

ASYLUM (defensive)

REGULATIONS

8 CFR §1208.4 Filing the application

8 CFR § 1208.4(a)(4)

Changed Circumstances

(i) 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, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution

that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

8 CFR § 1208.13 Establishing asylum eligibility.

8 CFR §1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

8 CFR §1208.17 Deferral of removal under the Convention Against Torture.

ASYLUM GENERALLY

1. Asylum Generally
2. Eligibility
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4. Affirmative Asylum Process
5. Definitive Asylum Process

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SEE ALSO

ASYLUM

Asylum can be either an affirmative application or a form of defensive relief in removal proceedings so it sort of a hybrid category.

What Is Asylum?

Asylum is a protection grantable to foreign nationals already in the United States or arriving at the border who meet the international law definition of a “refugee.” The [United Nations 1951 Convention](#) and [1967 Protocol](#) define a refugee as a person who is unable or unwilling to return to their home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted in the future “on account of race, religion, nationality, membership in a particular social group, or political opinion.” Congress incorporated this definition into U.S. immigration law in the Refugee Act of 1980. Asylum is technically a “discretionary” status, meaning that some individuals can be denied asylum even if they meet the definition of a refugee. For those individuals, a backstop form of protection known as “withholding of removal” may be available to protect them from harm if necessary.

As a signatory to the 1967 Protocol, and through U.S. immigration law, the United States has legal obligations to provide protection to those who qualify as refugees. The Refugee Act established two paths to obtain refugee status—either from abroad as a resettled refugee or in the United States as an asylum seeker.

Affirmative Asylum

When a noncitizen applies for asylum *before* they are in removal proceedings

Defensive Asylum

When a non-citizen is already in removal proceedings when they apply for asylum.

ASYLUM PROCESSING RULE

Since May 31, 2022, some individuals entering the United States are being processed under an interim final rule. These individuals are first put in expedited removal and if they express fear of persecution or torture, are given a credible fear interview, a process that initiates a defensive asylum claim. However, rather than having their case sent directly to an immigration judge, people processed under this rule are referred to an asylum officer for a non-adversarial Asylum Merits Interview between 21-45 days after the credible fear determination. This interview mirrors that of an affirmative asylum claim. An asylum officer can then either grant asylum or deny

asylum. If denied, the case is referred to an immigration judge. Additionally, a person who is denied asylum by an asylum officer is also assessed at the time for eligibility for withholding of removal and protection under the Convention Against Torture—another feature of defensive asylum processes. Since May 31, 2022, certain individuals entering the United States undergo processing based on an interim final rule. Initially, they are placed in expedited removal. If they express fear of persecution or torture, they receive a credible fear interview, which initiates a defensive asylum claim. Instead of directly sending their case to an immigration judge, individuals processed under this rule are referred to an asylum officer for a non-adversarial Asylum Merits Interview within 21-45 days after the credible fear determination. This interview resembles an affirmative asylum claim. The asylum officer can either grant or deny asylum. If denied, the case proceeds to an immigration judge. Additionally, a person denied asylum by an asylum officer is also evaluated for eligibility for withholding of removal and protection under the Convention Against Torture—a key aspect of defensive asylum procedures.

Asylum is a form of protection granted to foreign nationals already in the United States or arriving at the border. To qualify, they must meet the international law definition of a 'refugee.' According to the United Nations 1951 Convention and the 1967 Protocol, a refugee is someone who cannot or will not return to their home country due to past persecution or a well-founded fear of future persecution based on factors such as race, religion, nationality, membership in a particular social group, or political opinion. The U.S. incorporated this definition into its immigration law through the Refugee Act of 1980. Asylum status is technically 'discretionary,' meaning that even if an individual meets the refugee definition, they may still be denied asylum. In such cases, an alternative form of protection called 'withholding of removal' may be available to safeguard them from harm.

The United States, as a signatory to the 1967 Protocol, has legal obligations to protect those who qualify as refugees. The Refugee Act provides two paths to obtain refugee status: either from abroad as a resettled refugee or within the United States as an asylum seeker

ONE-YEAR FILING DEADLINE

An individual generally must apply for asylum within one year of their most recent arrival in the United States. In 2018, a federal district court found that DHS is obligated to notify asylum seekers of this deadline in a [class-action lawsuit](#) that challenged the government's failure to provide asylum seekers adequate notice of the one-year deadline and a uniform procedure for filing timely applications.

Asylum seekers in the affirmative and defensive processes face many obstacles to meeting the one-year deadline. Some [individuals face traumatic repercussions](#) from their time in detention or journeying to the United States and may never know that a deadline exists. Even those who are aware of the deadline encounter systemic barriers, such as lengthy backlogs, that can make it impossible to file their application in a timely manner. In many cases, [missing the one-year deadline](#) is the sole reason the government denies an asylum application. Under the expedited asylum process, a person who passes a credible fear interview is considered to have applied for asylum, which means that the one-year filing deadline is automatically satisfied.

PROVING ASYLUM

For asylum applicants, INA § 208 (b)(1)(B)(ii) specifies, “The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”

Demeanor and Credibility

The INA directs that an IJ in assessing credibility should consider the “totality of the circumstances” and “all relevant factors,” including:

the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.

The REAL ID Act states for asylum applicants that a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and

considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record. See INA § 208(b)(1)(B)(iii).

INA § 240(c)(4)(C). See also *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007) (holding that the IJ properly considered the totality of the circumstances in finding that the applicant lacked credibility based on his demeanor, implausible testimony, lack of corroboration, and inconsistent statements).

Respondent Has Burden to Explain Inconsistencies

In *Matter of Y-I-M-*, 28 I&N Dec. 724, 725 (BIA 2019), the BIA held that “if inconsistencies in the record are obvious or have previously been identified” by DHS or the IJ, the IJ is not required to give the respondent a specific opportunity to explain them.

“Credible” and “Reasonable” Fear Interviews

Fear interviews are part of the expedited removal process. When a person is put into the expedited removal process, if they express a fear of returning to their home country or request to seek asylum, they are first screened to see

if they could establish that they have a fear of persecution or torture. Generally speaking, there are two “levels” of fear interviews, most commonly referred to as “credible fear” and “reasonable fear.” A person is said to have a “credible fear” if they can demonstrate a “significant possibility” that they will be able to establish eligibility for asylum or withholding of removal under the Immigration and Nationality Act or withholding of removal or deferral of removal under the Convention Against Torture. A person establishing a “reasonable fear” of persecution or torture has to demonstrate a higher likelihood that they would be eligible for relief from removal.

The fear screening process has been periodically altered by new rules issued by various presidential administrations. Those rules are also often the subject of litigation, making the exact process an individual is subjected to (including the standard of proof needed to establish a “credible” fear) subject to regular change. Additionally, many of the rules are applied only to a subset of individuals, often seemingly at random, due to changing logistical, diplomatic, or humanitarian factors. Therefore, the credible and reasonable fear interview process may be applied differently to different people depending on things such as when they arrived at the border, where they arrived, what country they arrived from, whether they entered at a port of entry or between ports of entry, and other considerations.

At the credible or reasonable fear interview, if an individual is found by the asylum officer to have met the standard applied to them, they are then referred to proceedings where they can submit an application for asylum or other similar protections. Usually, this is done via a referral to an immigration court, where a person is put in removal proceedings initiated with a Notice to Appear. Some pilot programs such as that created by the Asylum Processing Rule created an alternative venue, where people would have their full asylum cases reviewed by an asylum officer rather than an immigration judge, on a significantly truncated timeline. If the asylum officer

determines the person did not establish either credible or reasonable fear, their expedited removal order stays in place. Before removal, the individual may request review of the fear determination by an immigration judge. If the immigration judge overturns a negative fear finding, the individual is treated as if they passed their fear interview and is placed in further removal proceedings through which the individual can seek protection from removal, including asylum. If the immigration judge upholds the negative finding by the asylum officer, the individual will be removed from the United States.

- The Fiscal Year (FY) 2023 fear cases which are Title 42 procedures expansion In FY 2023, USCIS completed 15,523 cases for 5,965 individuals including 1,484 of whom were detained during this screening process, will be afforded an opportunity to apply for asylum defensively and establish that they meet the refugee definition.

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