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/>)**

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 identicality 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;

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;

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;

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.

8 CFR §208.16 provides guidance on the consideration of eligibility for statutory withholding of removal and protection under the Convention Against Torture by a DHS officer 2. In contrast, 8 CFR §1208.16 deals with the adjudication of both an asylum claim and a request for withholding of removal by an immigration judge in exclusion, deportation, or removal proceedings 2.

8 CFR §208.16 and 8 CFR §1208.16 and INA § 241(b)

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)[1].

8 CFR §208.16 provides guidance on the consideration of eligibility for statutory withholding of removal and protection under the Convention Against Torture by a DHS officer [2]. In contrast, 8 CFR §1208.16 deals with the adjudication of both an asylum claim and a request for withholding of removal by an immigration judge in exclusion, deportation, or removal proceedings[3].

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.

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.

Revision #1
Created 2025-05-12 20:45:23 UTC by Joseph
Updated 2025-05-12 20:45:48 UTC by Joseph