photograph of you stapled to the form at Part D, page 9.

Behind your original Form I-589, attach in the following order:

- One (1) Form G-28 Notice of Entry of Appearance as Attorney or Representative, signed by you and the attorney/representative if you are represented by an attorney or other representative;
- The original of all supplemental sheets and supplementary statements submitted with your application;
- All passports, other travel or identification documents;
- One (1) copy of the evidence of your relationship to your spouse and unmarried children under 21 years of age who you want included in your application, if any; and
- Supporting documents, if available, such as but not limited to, country condition reports, newspaper articles, affidavits of witnesses or experts, medical and/or psychological records, doctors' statements, etc.

Behind this original complete package include two (2) additional copies of all the items listed above except for your photograph.

If you are including family members in your application, attach one (1) additional package as specified below for each family member. Arrange each family member's package as follows:

- One (1) copy of pages 1,2,3 (including Supplement A Form I-589 as needed) and 9 of the principal's Form I-589 application;
- On Part D, page 9 of your family member's copy of the Form I-589 staple in the upper right corner one (1) passport-style photo of the family member to be included.
- One (1) copy of the proof of relationship to the principal applicant; and
- One (1) copy of the Form G-28, if any.

For example, if you include your spouse and two (2) children, you should submit your original package, plus two (2) duplicates for you, plus one (1) package for your spouse, plus one (1) package for each child, for a total of six (6) packages. Be sure each has the appropriate documentation.

NOTE: Any additional pages submitted should include your printed name (exactly as it appears in Part A.I. of the form), A# (if any), signature and date.

XI. Incomplete Asylum Applications

An asylum application that is incomplete will be returned to you by mail within thirty (30) days of receipt of the application by the INS. An application that has not been returned to you within thirty (30) days of having been received by the INS will be considered complete and you will receive written acknowledgement of receipt from the Service.

The filing of a complete application starts the 150-day period you must wait before you may apply for employment authorization. If your application is not complete and is returned to you, the 150-day period will not begin until you resubmit a complete application. (See Instructions, Part 2: Information Regarding Post-Filing Requirements, Section V, "Employment Authorization while Your Application is Pending," for further information regarding eligibility for employment authorization.) The starting date of the 150-day waiting period is listed at the end of the first sentence in the I-589 Acknowledgement of Receipt Notice sent to you by the Service.

This notice informs you that your application was received by the Service and is pending as of that date.

An application will be considered incomplete in each of the following cases:

- The application does not include a response to each of the questions contained in the Form I-589;
- The application is unsigned;
- The application is submitted without the required photographs;
- The application is sent without the appropriate number of copies for any supporting materials submitted; or
- You indicated in Part D that someone prepared the application other than yourself or an immediate family member and the preparer failed to complete Part E of the asylum application.

XII. Where to File

Although the INS will confirm in writing its receipt of your application, you may wish to send the completed forms by registered mail (return receipt requested) for your own records.

If you are in proceedings in Immigration Court:

If you are currently in proceedings in Immigration Court (that is, if you have been served with Form I-221, Order to Show Cause and Notice of Hearing; Form I-122, Notice to Applicant for Admission Detained for Hearing Before an Immigration Judge; Form I-862, Notice to Appear; or Form I-863, Notice of Referral to Immigration Judge), you are required to file your Form I-589, Application for Asylum and for Withholding of Removal, with the Immigration Court having jurisdiction over your case.

If you are NOT in proceedings in Immigration Court:

You are to mail your completed application for Asylum and for Withholding of Removal, Form I-589, and any other additional information, to the INS Service Center as indicated below.

If you live in Alabama, Arkansas, Colorado, Commonwealth of Puerto Rico, District of Columbia, Florida, Georgia, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Oklahoma, western Pennsylvania in the jurisdiction of the Pittsburgh Suboffice*, South Carolina, Tennessee, Texas, United States Virgin Islands, Utah, Virginia, West Virginia, or Wyoming, mail your application to:

USINS Texas Service Center
Attn: Asylum
P.O. Box 851892
Mesquite, TX 75185-1892

If you live in Alaska, northern California*, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, northern Nevada in the jurisdiction of the Reno Suboffice*, North Dakota, Ohio, Oregon, South Dakota, Washington, or Wisconsin, mail your application to:

USINS Nebraska Service Center
P.O. Box 87589
Lincoln, NE 68501-7589

If you live in Arizona, southern California*, Hawaii, southern Nevada in the jurisdiction of the Las Vegas Suboffice*, or the Territory of Guam, mail your application to:

USINS California Service Center
P.O. Box 10589
Laguna Niguel, CA 92607-0589

If you live in Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, eastern Pennsylvania excluding the jurisdiction of the Pittsburgh Suboffice*, Rhode Island, or Vermont, mail your application to:

USINS Vermont Service Center
Attn: Asylum
75 Lower Welden Street
St. Albans, VT 05479-0589

*For applicants in the states of California, Nevada and Pennsylvania who may be unsure of which Service Center to use for mailing applications, you may call the National Customer Service Center or your local asylum office for more specific information. The National Customer Service Center and the asylum offices serving those states are listed below with their public information numbers:

The National Customer Service Center:

Toll Free Number 800-375-5283
TDD Hearing Impaired 800-767-1833

For California or Nevada:

Los Angeles Asylum Office 714-808-8199
San Francisco Asylum Office 415-744-8419

For Pennsylvania:

Newark Asylum Office 201-531-0555
Arlington Asylum Office 703-525-8141

Information concerning asylum offices and where to file asylum applications is also available on the INS website at: <http://www.ins.usdoj.gov>.

PART 2: INFORMATION REGARDING POST-FILING REQUIREMENTS

I. Notification Requirements when Your Address Changes

If you change your address you must inform the INS in writing within ten (10) days of moving.

While your asylum application is pending before the asylum office, you MUST notify the asylum office on Form AR-11 (Change of Address Form) or by a signed and dated letter of any changes of address within ten (10) days after you change your address. The address that you provide on the application, or the last change of address notification you submitted, will be used by the INS for mailing. Any notices mailed to that address will constitute adequate service, except that personal service may be required for the following: Notice to Alien Detained for Hearing by an Immigration Judge (Form I-122), Notice to Appear (Form I-862), Notice of Referral to Immigration Judge (Form I-863), and a Notice and Order of Expedited Removal (Form I-860).

If you are already in proceedings in Immigration Court, you MUST notify the Immigration Court on Form EOIR 33 (Change of Address Form) or by a signed and dated letter of any changes of address within five (5) days of the change in address. You must send the notification to the Immigration Court having jurisdiction over your case.

II. Asylum Interview Process

If you are not in proceedings in Immigration Court, you will be notified by the INS asylum office of the date, time and place (address) of a scheduled interview. The INS suggests that you bring a copy of your Form I-589, asylum application, with you when you have your asylum interview. An Asylum Officer will interview you under oath and make a determination concerning your claim. In most cases, you will not be notified of the decision in your case until a date after your interview. You have the right to legal representation at your interview, at no cost to the United States Government. (See Instructions, Part 1: Filing Instructions, Section IV, "Right to Counsel.") You also may bring witnesses with you to the interview to testify on your behalf.

If you are unable to proceed with the asylum interview in fluent English, you must provide at no expense to the INS, a competent interpreter fluent in both English and a language that you speak fluently. Your interpreter must be at least 18 years of age. The following persons cannot serve as your interpreter: your attorney or representative of record; a witness testifying on your behalf at the interview; or a representative or employee of your country. Quality interpretation may be crucial to your claim. Such assistance must be obtained, at your expense, prior to the interview.

Failure without good cause to bring a competent interpreter to your interview may be considered an unexcused failure to appear for the interview. Any unexcused failure to appear for an interview may prevent you from receiving work authorization, and your asylum application may be dismissed or referred directly to the Immigration Court.

If available, you must bring some form of identification to your interview, including any passport(s), other travel or identification documents, or Form I-94 Arrival-Departure Record. You may bring to the interview any additional available items documenting your claim that you have not already submitted with your application.

If members of your family are included in your application for asylum, they must also appear for the interview and bring any identity or travel documents they have in their possession.

III. Status while Your Claim Is Pending

While your case is pending, you will be permitted to remain in the United States. After your asylum interview, if you have not been granted asylum and appear to be deportable under Section 237 of the Act, 8 U.S.C. 1227, or inadmissible under Section 212 of the Act, 8 U.S.C. 1182, your application will be filed with the Immigration Court upon referral by the asylum office.

IV. Travel Outside the United States

If you leave the United States without first obtaining advance parole from the INS using Form I-131, Application for a Travel Document, OMB No. 1115-0005, it will be presumed that you have abandoned your application. If you obtain advance parole and return to the country of claimed persecution, it will be presumed that you abandoned your application, unless you can show that there were compelling reasons for your return.

NOTE: The application process for advance parole varies depending on your personal circumstances. Check with your local INS District Office for application instructions.

V. Employment Authorization while Your Application is Pending

You will be granted permission to work if your asylum application is granted.

Simply filing an application for asylum does not entitle you to work authorization. You may request permission to work if your asylum application is pending and 150 days have lapsed since your application was accepted by the INS or the Immigration Court. See 8 CFR 208.7(a)(1). Any delay in the processing of your asylum application that you request or cause shall not be counted as part of the 150-day period. If your asylum application has not been denied within 180 days from the date of filing a complete asylum application, you may be granted permission to work by filing an Application for Employment Authorization, Form I-765 (OMB No. 1115-0163), with the Service. Follow the instructions on that application and submit it with a copy of evidence as specified in the instructions that you have a pending asylum application. Each family member you have asked to have included in your application who also wants permission to work must submit a separate Form I-765. You may obtain a Form I-765 by calling 1-800-870-FORM (3676), or from the INS website at <http://www.ins.usdoj.gov>.

VI. Privacy Act Notice

The authority to collect this information is contained in Title 8 of the United States Code. Furnishing the information on this form is voluntary; however, failure to provide all of the requested information may result in the delay of a final decision or denial of your request.

VII. Paperwork Reduction Act Notice

Under the Paperwork Reduction Act an agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. The estimated average time to complete and file this application is as follows: (1) 2 hours to learn about the form; (2) 5 hours to complete the form; and (3) 5 hours to assemble and file the application; for the total estimated average burden hours of 12 hours per application. The estimated time to complete the form will vary depending on the complexity of your individual circumstances. If you have comments regarding the accuracy of this estimate or suggestions for making this form simpler, you can write to the Immigration and Naturalization Service, Policy Directives and Instructions Branch, 425 I Street, N.W., Room 4034, Washington, DC 20536, OMB No. 1115-0086. **DO NOT MAIL YOUR COMPLETED APPLICATION TO THIS ADDRESS.**

SUPPLEMENTS TO THE FORM I-589

Form I-589, Supplement A - for use in completing Part A. II.

Form I-589, Supplement B - for use in completing Parts B, C, and to provide additional information for any other part of the application.

Application for Asylum and for Withholding of Removal

Start Here - Please Type or Print. USE BLACK INK. SEE THE SEPARATE INSTRUCTION PAMPHLET FOR INFORMATION ABOUT ELIGIBILITY AND HOW TO COMPLETE AND FILE THIS APPLICATION. (Note: There is NO filing fee for this application.)

Please check the box if you also want to apply for withholding of removal under the Convention Against Torture.

PART A. I. INFORMATION ABOUT YOU

1. Alien Registration Number(s)(A#s)(If any)		2. Social Security No. (If any)	
3. Complete Last Name		4. First Name	
5. Middle Name			
6. What other names have you used? (Include maiden name and aliases.)			
7. Residence in the U.S. C/O			Telephone Number
Street Number and Name			Apt. No.
City		State	
ZIP Code			
8. Mailing Address in the U.S., if other than above			Telephone Number
Street Number and Name			Apt. No.
City		State	
ZIP Code			
9. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female		10. Marital Status: <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed	
11. Date of Birth (Mo/Day/Yr)		12. City and Country of Birth	
13. Present Nationality (Citizenship)		14. Nationality at Birth	15. Race, Ethnic or Tribal Group
		16. Religion	

17. Check the box, a through c that applies:
 a. I have never been in immigration court proceedings.
 b. I am now in immigration court proceedings.
 c. I am **not** now in immigration court proceedings, but I have been in the past.

18. Complete 18 a through c.

a. When did you last leave your country? (Mo/Day/Yr) _____ b. What is your current I-94 Number, if any? _____

c. Please list each entry to the U.S. beginning with your most recent entry.

List date (Mo/Day/Yr), place, and your status for each entry. (Attach additional sheets as needed.)

Date _____	Place _____	Status _____	Date Status Expires _____
Date _____	Place _____	Status _____	
Date _____	Place _____	Status _____	
Date _____	Place _____	Status _____	

19. What country issued your last passport or travel document?		20. Passport # Travel Document #	21. Expiration Date (Mo/Day/Yr)
22. What is your native language?		23. Are you fluent in English? <input type="checkbox"/> Yes <input type="checkbox"/> No	24. What other languages do you speak fluently?

FOR EOIR USE ONLY

Action: Interview Date: _____
Decision:
 — Approval Date: _____
 — Denial Date: _____
 — Referral Date: _____
 Asylum Officer ID# _____

FOR INS USE ONLY

PART A. II. INFORMATION ABOUT YOUR SPOUSE AND CHILDREN

Your Spouse. I am not married. (Skip to **Your Children**, below.)

1. Alien Registration Number (A#) (<i>If any</i>)	2. Passport/ID Card No. (<i>If any</i>)	3. Date of Birth (<i>Mo/Day/Yr</i>)	4. Social Security No. (<i>If any</i>)
5. Complete Last Name	6. First Name	7. Middle Name	8. Maiden Name
9. Date of Marriage (<i>Mo/Day/Yr</i>)	10. Place of Marriage		11. City and Country of Birth
12. Nationality (<i>Citizenship</i>)	13. Race, Ethnic or Tribal Group		14. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
15. Is this person in the U.S.? <input type="checkbox"/> Yes (<i>Complete blocks 16 to 24.</i>) <input type="checkbox"/> No (<i>Specify location</i>)			
16. Place of last entry in the U.S. ?	17. Date of last entry in the U.S. (<i>Mo/Day/Yr</i>)	18. I-94 No. (<i>If any</i>)	19. Status when last admitted (<i>Visa type, if any</i>)
20. What is your spouse's current status?	21. What is the expiration date of his/her authorized stay, if any? (<i>Mo/Day/Yr</i>)	22. Is your spouse in immigration court proceedings? <input type="checkbox"/> Yes <input type="checkbox"/> No	23. If previously in the U.S., date of previous arrival (<i>Mo/Day/Yr</i>)
24. If in the U.S., is your spouse to be included in this application? (<i>Check the appropriate box.</i>)			
<input type="checkbox"/> Yes (<i>Attach one (1) photograph of your spouse in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.</i>) <input type="checkbox"/> No			

Your Children. Please list **ALL** of your children, regardless of age, location, or marital status.

- I do not have any children. (*Skip to Part A. III., Information about Your Background.*)
 I do have children. Total number of children _____

(Use Supplement A Form I-589 or attach additional pages and documentation if you have more than four (4) children.)

1. Alien Registration Number (A#) (<i>If any</i>)	2. Passport/ID Card No. (<i>If any</i>)	3. Marital Status (<i>Married, Single, Divorced, Widowed</i>)	4. Social Security No. (<i>If any</i>)
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth (<i>Mo/Day/Yr</i>)
9. City and Country of Birth	10. Nationality (<i>Citizenship</i>)	11. Race, Ethnic or Tribal Group	12. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
13. Is this child in the U.S.? <input type="checkbox"/> Yes (<i>Complete blocks 14 to 21.</i>) <input type="checkbox"/> No (<i>Specify Location</i>)			
14. Place of last entry in the U.S. ?	15. Date of last entry in the U.S.? (<i>Mo/Day/Yr</i>)	16. I-94 No. (<i>If any</i>)	17. Status when last admitted (<i>Visa type, if any</i>)
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? (<i>Mo/Day/Yr</i>)	20. Is your child in immigration court proceedings? <input type="checkbox"/> Yes <input type="checkbox"/> No	
21. If in the U.S., is this child to be included in this application? (<i>Check the appropriate box.</i>)			
<input type="checkbox"/> Yes (<i>Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.</i>) <input type="checkbox"/> No			

PART A. II. INFORMATION ABOUT YOUR SPOUSE AND CHILDREN Continued

1. Alien Registration Number (A#) <i>(If any)</i>	2. Passport/ID Card No. <i>(If any)</i>	3. Marital Status <i>(Married, Single, Divorced, Widowed)</i>	4. Social Security No. <i>(If any)</i>
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth <i>(Mo/Day/Yr)</i>
9. City and Country of Birth	10. Nationality <i>(Citizenship)</i>	11. Race, Ethnic or Tribal Group	12. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
13. Is this child in the U.S.? <input type="checkbox"/> Yes <i>(Complete blocks 14 to 21.)</i> <input type="checkbox"/> No <i>(Specify Location)</i>			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S. ? <i>(Mo/Day/Yr)</i>	16. I-94 No. <i>(If any)</i>	17. Status when last admitted <i>(Visa type, if any)</i>
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, <i>(if any)?</i> <i>(Mo/Day/Yr)</i>		20. Is your child in immigration court proceedings? <input type="checkbox"/> Yes <input type="checkbox"/> No
21. If in the U.S., is this child to be included in this application? <i>(Check the appropriate box.)</i> <input type="checkbox"/> Yes <i>(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)</i> <input type="checkbox"/> No			
1. Alien Registration Number (A#) <i>(If any)</i>	2. Passport/ID Card No. <i>(If any)</i>	3. Marital Status <i>(Married, Single, Divorced, Widowed)</i>	4. Social Security No. <i>(If any)</i>
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth <i>(Mo/Day/Yr)</i>
9. City and Country of Birth	10. Nationality <i>(Citizenship)</i>	11. Race, Ethnic or Tribal Group	12. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
13. Is this child in the U.S.? <input type="checkbox"/> Yes <i>(Complete blocks 14 to 21.)</i> <input type="checkbox"/> No <i>(Specify Location)</i>			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? <i>(Mo/Day/Yr)</i>	16. I-94 No. <i>(If any)</i>	17. Status when last admitted <i>(Visa type, if any)</i>
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? <i>(Mo/Day/Yr)</i>		20. Is your child in immigration court proceedings? <input type="checkbox"/> Yes <input type="checkbox"/> No
21. If in the U.S., is this child to be included in this application? <i>(Check the appropriate box.)</i> <input type="checkbox"/> Yes <i>(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)</i> <input type="checkbox"/> No			
1. Alien Registration Number (A#) <i>(If any)</i>	2. Passport/ID Card No. <i>(If any)</i>	3. Marital Status <i>(Married, Single, Divorced, Widowed)</i>	4. Social Security No. <i>(If any)</i>
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth <i>(Mo/Day/Yr)</i>
9. City and Country of Birth	10. Nationality <i>(Citizenship)</i>	11. Race, Ethnic or Tribal Group	12. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
13. Is this child in the U.S.? <input type="checkbox"/> Yes <i>(Complete blocks 14 to 21.)</i> <input type="checkbox"/> No <i>(Specify Location)</i>			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? <i>(Mo/Day/Yr)</i>	16. I-94 No. <i>(If any)</i>	17. Status when last admitted <i>(Visa type, if any)</i>
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? <i>(Mo/Day/Yr)</i>		20. Is your child in immigration court proceedings? <input type="checkbox"/> Yes <input type="checkbox"/> No
21. If in the U.S., is this child to be included in this application? <i>(Check the appropriate box.)</i> <input type="checkbox"/> Yes <i>(Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.)</i> <input type="checkbox"/> No			

PART A. III. INFORMATION ABOUT YOUR BACKGROUND

1. Please list your last address where you lived before coming to the U.S. If this is not the country where you fear persecution, also list the last address in the country where you fear persecution. (*List Address, City/Town, Department, Province, or State, and Country.*) (*Use Supplement B Form I-589 or additional sheets of paper if necessary.*)

Number and Street <i>(Provide if available)</i>	City/Town	Department, Province or State	Country	Dates	
				From (Mo/Yr)	To (Mo/Yr)

2. Provide the following information about your residences during the last five years. List your present address first. (*Use Supplement Form B or additional sheets of paper if necessary.*)

Number and Street	City/Town	Department, Province or State	Country	Dates	
				From (Mo/Yr)	To (Mo/Yr)

3. Provide the following information about your education, beginning with the most recent. (*Use Supplement B Form I-589 or additional sheets of paper if necessary.*)

Name of School	Type of School	Location (Address)	Attended	
			From (Mo/Yr)	To (Mo/Yr)

4. Provide the following information about your employment during the last five years. List your present employment first. (*Use Supplement Form B or additional sheets of paper if necessary.*)

Name and Address of Employer	Your Occupation	Dates	
		From (Mo/Yr)	To (Mo/Yr)

5. Provide the following information about your parents and siblings (brother and sisters). Check box if the person is deceased. (*Use Supplement B Form I-589 or additional sheets of paper if necessary.*)

Name	City/Town and Country of Birth	Current Location
Mother		<input type="checkbox"/> Deceased
Father		<input type="checkbox"/> Deceased
Siblings		<input type="checkbox"/> Deceased
		<input type="checkbox"/> Deceased

PART B. INFORMATION ABOUT YOUR APPLICATION

(Use Supplement B Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in PART B.)

When answering the following questions about your asylum or other protection claim (withholding of removal under 241(b)(3) of the Act or withholding of removal under the Convention Against Torture) you should provide a detailed and specific account of the basis of your claim to asylum or other protection. To the best of your ability, provide specific dates, places, and descriptions about each event or action described. You should attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim. If this documentation is unavailable or you are not providing this documentation with your application, please explain why in your responses to the following questions. Refer to Instructions, Part 1: Filing Instructions, Section II, "Basis of Eligibility," Parts A - D, Section V, "Completing the Form," Part B, and Section VII, "Additional Documents that You Should Submit" for more information on completing this section of the form.

1. Why are you applying for asylum or withholding of removal under section 241(b)(3) of the Act, or for withholding of removal under the Convention Against Torture? Check the appropriate box (es) below and then provide detailed answers to questions A and B below:

I am seeking asylum or withholding of removal based on

- Race
- Religion
- Nationality
- Political opinion
- Membership in a particular social group
- Torture Convention

- A. Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?

No Yes If your answer is "Yes," explain in detail:

- 1) What happened;
- 2) When the harm or mistreatment or threats occurred;
- 3) Who caused the harm or mistreatment or threats; and
- 4) Why you believe the harm or mistreatment or threats occurred.

- B. Do you fear harm or mistreatment if you return to your home country?

No Yes If your answer is "Yes," explain in detail:

- 1) What harm or mistreatment you fear;
- 2) Who you believe would harm or mistreat you; and
- 3) Why you believe you would or could be harmed or mistreated.

PART B. INFORMATION ABOUT YOUR APPLICATION Continued

2. Have you or your family members ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States?

No Yes If "Yes," explain the circumstances and reasons for the action.

3. A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media?

No Yes If "Yes," describe for each person the level of participation, any leadership or other positions held, and the length of time you or your family members were involved in each organization or activity.

- B. Do you or your family members continue to participate in any way in these organizations or groups?

No Yes If "Yes," describe for each person, your or your family members' current level of participation, any leadership or other positions currently held, and the length of time you or your family members have been involved in each organization or group.

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

No Yes If "Yes," explain why you are afraid and describe the nature of the torture you fear, by whom, and why it would be inflicted.

PART C. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION

(Use Supplement B Form I-589 or attach additional sheets of paper as needed to complete your responses to the questions contained in Part C.)

1. Have you, your spouse, your child(ren), your parents, or your siblings ever applied to the United States Government for refugee status, asylum, or withholding of removal? No Yes

If "Yes" explain the decision and what happened to any status you, your spouse, your child(ren), your parents, or your siblings received as a result of that decision. Please indicate whether or not you were included in a parent or spouse's application. If so, please include your parent or spouse's A- number in your response. If you have been denied asylum by an Immigration Judge or the Board of Immigration Appeals, please describe any change(s) in conditions in your country or your own personal circumstances since the date of the denial that may affect your eligibility for asylum.

2. A. After leaving the country from which you are claiming asylum, did you or your spouse or child(ren), who are now in the United States, travel through or reside in any other country before entering the United States? No Yes

B. Have you, your spouse, your child(ren), or other family members such as your parents or siblings ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum? No Yes

If "Yes" to either or both questions (2A and/or 2B), provide for each person the following: the name of each country and the length of stay; the person's status while there; the reasons for leaving; whether the person is entitled to return for lawful residence purposes; and whether the person applied for refugee status or for asylum while there, and, if not, why he or she did not do so.

3. Have you, your spouse, or child(ren) ever ordered, incited, assisted, or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

No Yes If "Yes," describe in detail each such incident and your own or your spouse's or child(ren)'s involvement.

PART C. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION Continued

4. After you left the country where you were harmed or fear harm, did you return to that country?

No Yes If "Yes," describe in detail the circumstances of your visit (for example, the date(s) of the trip(s), the purpose(s) of the trip(s), and the length of time you remained in that country for the visit(s)).

5. Are you filing the application more than one year after your last arrival in the United States?

No Yes If "Yes," explain why you did not file within the first year after you arrived. You should be prepared to explain at your interview or hearing why you did not file your asylum application within the first year after you arrived. For guidance in answering this question, see Instructions, Part 1: Filing Instructions, Section V. "Completing the Form," Part C.

6. Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted and sentenced for any crimes in the United States?

No Yes If "Yes," for each instance, specify in your response what occurred and the circumstances; dates; length of sentence received; location; the duration of the detention or imprisonment; the reason(s) for the detention or conviction; any formal charges that were lodged against you or your relatives included in your application; the reason(s) for release. Attach documents referring to these incidents, if they are available, or an explanation of why documents are not available.

PART D. YOUR SIGNATURE

After reading the information regarding penalties in the instructions, complete and sign below. If someone helped you prepare this application, he or she must complete Part E.

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it are all true and correct. Title 18, United States Code, Section 1546, provides in part: "Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or knowingly presents any such application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement or which fails to contain any reasonable basis in law or fact - shall be fined in accordance with this title or imprisoned not more than five years, or both." I authorize the release of any information from my record which the Immigration and Naturalization Service needs to determine eligibility for the benefit I am seeking.

Staple your photograph here or the photograph of the family member to be included on the extra copy of the application submitted for that person.

WARNING: Applicants who are in the United States illegally are subject to removal if their asylum or withholding claims are not granted by an Asylum Officer or an Immigration Judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn. Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act. See 208(d)(6) of the Act and 8 CFR 208.20.

Print Complete Name

Write your name in your native alphabet

Did your spouse, parent, or child(ren) assist you in completing this application? No Yes (If "Yes," list the name and relationship.)

(Name)

(Relationship)

(Name)

(Relationship)

Did someone other than your spouse, parent, or child(ren) prepare this application?

No Yes (If "Yes," complete Part E)

Asylum applicants may be represented by counsel. Have you been provided with a list of persons who may be available to assist you, at little or no cost, with your asylum claim? No Yes

Signature of Applicant (The person in Part A. I.)

[_____]

Sign your name so it all appears within the brackets

Date (Mo/Day/Yr)

PART E. DECLARATION OF PERSON PREPARING FORM IF OTHER THAN APPLICANT, SPOUSE, PARENT OR CHILD

I declare that I have prepared this application at the request of the person named in Part D, that the responses provided are based on all information of which I have knowledge, or which was provided to me by the applicant and that the completed application was read to the applicant in his or her native language or a language he or she understands for verification before he or she signed the application in my presence. I am aware that the knowing placement of false information on the Form I-589 may also subject me to civil penalties under 8 U.S.C. 1324(c).

Signature of Preparer	Print Complete Name		
Daytime Telephone Number ()	Address of Preparer: Street Number and Name		
Apt. No.	City	State	ZIP Code

PART F. TO BE COMPLETED AT INTERVIEW OR HEARING

You will be asked to complete this Part when you appear before an Asylum Officer of the Immigration and Naturalization Service (INS), or an Immigration Judge of the Executive Office for Immigration Review (EOIR) for examination.

I swear (affirm) that I know the contents of this application that I am signing, including the attached documents and supplements, that they are all true to the best of my knowledge taking into account correction(s) numbered _____ to _____ that were made by me or at my request.

Signed and sworn to before me by the above named applicant on:

Signature of Applicant

Date (Mo/Day/Yr)

Write Your Name in Your Native Alphabet

Signature of Asylum Officer or Immigration Judge

A # (<i>If available</i>)	Date
Applicant's Name	Applicant's Signature

LIST ALL OF YOUR CHILDREN, REGARDLESS OF AGE OR MARITAL STATUS.*(Use this form and attach additional pages and documentation as needed to your application if you have more than four (4) children.)*

1. Alien Registration Number (A#)(<i>If any</i>)	2. Passport/ID Card No. (<i>If any</i>)	3. Marital Status (<i>Married, Single, Divorced, Widowed</i>)	4. Social Security No. (<i>If any</i>)
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth (<i>Mo/Day/Yr</i>)
9. City and Country of Birth	10. Nationality (<i>Citizenship</i>)	11. Race, Ethnic or Tribal Group	12. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
13. Is this child in the U.S.? <input type="checkbox"/> Yes (<i>Complete blocks 14 to 21.</i>) <input type="checkbox"/> No (<i>Specify Location</i>)			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? (<i>Mo/Day/Yr</i>)	16. I-94 No. (<i>If any</i>)	17. Status when last admitted (<i>Visa type, if any</i>)
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? (<i>Mo/Day/Yr</i>)		20. Is your child in immigration court proceedings? <input type="checkbox"/> Yes <input type="checkbox"/> No
21. If in the U.S., is this child to be included in this application? (<i>Check the appropriate box.</i>) <input type="checkbox"/> Yes (<i>Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.</i>) <input type="checkbox"/> No			

1. Alien Registration Number (A#)(<i>If any</i>)	2. Passport/ID Card No. (<i>If any</i>)	3. Marital Status (<i>Married, Single, Divorced, Widowed</i>)	4. Social Security No. (<i>If any</i>)
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth (<i>Mo/Day/Yr</i>)
9. City and Country of Birth	10. Nationality (<i>Citizenship</i>)	11. Race, Ethnic or Tribal Group	12. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female
13. Is this child in the U.S.? <input type="checkbox"/> Yes (<i>Complete blocks 14 to 21.</i>) <input type="checkbox"/> No (<i>Specify Location</i>)			
14. Place of last entry in the U.S.?	15. Date of last entry in the U.S.? (<i>Mo/Day/Yr</i>)	16. I-94 No. (<i>If any</i>)	17. Status when last admitted (<i>Visa type, if any</i>)
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? (<i>Mo/Day/Yr</i>)		20. Is your child in immigration court proceedings? <input type="checkbox"/> Yes <input type="checkbox"/> No
21. If in the U.S., is this child to be included in this application? (<i>Check the appropriate box.</i>) <input type="checkbox"/> Yes (<i>Attach one (1) photograph of your child in the upper right hand corner of page 9 on the extra copy of the application submitted for this person.</i>) <input type="checkbox"/> No			

ADDITIONAL INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

A # (<i>If available</i>)	Date
Applicant's Name	Applicant's Signature

Use this as a continuation page for any information requested. Please copy and complete as needed.

PART _____

QUESTION _____

Appendix 3: Prohibitions On Filing Asylum Applications

From Supplementary Information, Interim Regulations, CITE 62 Fed. Reg. 44, 10312, 10316

There were numerous comments on the prohibitions on the filing of asylum applications in section 208(a)(2) of the Act. Because of the importance of a decision to deny an alien the right to apply for asylum, the Department has chosen to adopt the suggestion that only Asylum Officers, Immigration Judges, and the BIA be empowered to make such determinations. The Department has also made clear that, while the alien must establish by clear and convincing evidence that he or she applied within one year of his or her arrival in the United States, the alien's burden of establishing that one of the exceptions in section 208(a)(2)(D) applies must only be to the "satisfaction of the Attorney General." The rule also contemplates that the asylum officer or immigration judge hearing such a case will explore the reasons for the late filing. Finally, and importantly, the Department has decided to follow the recommendation that the date of arrival used to determine the one-year period in section 208(a)(2)(B), consistent with the effective date of that section, be no earlier than April 1, 1997. Thus, the first case to which this prohibition could apply would be one filed on April 2, 1998.

From CITE 62 Fed. Reg. 44, 10312, 10338

8 C.F.R. 208.4 Filing the application.

Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.

(a) Prohibitions on filing. Section 208(a)(2) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate to the satisfaction of the Attorney General that one of the exceptions in section 208(a)(2)(D) of the Act applies. Such prohibition applies only to asylum applications under section 208 of the Act and not to applications for withholding of removal under section 241 of the Act. If an applicant submits an asylum application and it appears that one or more of the prohibitions contained in section 208(a)(2) of the Act apply, an asylum officer or an immigration judge shall review the application to determine if the application should be rejected or denied. For the purpose of making determinations under section 208(a)(2) of the Act, the following rules shall apply:

(1) Authority. Only an asylum officer, an immigration judge, or the Board of Immigration Appeals is authorized to make determinations regarding the prohibitions contained in section 208(a)(2)(B) or (C) of the Act;

(2) One-year filing deadline. For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving (i) by clear and convincing evidence that he or she applied within one year of the alien's arrival in the United States or (ii) to the satisfaction of the asylum officer, immigration judge, or Board of Immigration Appeals that he or she qualifies for an exception to the one-year deadline. The one-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. In the case of an

application that appears to have been filed more than a year after the applicant arrived in the United States, an Asylum Officer or Immigration Judge will determine whether the applicant qualifies under one of the exceptions to the deadline;

(3) Prior denial of application. For purposes of section 208(a)(2)(C) of the Act, an asylum application has not been denied unless denied by an immigration judge or the Board of Immigration Appeals;

(4) Changed circumstances. The term “changed circumstances” in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant's eligibility for asylum. They may include: (i) changes in conditions in the applicant's country of nationality or, if the person is stateless, country of last habitual residence or (ii) changes in objective circumstances relating to the applicant in the United States, including changes in applicable U.S. law, that create a reasonable possibility that applicant may qualify for asylum. The applicant shall apply for asylum within a reasonable period given those “changed circumstances.”

(5) The term extraordinary circumstances in section 208(a)(2)(D) of the Act shall refer to events or factors beyond the alien's control that caused the failure to meet the 1-year deadline. Such circumstances shall excuse the failure to file within the 1-year period so long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer or immigration judge that the circumstances were both beyond his or her control and that, but for those circumstances, he or she would have filed within the 1-year period. These circumstances may include:

(i) Serious illness or mental or physical disability of significant duration, 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 first year after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status until a reasonable period before the filing of the asylum application; and

(v) The applicant submitted 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.

(b) Filing location. (1) With the service center by mail. Except as provided in paragraphs (b)(2), (b)(3), (b)(4) and (b)(5) of this section, asylum applications shall be filed directly by mail with the service center servicing the asylum office with jurisdiction over the place of the applicant's residence or, in the case of an alien without a United States residence, the applicant's current lodging or the land border port-of-entry through which the alien seeks admission to the United States.

(2) With the asylum office. Asylum applications shall be filed directly with the asylum office having jurisdiction over the matter in the case of an alien who has received the express consent of the Director of Asylum to do so.

(3) With the immigration judge. Asylum applications shall be filed directly with the Immigration Court having jurisdiction over the case in the following circumstances:

(i) During exclusion, deportation, or removal proceedings, with the Immigration Court having jurisdiction over the port, district office, or sector after service and filing of the appropriate charging document.

(ii) After completion of exclusion, deportation, or removal proceedings, and in conjunction with a motion to reopen pursuant to 8 CFR part 3 where applicable, with the Immigration Court having jurisdiction over the prior proceeding. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings.

(iii) In asylum proceedings pursuant to § 208.2(b)(1) and after the Notice of Referral to Immigration Judge has been served on the alien and filed with the Immigration Court having jurisdiction over the case.

(4) With the Board of Immigration Appeals. In conjunction with a motion to remand or reopen pursuant to §§ 3.2 and 3.8 of this chapter where applicable, an initial asylum application shall be filed with the Board of Immigration Appeals if jurisdiction over the proceedings is vested in the Board of Immigration Appeals under 8 CFR part 3. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings.

(5) With the district director. In the case of any alien described in § 208.2(b)(1) and prior to the service on the alien of Form I-863, any asylum application shall be submitted to the district director having jurisdiction pursuant to 8 CFR part 103. The district director shall forward such asylum application to the appropriate Immigration Court with the Form I-863 being filed with that Immigration Court.

(c) Amending an application after filing. Upon request of the alien and as a matter of discretion, the asylum officer or immigration judge having jurisdiction may permit an asylum applicant to amend or supplement the application, but any delay caused by such request shall

extend the period within which the applicant may not apply for employment authorization in accordance with § 208.7(a).

Appendix 4: One-Year Filing Deadline For Asylum Applicants

Part I. One-Year Deadline For Filing Asylum Application: Denial Of Application Because Of Late Filing

TO THE CLIENT: Changes in immigration law that went into effect on April 1, 1998 require that an applicant file for asylum within a year of her or his last entry to the U.S. If you have been in the U.S. for more than a year since your last arrival, you are not necessarily ineligible to apply for asylum. In some cases, an exception to the filing deadline may be granted. Each applicant for asylum is given a full asylum interview. No applicant for asylum is denied an interview because the application is filed beyond the one-year deadline. At the interview, asylum officers determine the validity of an applicant's claim of a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group or political opinion. If an application has been filed beyond the one-year deadline, asylum officers also gather information from the applicant to assess whether the applicant is eligible for an exception to the one-year filing deadline.

TO THE LEGAL REPRESENTATIVE: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") mandated that an applicant filing for asylum after April 1, 1998, must apply within a year of her or his/her last entry to the U.S.

It is important to bear in mind that only the applicant's last arrival is operative. Therefore, if an applicant who has been in the U.S. for more than one year, but leaves and reenters the U.S., it is only his/her last arrival which will be relevant for determining one-year filing deadline.

The one-year is calculated from the date of last arrival in the U.S. up to the previous calendar date the following year. For example, an applicant who arrives on April 4, 1998 and files on April 3, 1999, will be considered to have timely filed. However, if the same application is filed on April 4, 1999 it will not be considered filed within one year. It is the date that the INS receives the application and not the postmarked date that is relevant for determining one-year deadline. Although there has been some indication from the INS that the Asylum Offices are trained to take a flexible approach to adjudicating one year deadline exception issues, applicants should be aware that the filing deadline may be strictly enforced, and should govern themselves accordingly. *An out-of-status applicant who files his or her application with the asylum office beyond the one year deadline and is not granted an exception to the filing deadline will be referred to Immigration Court for a removal hearing without an administrative determination on the merits of the application by the asylum office.* The Immigration Judge may also deny the applicant an exception to the deadline and may order the applicant removed without a consideration of the application itself.

Part II. Exceptions To The One-Year Filing Deadline

TO THE CLIENT: You may be eligible for an exception to the filing deadline if your delay in filing was caused by **changed** or **extraordinary** circumstances. Changed circumstances include any change in conditions that lead you to file for asylum after the one-year filing

deadline or prevented you from filing within one-year deadline. Such changed circumstances must affect your eligibility for asylum in a substantial way. Extraordinary circumstances include events or factors that directly caused you to miss the filing deadline.

TO THE LEGAL REPRESENTATIVE: All applicants who have been in the United States for a protracted period of time since their last arrival should offer some explanation as to why they did not file for asylum earlier. For example, many asylum applicants report they did not know that persecution based on sexual orientation could be a grounds for asylum and express difficulty in finding legal representation which is both affordable and sensitive to these issues. Some lesbian and gay asylum applicants only "come out" years after arriving in the United States and then develop their fear of persecution. Attorneys should explore the reasons behind a client's delay in filing even if the client is not subject to the filing deadline. If the client is subject to the filing deadline, these details may mean the difference between having an asylum application adjudicated on its merits and having an application denied for late filing.

Because the new filing deadline may have the effect of making an otherwise true asylum applicant ineligible, it is important that the applicant carefully document why there was a delay of more than one year in filing the application. For sexual orientation-based claims there are often many issues which arise for the potential applicant, some of which serve to delay the filing of the case. Frequently lesbian and gay people who recently arrive in the U.S. do not feel comfortable enough to "come out" to government officials especially in the context of immigration. Unfortunately, this has kept many potential asylum applicants from filing asylum applications or even inquiring about sexual orientation-based persecution claims. If an applicant seems to be ineligible to file for asylum because the one-year deadline has passed it is vital that the attorney and applicant consider the objective and subjective conditions which may have contributed to the delay in filing to assess the likelihood that an exception would be granted.

Any explanation for late filing should be accompanied by supporting documentation to the fullest extent possible.

Some exceptions to the filing deadline have been granted when the delay in filing was due to special and extraordinary circumstances. There are two exceptions to the one-year filing deadline specified in INS regulations (see Chapter 3, Appendix 3, page 93). According to the regulations, an exception may be granted if the delay in filing occurred due to **changed circumstances** that materially affect the eligibility of the applicant or if the delay occurred due to **extraordinary circumstances** that caused the delay in filing the application. Another source which offers guidance on this issue is INS Asylum Office Training Materials which were published in 1998. The policy enunciated in these training materials is not binding on INS or on the Immigration Court.

A. Changed Circumstances

TO THE CLIENT: Changed circumstances include any change in conditions that leads you to file for asylum after the one-year filing deadline, or prevented you from filing within the one-year deadline. Such changed circumstances must affect your eligibility for asylum in a substantial way. Changed circumstances may include any change in personal or home country conditions. For example, recent political activism or recent discovery of HIV status would be

considered a change in circumstances. It is applicant's responsibility to prove to the INS the existence of changed circumstances.

TO THE LEGAL REPRESENTATIVE:

The exception recognizes that changed circumstances may exist causing a delay in filing the application for asylum. Such changed circumstances may include:

- changed conditions in applicant's country of nationality or if stateless, applicant's country of last habitual residence;
- changes in applicant's personal circumstances (e.g., recent knowledge of asylum option, political activism, conversion from one religion to another, etc.);

Asylum officers are trained to assume a cooperative role when assessing an application for asylum and are under an "affirmative" duty to elicit all relevant and useful information to determine applicant's eligibility for his/her claim. To consider whether a one-year filing deadline exception applies due to changed circumstances, asylum officers should be flexible and inclusive in examining changed circumstances in the light of existing credible testimony or documentary evidence.

The burden of proof to establish that a changed circumstance exists is on the applicant. The standard of proof acceptable to asylum officers, immigration judge, or BIA is a reasonable one. While assessing changed circumstances, asylum officers also consult other sources of information beyond applicant's testimony.

It is important to note that changed circumstances must occur during the presence of the applicant in the United States and must occur on or after April 1, 1997. If an exception applies to an applicant's asylum claim, the filing must be done within a reasonable time.

Example:

An Applicant was persecuted due to his sexual orientation by his government in 1991; he arrives in the U.S. in 1992. A change in the grounds for asylum in 1994- i.e. the Attorney General of the U.S. announced sexual orientation to be recognized as ground(s) for asylum- materially affects his eligibility and he files for asylum on April 18, 1998. The changed circumstance exception under the law does not apply to this applicant as the change did not occur on or after April 1, 1997. If no other exceptions apply, this applicant's asylum claim will be rejected because he did not file for asylum within one-year of his arrival in the U.S.

1. Specific Cases

A change in the individual's circumstances, changes in U.S. law or policies or changes in country conditions affecting an applicant's claim for asylum will be given consideration under the exception to one-year filing deadline rule. Examples include:

--Change in U.S. law:

- Change in precedent-setting caselaw including BIA's decisions affecting an applicant's eligibility for asylum claim;
- Recent hostilities between the U.S. and the government of applicant's country.

--Change in Individual circumstances:

A change in individual circumstances may include a change in the dependent relationship between applicant and the former principal applicant spouse or former principal applicant parent, due to marriage, divorce, death, or attainment of the age of 21.

2. Refugees Sur Place

An asylum applicant who was not a refugee when leaving his/her home country, but becomes a refugee at a later date, is called a refugee sur place. Changes in applicant's country or place of last habitual residence or activities by an applicant outside his or her country may make him/her subject to persecution upon return to home country or place of last habitual residence. Examples include:

- a change of government which is now hostile to applicant's profession;
- applicant's involvement in political organizing or other activities in the U.S. that are critical of applicant's government;
- applicant's conversion from one religion to another;
- recent antagonism in applicant's country toward applicant's race or nationality;
- threats against an applicant's family member living abroad.

3. Standard For A Changed Circumstance Exception

The purpose of providing the exception stems from the changed circumstances that substantially affect the applicant's eligibility for asylum. The regulations provide that changed circumstance exception to one-year deadline may include cases where the change in circumstances creates a reasonable possibility that applicant may qualify for asylum.

There is a distinction between "reasonable possibility" of an applicant suffering persecution upon return to his or her country and "reasonable possibility" in the context of one-year filing deadline. The former refers to the chance of being persecuted upon return while latter refers to the level of evidence that is required to establish that there is a reasonable possibility that the applicant's asylum eligibility is materially affected by the changed circumstances. Therefore, any changed circumstances that lead an applicant to file for asylum will be relevant for the purposes of changed circumstance exception. The asylum officers will weigh the materiality of changed circumstances against the conditions of the country involved.

4. What Is Reasonable Time For Filing After Establishing Exception To One-Year Rule?

The regulations stipulate that where there are changed circumstances that prevented an applicant from filing for asylum within one-year of his/her arrival in the U.S., the application must be filed within a reasonable period of time.

Once an exception to one-year filing deadline is established, a determination as to reasonable time will depend on the facts of the case and may vary considerably from case to case. INS training materials for asylum officers sheds some light as determining the reasonableness of the time. According to these training materials, an applicant who has established an exception or fall into one or more exceptions has already demonstrated that an allowance should be made for the delayed filing and asylum officers are therefore encouraged to give applicants the benefit of doubt in evaluating the reasonableness of time in which to file the application. Factors such as an applicant's education, level of sophistication, the amount of time it takes to obtain legal assistance and any effects of persecution/illness will be considered while evaluating the reasonable time.

It is important to note that it is the time when an applicant become aware of the changed circumstances that materially affects his/her eligibility and is considered while determining the reasonable period within which to file.

The training materials directs asylum officers that they should at the initial stage determine whether an exception to one-year deadline applies regardless of the ultimate decision of applicant's asylum claim. The one-year filing deadline should be analyzed against the question that whether a reasonable person under similar circumstances would not have timely filed.

Example:

An educated activist who arrived in 1995 and makes a case that the country conditions changed in 1997, and fails to apply for asylum until 2000. Since this particular applicant has a good grasp of his asylum possibilities, an explanation for his failure to file from 1998 to 2000 must be very convincing to meet the test of a reasonable time period.

B. Extraordinary Circumstances

TO THE CLIENT: Extraordinary circumstances include events or factors that directly caused you to miss the filing deadline. Such circumstances include serious illness (mental or physical disability), legal disability or ineffective assistance of Counsel. For example, if you were not aware of that you could be eligible to apply for asylum on the ground(s) of sexual orientation and feared revealing your sexual orientation to the authorities due to past persecution, you might be eligible for the exception.

TO THE LEGAL REPRESENTATIVE: Extraordinary circumstances include events or factors in an applicant's life that caused the applicant to miss the filing deadline. The existence of such extraordinary circumstances allows the applicant to file the application after one-year of applicant's arrival.

To claim the exception to one-year deadline rule because of extraordinary circumstances, the applicant must:

- show the existence of the extraordinary circumstances;
- explain how such extraordinary circumstance directly caused the failure to timely file the application;
- not have intentionally created the extraordinary circumstances for the purpose of establishing a filing-deadline exception;
- must file the application within a reasonable period thereafter.

The extraordinary circumstances can occur at anytime before or after applicant's arrival in the U.S., however, the effects of circumstances must impact on the ability of the applicant to file the application within one-year of his arrival. Although regulations describe several situations that could fall under the extraordinary exception, the regulations carefully note that this is not intended to be an exhaustive list. To overcome the delay in filing the application under this exception, the applicant must be able to establish that, but for such circumstances, the application would have been timely filed.

1. Serious Illness/Mental Or Physical Disability

Serious illness to applicant or a family member is considered under this category. Additionally, applicant's legal guardian or holder of power of attorney is also a family member for the purposes of this exception. The practical relationship as well as blood relationship will be taken into consideration. For example, an estranged brother with whom applicant had very little contact will not qualify for the purposes of this exception. On other hand, a grandfather for whom applicant had responsibility will meet the standard of a family member.

The claimed illness should be of significant duration and must be present during the one-year period after arrival. If the applicant had been subjected to torture in the past, the asylum officers will also consider residual effects of such persecution that may exist in the form of serious illness, mental or physical disability.

Factors such as severe family opposition, extreme isolation within a refugee community, profound language barriers, or difficulties in cultural acclimatization are considered to be causing a significant barrier on applicant's ability to timely file the application. If the illness or disability comes to an end before the expiration of one-year deadline, the applicant should have filed the application within reasonable time.

2. Legal Disability

Generally, legal disability is described as the incapacity to enjoy ordinary legal rights and includes unaccompanied minors and mental impairment.

3. Ineffective Assistance Of Counsel (attorneys or accredited representatives)

To assert that ineffective assistance of counsel caused delay in filing the application, an applicant must:

- describe in a written affidavit the agreement between the applicant and attorney, list the promises made or did not make by attorney,
- provide documentary evidence or testimony that the accused counsel was informed of the allegation and was given an opportunity to respond, and
- provide documentary evidence or testimony that indicates whether there has been a complaint filed with the appropriate authorities and if not, explain why there has been no such complaint.

This provision also applies to notary publics, paralegal working for attorneys and law students who are not authorized to provide legal advice. In the United States, the role of Notary Publics is limited to verifying the authenticity of signatures and legal documents. There have been cases where Notary Publics have assisted many immigrants in filing frivolous asylum applications.

4. Maintaining Of Lawful Status

If the applicant maintained Temporary Protected Status during the one-year deadline and until the reasonable period before filing the asylum application, he/she will be eligible for an exception. The training manual for asylum officers also explains that one-year filing deadline does not apply to the applicants who have maintained a lawful status through one-year filing deadline and continues to maintain lawful status up to the filing of the asylum application. While this exception is not provided for in the regulations, it seems to have been adopted as a policy of the asylum program.

Applicants who have been in the U.S. for more than a year and during that time maintained their lawful immigrant or non-immigrant status (e.g. students on F-1 visas, professional workers on H-1B visas etc.) are also eligible for an exception to the one-year filing deadline.

5. Rejection Of Timely Filed Asylum Application

Where the applicant filed the application within one-year of his/her arrival but was rejected by INS for being incomplete or improper, the applicant must re-file the application within reasonable time. The period of reasonable time runs from the rejection to the resubmission of the application.

Part III. An Illustration Of Changed And Extraordinary Circumstances

An individual who entered the U.S. in 1991 and applied for asylum after he was placed in removal (deportation) in April 1998. The individual testified that he did not learn of asylum based on sexual orientation as an option until the time he was detained by INS. The individual had suffered abuse and mistreatment including rape in his home country because of his sexuality. He feared that he would be deported if he reveal his sexual orientation to authorities in the U.S.

and therefore never consulted a private attorney regarding his fear of persecution. His testimony also indicated the psychological impact of his memories of rape and abuse leading him to attempt suicide in the U.S. While in INS custody, the individual learned of his HIV positive status which added to his fear of persecution in his home country as AIDS is seen as “gay plague” and results in denial of basic medical treatment and discrimination against people with HIV and AIDS.

The immigration court found that the “changed circumstances” exception applied to this individual due to his recent discovery of his HIV status that fortified his fear of persecution given the severe discrimination and mistreatment of people with HIV. Furthermore, the court ruled that the effects of past persecution or violent harm on the applicant constituted “mental disability of significant duration” meeting the criteria for “extraordinary circumstances”. Additionally, the fear of the applicant in disclosing his sexual identity to the U.S. government due to past persecution made him emotionally and mentally disable also qualified as “extraordinary circumstance.” The lack of applicant’s knowledge of the right to apply for asylum was also treated as an excuse for the deadline as “extraordinary circumstances.”