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Establishing Eligibility for Asylum

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Legal Authorities

- Statutes
 - Immigration and Nationality Act (INA)
 - INA §§ 101(a)(42)(A), 208(b)(1)
 - Title 8 of the U.S. Code
- Regulations
 - Title 8 of the Code of Federal Regulations (8 C.F.R.)
 - 8 C.F.R. § 1208.13
- Board of Immigration Appeals (BIA or the Board) precedent decisions
- Attorney General (AG) precedent decisions
- Federal court decisions
- Supreme Court decisions

ELIGIBILITY CHART

based on the law as of October 28, 2021

	A S Y L U M	W I T H H O L D I N G	C A T P R O T E C T I O N
T y p e o f H a r m	P e r s e c u t i o n	F u t u r e h a t t o l i f e o r f r e e d o m	T o r t u r e

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or

A non-government actor the government is unable or unwilling to control. | The government

or

A non-government actor the government is unable or unwilling to control. | A public official or person acting in an official capacity or any person acting at the instigation of or with the consent or acquiescence of a public official |

INA §208.13 Establishing asylum eligibility

See INA §208.13

(a) **Burden of proof.** The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) **Eligibility.** The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) **Past persecution.** An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of

the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) **Discretionary referral or denial.** Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

FUNDAMENTAL CHANGE IN CIRCUMSTANCES

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

INTERNAL RELOCATION

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

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

GRANT IN THE ABSENCE OF WELL-FOUNDED FEAR

(iii) **Grant in the absence of well-founded fear of persecution.** An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

WELL-FOUNDED FEAR

(2) ***Well-founded fear of persecution.***

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

WHEN EVIDENCE OF BEING SINGLED OUT IS NOT REQUIRED

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, 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

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

REASONABLENESS OF INTERNAL RELOCATION

(3) ***Reasonableness of internal relocation.*** For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(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 asylum.

(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 persecution is by 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 all 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 persecutors who are gang members, officials acting outside their official capacity, 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.

Persecution

Particular Social Group

POINT TO ADDRESS IN CLOSING ARGUMENT

UNABLE OF UNWILLING TO CONTROL

BARS TO ASYLUM

DUAL NATIONALITY

Zepeda-Lopez, et al. v. Garland, No. 19-145 (2d Cir. 2022)

The Second Circuit granted Petitioners' petition for review and held that to qualify as a "refugee" under the INA, a dual national asylum applicant need only show persecution in any singular country of nationality. The court explained that to be eligible for asylum and withholding of removal, an individual must be a "refugee." 8 U.S.C. Section 1158(b)(1)(A).

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