

Withholding of Removal

8 CFR § 208.16 - Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

- **Withholding of Removal** **Differences Between Withholding & Asylum**

Withholding of Removal

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

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(a) Consideration of application for withholding of removal. An asylum officer shall not determine whether an [alien](#) is eligible for withholding of the exclusion, deportation, or removal of the [alien](#) to a country where the [alien's](#) life or freedom would be threatened, except in the case of an [alien](#) who is determined to be an applicant for admission under section 235(b)(1) of the [Act](#), who is found to have a credible fear of persecution or torture, whose case is subsequently retained by or referred to [USCIS](#) pursuant to the [jurisdiction](#) provided at § 208.2(a)(1)(ii) to consider the [application](#) for asylum, and whose [application](#) for asylum is not granted; or in the case of the spouse or child of such an [alien](#) who is included in the [alien's](#) asylum [application](#) and who files a separate [application](#) for asylum with [USCIS](#) that is not granted. In such cases, the asylum officer will determine, based on the record before [USCIS](#), whether the applicant is eligible for statutory withholding of removal under [paragraph \(b\)](#) of this section or withholding or deferral of removal pursuant to the Convention Against Torture under [paragraph \(c\)](#) of this section. Even if the asylum officer determines that the applicant has established eligibility for withholding of removal under paragraph (b) or (c) of this section, the asylum officer shall proceed with referring the [application](#) to the [immigration judge](#) for a hearing pursuant to § 208.14(c)(1). In exclusion, deportation, or [removal proceedings](#), an [immigration judge](#) may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of

removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

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

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including but not limited to persecutors who are gang members, public officials who are not acting under color of law, or family members who are not themselves government officials

or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, “Convention Against Torture” shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the adjudicator shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the adjudicator determines that the alien is more likely than not to be tortured in the country of removal, the alien is eligible for protection under the Convention Against Torture, and the adjudicator shall determine whether protection under the Convention Against Torture should be granted either in the form of withholding of removal or in the form of deferral of removal. The adjudicator shall state that an alien eligible for such protection is eligible for withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraph (d)(2) or (3) of this section. If an alien eligible for such protection is subject to mandatory denial of withholding of removal under paragraph (d)(2) or (3) of this section, the adjudicator shall state that the alien is eligible for deferral of removal under § 208.17(a). For cases under the jurisdiction of USCIS pursuant to § 208.2(a)(1)(ii), the asylum officer may make such a determination based on the application and the record before USCIS; however, the asylum officer shall not issue an order granting either withholding of removal or deferral of removal because that is referred to the immigration judge pursuant to § 208.14(c)(1) and 8 CFR 1240.17.

(d) Approval or denial of application—(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs

(b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) Exception to the prohibition on withholding of deportation in certain cases. Section 243(h)(3) of the Act, as added by section 413 of Pub. L. 104-132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it

appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) [Reserved]

(f) Removal to third country. Nothing in this section or [§ 208.17](#) shall prevent the [Service](#) from removing an [alien](#) to a third country other than the country to which removal has been withheld or deferred.

[[62 FR 10337](#), Mar. 6, 1997, as amended at [64 FR 8488](#), Feb. 19, 1999; [65 FR 76135](#), Dec. 6, 2000; [85 FR 67259](#), Oct. 21, 2020; [85 FR 80388](#), Dec. 11, 2020; [87 FR 18218](#), Mar. 29, 2022]

Differences Between Withholding & Asylum

What is the Difference Between Asylum and Withholding of Removal?

A person granted asylum is protected from being returned to his or her home country, is eligible to apply for authorization to work in the United States, may apply for a Social Security card, may request permission to travel overseas, and can petition to bring family members to the United States.

Asylees may also be eligible for certain government programs, such as Medicaid or Refugee Medical Assistance. Asylum is technically a discretionary benefit, and certain individuals by law are not eligible for asylum. For example, individuals who have previously been deported and then reentered the United States, or who did not apply for asylum within one year of arriving in the United States, are barred from applying for asylum. Individuals who have been banned from asylum are instead eligible in most

cases for “withholding of removal.”

As in the case of asylum, a person who is granted withholding of removal is protected from being returned to his or her home country and receives the right to remain in the United States and work legally. But at the end of the court process, an immigration judge enters a deportation order and then tells the government they cannot execute that order. That is, the “removal” to a person’s home country is “withheld.” However, the government is still allowed to deport that person to a different country if the other country agrees to accept them.

Withholding of removal provides a form of protection that is less certain than asylum, leaving its recipients in a sort of limbo. A person who is granted withholding of removal may never leave the United States without executing that removal order, cannot petition to bring family members to the United States, and does not gain a path to citizenship. And unlike asylum, when a family seeks withholding of removal together a judge may grant protection to the parent while denying it to the children, leading to family separation. Withholding of removal also does not offer permanent protection or a path to permanent residence. If conditions improve in a person’s home country, the government can revoke withholding of removal and again seek the person’s deportation. This can occur even years after a person is granted protection.

Some individuals, including those who were convicted of “particularly serious crimes,” are not eligible for withholding of removal. These individuals are limited to applying for relief under the Convention Against Torture, a protection that is harder to win than withholding of removal and that offers even fewer benefits.

Second Circuit Explains

Since 1980, the Act as amended has provided two methods by which a deportable alien, already in the United States, may seek relief: asylum or withholding of deportation. *INS v. CardozaFonseca*, 480 U.S. 421, 423, 107 S.Ct. 1207, 1209, 94 L.Ed.2d 434 (1987) (articulating the difference between asylum and withholding of deportation); see also *Sale v. Haitian Ctrs. Council, Inc.*, ___ U.S. ___, ___, 113 S.Ct. 2549, 2552-53, 125 L.Ed.2d 128 (1993). Section 208(a) of the Act authorizes the Attorney General, at her discretion, to grant asylum to eligible aliens. 8 U.S.C. § 1158(a). Section 243(h) of the Act requires the Attorney General to withhold the deportation of an alien who demonstrates that if deported his or her "life or freedom would be threatened" on account of one of several enumerated factors. 8 U.S.C. § 1253(h) (setting forth requirements for withholding of deportation).

Asylum and withholding of deportation are "'closely related and appear to overlap.'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)). Nevertheless, there are two important distinctions. First, "[t]he burden of proof that an alien must meet to be eligible for asylum is lower than that required of an alien who seeks withholding of deportation." *CarranzaHernandez*, 12 F.3d at 7 (emphasis added) (citing *Cardoza-Fonseca*, 480 U.S. at 443-50, 107 S.Ct. at 1219-23 (1987); *INS v. Stevic*, 467 U.S. 407, 428-30, 104 S.Ct. 2489, 2500-01, 81 L.Ed.2d 321 (1984); *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 240 (2d Cir. 1992); *Gomez v. INS*, 947 F.2d 660, 665 (2d Cir. 1991)).

Second, once eligibility for asylum has been established, a grant of asylum remains within the Attorney General's discretion. In contrast, "withholding of deportation for those who qualify [is] mandatory rather than discretionary."

Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed.Reg. 30674 (July 27, 1990). Thus, although the Attorney General has the discretion to deny asylum to an alien eligible under section 208(a), she may not deny withholding of deportation to the same alien if the alien satisfies the stricter standards of section 243(h). See Cardoza-Fonseca, 480 U.S. at 443 n. 28, 107 S.Ct. at 1219 n. 28 (noting certain statutory exceptions not applicable to this case). For both asylum and withholding of deportation, an *1022 otherwise deportable alien bears the burden of establishing eligibility. See 8 C.F.R. §§ 208.13, 208.16(b) (1993).

***INS v. CardozaFonseca*, 480 U.S. 421, 423, 107 S.Ct. 1207, 1209, 94 L.Ed.2d 434 (1987)**

*[\[FULL DECISION\]](https://supreme.justia.com/cases/federal/us/480/421/)(<https://supreme.justia.com/cases/federal/us/480/421/>)

Held:* The § 243(h) "clear probability" standard of proof does not govern asylum applications under § 208(a). Pp.

480 U. S. 427

(a) The plain meaning of the statutory language indicates a congressional intent that the proof standards under §§ 208(a) and 243(h) should differ. Section 243(h)'s "would be threatened" standard has no subjective component, but, in fact, requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation. In contrast, § 208(a)'s reference to "fear" makes the asylum eligibility determination turn to some extent on the alien's subjective mental state, and the fact that the fear must be "well founded" does not transform the

standard into a "more likely than not" one. Moreover, the different emphasis of the two standards is highlighted by the fact that, although Congress simultaneously drafted § 208(a)'s new standard and amended § 243(h), it left § 243(h)'s old standard intact. Pp. [480 U. S. 430](#) 432.

(b) The legislative history demonstrates the congressional intent that different standards apply under §§ 208(a) and 243(h). Pp. 480 U.S. 432-443.

(c) The argument of the Immigration and Naturalization Service (INS) that it is anomalous for § 208(a) to have a less stringent eligibility standard than § 243(h), since § 208(a) affords greater benefits than § 243(h), fails, because it does not account for the fact that an alien who satisfies the § 208(a) standard must still face a discretionary asylum decision by the Attorney General, while an alien satisfying § 243(h)'s stricter standard is automatically entitled to withholding of deportation. Pp. [480 U. S. 443](#) 445.

(d) The INS's argument that substantial deference should be accorded BIA's position that the "well founded fear" and "clear probability" standards are equivalent is unpersuasive, since the narrow legal question of identity is a pure question of statutory construction within the traditional purview of the courts, and is not a question of case-by-case interpretation of the type traditionally left to administrative agencies. Pp. [480 U. S. 445](#) 448.

Withholding of Removal Statutes

INA § 241(b)

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion,

(B) Exception Subparagraph (A) does not apply to an alien if the Attorney General determines that- (i) the alien 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;

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Regulations

****8 CFR §208.16 and 8 CFR**

§1208.16 and INA §

241(b)**

In summary, while both sections deal with the eligibility for withholding of removal under section 241(b)(3) of the INA, 8 CFR §208.16 provides guidance

on eligibility consideration by a DHS officer, whereas 8 CFR §1208.16 deals with adjudication by an immigration judge in exclusion, deportation, or removal proceedings.

8 CFR §208.16 and 8 CFR §1208.16 are both sections of the Code of Federal Regulations that deal with the eligibility for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA) 123.

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****8 CFR §208.16 and 8 CFR**

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Are People in Withholding-Only Proceedings Eligible for Release on Bond?

Most individuals who are placed in withholding-only proceedings are held in ICE detention throughout the entire process of seeking protection and are not given the opportunity to ask a judge for release. ICE takes the legal position that people in withholding-only proceedings are not eligible for bond and must be held in “mandatory detention.” This means that some people are held for months or years in detention even if ICE or an immigration judge would normally have released them.

However, in some locations, federal courts have ruled that individuals in withholding-only proceedings are eligible for release on bond. In the jurisdiction of the Second Circuit Court of Appeals (New York, Connecticut, and Vermont) and the Fourth Circuit Court of Appeals (Maryland, North Carolina, South Carolina, Virginia, and West Virginia), immigrants in withholding-only proceedings may ask an immigration judge for release on

bond. The Supreme Court is set to decide this issue in 2021.