# AN OVERVIEW OF ASYLUM PRACTICE

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AN OVERVIEW OF ASYLUM PRACTICE

This chapter provides a very brief general overview of the practice of asylum law. It is far from complete, but is intended to serve as an initial foundation on which you will build a lot of specific knowledge about asylum law and practice over the course of the semester.

American asylum law is rooted in both international human rights law and United States immigration law. This overview, therefore, begins with an introduction to the status of refugees in international human rights law, and it continues with an introduction to the status of refugees in United States law. The third section of this overview summarizes the procedural system in which asylum claims are made and adjudicated. The last section sets asylum law into the broader context of United States immigration law, briefly explaining some of the other ways in which individuals may immigrate to the United States.

I. Refugees in International Law

In the aftermath of World War I, large numbers of refugees streamed across Europe, and the League of Nations created a High Commissioner for Refugees (an office that later became the United Nations High Commissioner for Refugees, or

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1 The word “refugee,” when used in its ordinary sense, can refer to any person who has fled from a situation of danger. However, as discussed in this chapter, the word "refugee" has taken on more technical legal meanings. Under both international law and United States immigration law, the term “refugee” is limited to persons who have fled their home countries because of persecution based on certain enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion. In order to be granted asylum, an individual must establish that he or she is a “refugee” in this legal sense.

U.S. immigration law also uses the term “refugee” to refer to a particular immigration status, under which a limited number of individuals who are outside the United States and who have been determined to meet the “refugee” definition are allowed to gain admission. In that second of the two technical meanings of the word, no Clinic clients are “refugees,” since all of them are applying after entering the United States. Our clients are properly termed “asylum applicants,” and if they are granted asylum status, they become “asylees.”
UNHCR) to begin to bring legal order to the international treatment of refugees. The refugee problem was compounded in the years before World War II. Many nations, including the United States, turned away Jewish refugees from Germany. The United States even forced a ship full of such refugees to return to Europe, where many of them perished.

After the facts of the Holocaust were revealed, the international community began to reform international law. An early United Nations resolution provided that no refugee with valid reasons for not wanting to return to his or her former country should be forced to do so. The non-binding Universal Declaration of Human Rights (1948) recognized the right of a refugee to seek asylum.

In 1951, the United Nations completed work on the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (“the Convention”). By this time, many Western countries were more concerned about refugees from the politically repressive regimes in the Soviet Union and its Eastern European satellites, as well as those displaced by Nazi persecution, than with refugees who might flee the carnage of ordinary wars. Therefore, the countries that developed the Convention made an important distinction that strongly influences United States asylum law today. The Convention defined a refugee as a person who is outside his or her own country and is unwilling to return to it because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."

Notably, the drafters did not define the term refugee to include people who had fled their countries because of general conditions of war, civil strife, famine, natural disasters, or economic decline. Because United States law in many ways mirrors the 1951 definition, the key issues in establishing an applicant’s eligibility for asylum include (1) establishing that what the applicant experienced or fears constitutes "persecution," and (2) establishing a causal relationship (a “nexus”) between the actual or feared persecution and one of the five enumerated categories of race, religion, nationality, membership of a particular social group, or political opinion.
Article 33 of the Convention prohibits its signatories from returning any person who satisfies the “refugee” definition to a country where that person’s life or freedom would be threatened because of one of the five grounds listed above. This requirement is often referred to as “non-refoulement,” because of the Convention’s use of the French word *refouler*, which means to expel or return. The Convention also provides certain basic rights for refugees, such as freedom of movement and freedom of religion. The Convention encourages, but does not require, its signatories to provide a process for giving refugees permanent residence and the ability to become citizens. Thus, the Convention creates no right of “asylum,” just an obligation not to return refugees to a place where they will face persecution.

The Convention applied only to persons who were made refugees by events before 1951. A subsequent treaty, the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (“the Protocol”) made the Convention applicable to all refugees, regardless of when their refugee status arose. Although the United States had never signed the Convention, it signed and ratified the Protocol in 1968.²

Some countries subsequently began to expand their conceptions of the kind of refugees who deserve legal protection. For example, in 1969, the Organization of African Unity decided that refugees should include those who fled because of external aggression or events seriously disturbing public order. In 1984, ten Latin American nations signed the non-binding Cartagena Declaration, which advocated providing protection to those fleeing "generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disrupted public order." Since 2004, the European Union has required member states

² The text of 1951 Refugee Convention and the 1967 Protocol can be found on the website of the U.N. High Commissioner for Refugees (UNHCR), at [http://www.unhcr.org/3b66c2aa10.html](http://www.unhcr.org/3b66c2aa10.html). They are also reprinted in compilations of human rights instruments which can be found among the books in the Clinic library.
to grant renewable residence permits not only to refugees who meet the Convention definition, but also to individuals who would face serious threats in their home countries “by reason of indiscriminate violence in situations of international or internal armed conflict.”\textsuperscript{3} In spite of this international trend, however, the United States has adhered to the limitation of the refugee definition to the five grounds set forth in the Convention.

Activities and pronouncements of international institutions have also affected the application of domestic law to refugees. After negotiation of the Convention and Protocol, the UNHCR began to issue formal interpretations of those documents. The most important interpretation is the \textit{Handbook on Procedures and Criteria for Determining Refugee Status} (1979, re-edited 1992).\textsuperscript{4} The \textit{Handbook} includes recommended ways of construing the terms of the Convention, including the concept of persecution and the five protected grounds. In addition, the UNHCR periodically issues guidelines and opinion letters regarding the application of the Convention to new situations (such as conditions in particular countries), to emerging types of claims (e.g., gender-based forms of persecution, gang violence, and children’s asylum claims), and recurring issues in the interpretation of the Convention (e.g., the meaning of “particular social group”). The Executive Committee of UNHCR also periodically issues conclusions (referred to as ExCom Conclusions) interpreting the Protocol and Convention.\textsuperscript{5} Although the interpretations of the UNHCR are not binding on signatory states, they are widely respected and they have in fact often influenced the decisions of officials in the United States and other countries.

\begin{footnotesize}

\textsuperscript{4} We have a copy of the UNHCR Handbook in the Clinic library, in a loose-leaf binder. It can also be accessed at the UNHCR website, at \url{www.unhcr.org/pub/PUBL/3d58e13b4.pdf}.

\textsuperscript{5} For web links to these UNHCR materials, see the “Research Resources” chapter of this manual, Section III.A.
\end{footnotesize}
International law is relevant to U.S. asylum law in two major ways. First, much of the language of the U.S. Refugee Act is borrowed from the Convention. Therefore, the UNHCR’s interpretations of the “refugee” definition and other issues relating to refugee status and non-refoulement may be relied upon by United States tribunals for guidance.\(^6\) Decisions of other countries’ courts interpreting provisions of the Refugee Convention and commentary on the Convention by scholars can serve as persuasive authority as well.

Second, because other international instruments help to define fundamental human rights\(^7\), they may be used to support arguments about the meaning of the term “persecution” under United States law. For example, one U.S. court, in assessing whether China’s refusal to allow an asylum applicant to marry amounted to “persecution,” examined the extent to which the right to marry is deemed fundamental under international human rights law and the U.S. Constitution.\(^8\)

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\(^7\) These other agreements include the International Covenant on Political and Civil Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).\(^7\) Error! Main Document Only. Note that not all of these instruments have been signed by the United States, and some have been signed but not yet ratified.

\(^8\) *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 230 (3d Cir. 2004) (Alito, J.).
II. Refugees in United States Law

Congress passed the Refugee Act of 1980 (amending the Immigration and Nationality Act ("INA")\(^9\)), to implement the United States' obligations under the Protocol to the Refugee Convention. The refugee and asylum provisions of the INA were significantly amended in 1996 by the Illegal Immigrant Responsibility and Immigration Reform Act ("IIRIRA"), and again in 2005 by the REAL ID Act. The INA defines a refugee as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of that country 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.

INA §101(a)(42)(A). Note that this definition is slightly broader than the “refugee” definition contained in the Convention and Protocol, in that it permits asylum based on past persecution as well as on a well-founded fear of future persecution.

The INA and its amendments establish two related, but distinct, mechanisms through which refugees in the United States may seek protection under U.S. law: withholding of removal, and asylum. Congress implemented Article 33 of the Convention in the withholding of removal provisions found in INA § 241(b)(3). Article 33 contains the prohibition against the return ("non-refoulement") of an individual to a country where the person would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. In addition to the

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\(^9\) The INA is codified at 8 United States Code § 1101 et seq. It also has its own internal section numbering, which differs from the U.S. Code section numbers. The Department of Homeland Security, immigration judges and the Board of Immigration Appeals generally refer to statutory provisions by their INA section numbers, not by the corresponding sections of the United States Code. Courts of Appeals and the U.S. Supreme Court, however, generally use the 8 U.S.C. citations.
withholding provisions, Congress enacted provisions in INA § 208 to grant asylum to individuals with a well-founded fear of persecution on account of one of the five grounds. These two basic mechanisms for seeking protection, and their corresponding requirements and standards, are discussed below.

A. Asylum

The INA permits non-citizens who are physically present in the United States (whether or not documented) to apply for asylum. The number of persons who may be granted asylum is not limited by any numerical quota. 83,254 people filed “affirmative” asylum applications in fiscal year 2015, up from 44,446 in FY2013 and nearly 57,000 in FY2014.10 (This means they filed their application with the Asylum Office on their own initiative, rather than first raising the issue in a “defensive” posture after removal proceedings were instituted.) The number of affirmative asylum applications that were granted in fiscal year 2014 (the last year for which these statistics are available) was 14,758.11

As explained more fully below, after filing an asylum application (the “I-589" form), an affirmative applicant for asylum will be interviewed by an asylum officer. The

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11 U.S. Department of Homeland Security, Office of Immigration Statistics, Annual Flow Report, Refugees and Asylees: 2014 (April 2016) at 6, available at https://www.dhs.gov/sites/default/files/publications/Refugees%20%26%20Asylees%20Flow%20Report%202014_508.pdf. Information on the percentage of affirmative asylum applications that are approved is not easily accessible; in 2005, DHS stopped publishing annual “grant rate” statistics. From case completion numbers released by USCIS for the first quarter of 2016 (January-March), it can be calculated that 42.9% of the affirmative asylum applications that were decided during that period by asylum officers nationwide were granted. In the Newark Asylum Office, the grant rate during that time period was 34.7%; in the New York Office, it was 13.4%. (See statistics available at: https://www.uscis.gov/outreach/asylum-division-quarterly-stakeholder-meeting-3.) A similar calculation for the period from April to September of 2015 shows a grant rate of 35.6% in Newark, and 22.6% for New York. See statistics available at: http://www.asylumist.com/2016/02/25/the-easiest-office-to-win-asylum-and-why-you-shouldnt-apply-there/
Asylum Office is part of the Bureau of Citizenship and Immigration Services (USCIS), a branch of the Department of Homeland Security (DHS). The asylum officer may either grant asylum or refer the case to the immigration court for removal proceedings before an immigration judge. In those removal proceedings, the applicant may renew the asylum application and will have a second opportunity to present evidence showing that asylum should be granted. Individuals who are placed in removal proceedings without having filed for asylum affirmatively (for example, someone apprehended by immigration agents and charged with being in the U.S. without authorization) may apply for asylum for the first time in the removal proceedings (these are called “defensive” asylum applications).

In fiscal year 2015, immigration courts nationwide ruled on 41,615 asylum applications, and immigration judges granted asylum to 8,246 individuals. Unsuccessful applicants for asylum in immigration court are ordered removed, or granted voluntary departure in lieu of removal, by the immigration judge.

Prior to March 1, 2003, the Asylum Office belonged to the Immigration and Naturalization Service (INS), which was part of the Department of Justice (DOJ). On March 1, 2003, the INS was abolished and its functions were transferred to three different branches within DHS. USCIS handles immigration services and benefits, including asylum. Immigration enforcement functions, including detention and deportations, are handled by Immigration and Customs Enforcement (ICE). Finally, border and airport inspections are handled by Customs and Border Protection (CBP). The reorganization did not affect the Immigration Court and Board of Immigration Appeals, which remain part of the Executive Office for Immigration Review (EOIR), within the DOJ.

If the applicant is in a lawful immigration status at the time of the Asylum Office’s decision (for example, a person with still-valid authorization to stay in the U.S. under a student visa), then the Asylum Office, instead of referring the case to immigration court, will simply deny the application, leaving the person in the same lawful status as before.

U.S. Dep’t of Justice, Executive Office for Immigration Review, FY 2015 Statistical Year Book (April 2016), at J2 and K1, available at https://www.justice.gov/eoir/page/file/fysb15/download. The overall grant rate in immigration courts nationwide in FY 2015 was 48% (counting only asylum claims that were granted or denied; this does not include applications that were abandoned, withdrawn, or resolved in other ways). Id. at K1. The grant rate in the Hartford Immigration Court (calculated using the same method) was 24%. Id. at K2. Particular immigration judges’ grant rates in asylum cases can be found by searching the Individual Judge Reports on the TRAC immigration website, trac.syr.edu/immigration/reports/judgereports/. The two Immigration Judges in Hartford are Judge Michael W. Straus and the Judge Philip Verrillo. During the period from FY 2009-2014, Judge Straus’s grant rate in asylum cases was 28.3%, and Judge Verrillo’s 53.8%.
Persons who demonstrate to either an asylum officer or an immigration judge that they meet the refugee definition of INA §101(a)(42)(A) should be granted asylum and the right to reside lawfully in the United States, unless they (a) are subject to one of the mandatory statutory bars to asylum,\(^{15}\) (b) fall into certain situations where the asylum regulations provide for the denial of asylum to individuals who satisfy the statutory refugee definition,\(^{16}\) or (c) the adjudicator exercises the Attorney General’s statutory discretion to deny asylum. This discretion is sometimes exercised to deny asylum if the applicant has lied to the judge or to the Asylum Office, has violated U.S. laws even if not so seriously as to be barred, or has some other characteristic that makes the applicant “unworthy” of asylum in the eyes of the adjudicator.\(^{17}\)

Although the standard for a grant of asylum can be stated in a single sentence, it has been embellished through years of interpretation in regulations,\(^{18}\) opinions issued

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\(^{15}\) The statutory bars are listed in INA §§ 208(a)(2), (b)(2) and (d)(6). Applicants barred from obtaining asylum include persons who have participated or assisted in the persecution of others; have been convicted of a particularly serious crime; committed a serious non-political crime outside the U.S.; engaged in terrorist activity (which is broadly defined) or would pose a national security risk; were firmly resettled in a third country before arriving in the U.S.; entered Canada before coming to the United States and could have applied for asylum there; or failed to apply for asylum within one year after entering the U.S. (with certain exceptions). If any mandatory bar is potentially applicable to your case, it will be very important to research the legal contours of the bar and investigate all potentially relevant facts.

\(^{16}\) For example, although any person who suffered past persecution based on a protected ground satisfies the statutory definition of a “refugee,” the asylum regulations provide that applicants who no longer have a well-founded fear of being persecuted, or could avoid persecution by relocating to a different part of their home country and can reasonably be expected to do so, generally will be denied asylum. There are exceptions that allow asylum to be granted on the basis of past persecution alone in certain situations. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1).

\(^{17}\) USCIS Asylum Officers are instructed by their supervisors that they generally should exercise discretion favorably when they find that an applicant meets the eligibility requirements for asylum. Thus, discretionary denials in the Asylum Office are extremely rare. Immigration judges, however, sometimes do deny asylum on discretionary grounds, although the particular immigration judges currently assigned to the Hartford Immigration Court do this rarely.

\(^{18}\) Regulations implementing the INA are codified in Title 8 of the Code of Federal Regulations, a copy of which can be found in the Clinic library. Most of the regulations relevant to asylum claims appear in 8 CFR Part 208. In March 2003, as a result of the reorganization of immigration functions, many immigration regulations were moved or duplicated into new CFR sections. The asylum regulations remain at 8 CFR Part 208, as regulations of DHS. A nearly identical set of asylum regulations now also
by federal courts and the Board of Immigration Appeals,\textsuperscript{19} and secondary literature. You will need to do thorough research on the legal issues significant to your case. The “Research Resources” chapter of this manual provides some useful starting points for your research.

Several benefits accrue to asylees. The most immediate benefit of asylum is that the individual will not be returned to the country where he or she fears persecution. An asylum grant also puts a person on the road to permanent residency and citizenship. One year after the grant of asylum, the asylee may apply for an "adjustment of status" to become a lawful permanent resident.\textsuperscript{20} Four years after receiving his or her “green card,” such a person may “naturalize” and become a United States citizen.

Another important benefit of obtaining asylum is that United States law allows an asylee’s spouse (if married to the asylee at the time he or she applied for asylum) and unmarried children who were under age 21 at the time of the asylum application to obtain “derivative” asylum status. The spouse and children do not have to be in the United States in order to qualify for derivative asylum status. A spouse and any

\textsuperscript{19} The Board of Immigration Appeals (BIA), located in Falls Church, Virginia, is an administrative tribunal created by the Attorney General to hear appeals from decisions of immigration judges. The Attorney General can, and occasionally does, overturn decisions of the BIA. In asylum cases, appeals from a final decision of the BIA or Attorney General are filed with the United States Court of Appeals in the circuit where the immigration court proceeding was held (in our cases, the Second Circuit).

\textsuperscript{20} An asylee can apply for permanent residence after a year of physical presence in the U.S. after being granted asylum. When an asylee is granted adjustment of status, the person’s status as a permanent resident is deemed to begin one year before the date on which the adjustment of status application is approved. INA § 209(b).

Until 2005, there was a statutory annual cap of 10,000 on the number of asylees who could adjust their status to permanent resident. As a result, an asylee applying for adjustment of status faced a wait of up to twelve years before actually becoming a permanent resident. The REAL ID Act of 2005 eliminated the annual cap. Thus, the waiting time for asylee adjustment of status has been reduced, and as of July 2016 was approximately 7 months on average.
qualifying children who are already in the United States can be included as part of the main applicant’s asylum application, and will be granted asylum at the same time as the applicant. Alternatively, an application seeking to have a qualifying spouse and/or children “follow to join” the asylee can be filed within two years after the grant of asylum.

Another benefit granted to asylees is the right to work in the United States. Until 1995, simply filing an asylum application almost always enabled the applicant to obtain a temporary permit to work in the United States, which would remain in effect until the application was adjudicated and during any appeals. As a result of the strong incentive to file for asylum that this created, coupled with understaffing inside the INS, a huge backlog of unresolved asylum applications developed in the early 1990s. The rules and the system of adjudication were changed in 1995 in an effort both to discourage frivolous asylum filings and to encourage expeditious case processing. Under the rules that have governed since 1995, the government is required to, whenever possible, reach a final decision on an asylum application within 180 days after the application is filed. An applicant may not apply for employment authorization until his or her asylum application has been pending for 150 days, and will only be granted work authorization if he or she is granted asylum, or if the case remains undecided after 180 days through no fault of the applicant. (There are complicated rules governing when and how this asylum “clock” runs.)

The importance of work authorization to clients warrants detailed treatment in this manual. Therefore, you will find a more complete discussion of employment authorization in the chapter on Asylum Applicants and Employment. Because work authorization is something your client is likely to be concerned about, you should read that chapter prior to your first client meeting.

A grant of asylum also makes the asylee eligible for certain monetary benefits and services. The chapter of this manual on Post-Adjudication Action includes information about the resources available to asylees.
B. Withholding of Removal

An application for asylum also constitutes an application for withholding of removal under INA § 241(b)(3). (Although the statute uses the term “restriction on removal,” it is referred to in the regulations and in most court and agency decisions as “withholding of removal.”) This provision prohibits the removal of any person to a country where the person’s “life or freedom would be threatened . . . because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” The United States Supreme Court has interpreted this statutory language to require the applicant for withholding to establish a “clear probability” of persecution, meaning that the applicant must show by a preponderance of the evidence that it is more likely than not that he or she will be persecuted. INS v. Stevic, 467 U.S. 407 (1984).21 This is a more demanding standard than the “well-founded fear” standard that applies in asylum cases. As the Supreme Court has noted, “One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.” INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (noting that a 10% chance of persecution would give rise to a “well-founded fear” that qualifies an individual for asylum).

Although the standard for being granted withholding is more stringent than the eligibility standard for asylum, withholding confers a more tenuous status with fewer benefits. Although a person granted withholding of removal cannot be sent to the specified country where he or she would face persecution, removal to any other country is permitted. (It is rare, however, that any country will accept a person who is not a citizen of that country.) Those granted withholding, unlike asylees, do not become eligible to adjust their status to permanent resident (and thus are not on a path to

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21 The current INA § 241(b)(3) is a 1996 re-enactment of former section 243(h), which the Supreme Court construed in Stevic. Under the regulations that implement the withholding statute, a showing of past persecution creates a rebuttable presumption that future persecution is likely. 8 C.F.R. § 1208.16(b)(1).
citizenship). Withholding of removal may be revoked in the future if the government shows, in a hearing before an immigration judge, that persecution is no longer likely. Unlike asylees, persons granted withholding cannot obtain “derivative” status for a spouse or minor child; thus, a grant of withholding may leave family members stranded abroad. Persons granted withholding are, however, entitled to work authorization.

The INA includes bars to eligibility for withholding of removal that are similar to, but not quite as extensive as, the bars for asylum. There is a bar for serious criminal convictions, which is less restrictive than the comparable asylum bar, so that in certain circumstances a conviction that would prevent the granting of asylum will not preclude withholding of removal. A person who was “firmly resettled” in a third country before coming to the U.S. is barred from obtaining asylum, but not withholding. Most importantly, a person who failed to meet the one-year application deadline for asylum (which will be discussed in Section III below) is still eligible for withholding. Thus, withholding of removal can be an important fallback argument in many cases.

If an applicant demonstrates that his or her life or freedom would be threatened on account of one of the five enumerated grounds, and none of the bars to withholding apply, then the immigration judge\(^2\) **must** grant withholding of removal, even if asylum is not granted. A grant of withholding is mandatory, not discretionary, to someone who satisfies all of the elements of the claim. Withholding of removal is the statutory scheme by which the United States seeks to comply with its treaty obligation of *non-refoulement*.\(^2\)

\(^2\) USCIS asylum officers do not have the authority to grant withholding of removal. See 8 C.F.R. §§ 208.16(a), 1208.16(a).

\(^2\) It is controversial whether the United States is actually meeting its treaty obligations through this scheme. Note that someone who has a well-founded fear of persecution based on a protected ground could be denied asylum (on discretionary grounds, or for failure to meet the one year deadline), but still may not be able to meet the higher (“more likely than not”) standard for withholding of removal. Many other countries that have signed on to the Refugee Convention and international law scholars interpret the *non-refoulement* obligation of Refugee Convention to extend to any individual who meets the refugee definition, not just those who can prove that their persecution is probable.
C. Other Possible Forms of Immigration Relief

In addition to asylum and withholding of removal, other remedies may be available to persons who have fled from persecution under certain circumstances. A number of these are briefly discussed below.24

1. Convention Against Torture

In 1999, the U.S. adopted regulations to implement the Convention Against Torture (CAT), an international agreement that the United States ratified in 1994.25 Protection under the CAT is similar to withholding of removal under § 241(b)(3) of the INA in that the United States will not return someone to a country where he or she is likely to be tortured. The applicant for CAT protection must prove that torture is more likely than not to occur, and that state officials would be responsible for it, either directly or through their consent or acquiescence. Although CAT relief can be requested on the asylum application form, only an immigration judge has the authority to grant it; the USCIS Asylum Office cannot do so.

Torture, within the meaning of the CAT and its implementing regulations, is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for purposes that may include extracting a confession, punishing the person for actual or perceived conduct, intimidating or coercing the victim or a third person, or “for any reason based on discrimination of any

24 Also see the discussion in Section IV of a few other routes to immigration that might be open to certain asylum applicants: family-based and employment-based petitions and the diversity lottery.

25 The United States ratified the CAT with certain “reservations.” The U.S. regulations that implement the CAT and govern the granting of CAT relief in immigration court appear at 8 C.F.R. §§ 1208.16(c), 1208.17 and 1208.18.
kind.” Furthermore, the pain or suffering must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” which requires a showing that a public official is aware of the tortuous activity and fails to meet a legal obligation to intervene to prevent it. A government’s inability to stop acts of torture committed by private parties is not enough to establish that public officials have consented or acquiesced in the torture; however, if government officials are “willfully blind” to tortuous activity and refuse to intervene to stop it, that can be enough to show government acquiescence. See, e.g., Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004).

In determining whether an applicant is likely to be tortured in a particular country, an immigration judge must consider all relevant evidence, including but not limited to “evidence of past torture inflicted upon the applicant;” “evidence of gross, flagrant or mass violations of human rights within the country of removal;” and whether the applicant could escape the likelihood of torture by relocating to a different part of the country. If an immigration judge determines that an applicant is likely to be tortured if removed to a particular country, a grant of withholding or deferral of removal under the Convention Against Torture is mandatory.

26 8 C.F.R. § 1208.18(a)(1). The regulations further provide that for mental pain or suffering to amount to torture, it must be “prolonged mental harm” that results from the threat of imminent death; the intentional infliction or threatened infliction of severe physical pain; the actual or threatened administration of mind-altering substances or other procedures “calculated to disrupt profoundly the senses or the personality;” or the threat that another person will be imminently be subjected to death or severe physical pain. 8 C.F.R. § 1208.18(a)(4).

27 8 C.F.R. § 1208.18(a)(1), (a)(7).

28 See also Delgado v. Mukasey, 508 F.3d 702, 708 (2d Cir. 2007). Even if some government officials would act to prevent torture, government acquiescence may be established “where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture.” De La Rosa v. Holder, 598 F.3d 103, 110 (2d Cir. 2010).

29 8 C.F.R. § 1208.16(c)(3).

30 8 C.F.R. § 1208.16(c)(4).
Importantly, relief under CAT is not limited to torture inflicted on account of one of the five grounds covered by the refugee definition (race, religion, nationality, membership in a particular social group or political opinion); it is available to an individual facing likely torture for any reason. Thus, a claim for CAT relief can be an important fallback argument for a client seeking asylum and/or withholding of removal in case the immigration judge is not convinced that the torture the applicant faces would be inflicted based on one of the five protected grounds. In addition, the statutory bars to asylum and withholding of removal under INA § 241(b)(3) (e.g., the bar for those convicted of “particularly serious crimes” or who assisted in the persecution of others) do not preclude a grant of relief under CAT.

The CAT regulations authorize two types of protection: withholding of removal and deferral of removal. CAT withholding of removal is available if the applicant is not subject to any of the statutory bars to withholding of removal under INA § 241(b)(3). Those who are subject to a mandatory bar to withholding of removal are eligible only for CAT deferral of removal. A recipient of CAT deferral may be detained by DHS if deemed a public danger. CAT deferral is also easier to revoke; the government may seek revocation at any time if it believes that the applicant no longer faces likely torture, and the applicant will bear the burden, in a hearing before an immigration judge, of establishing that torture remains probable.31 (With CAT withholding, in contrast, if revocation is sought the government bears the burden of proving that torture is no longer likely to occur).

2. Temporary Protected Status (TPS)

Under INA § 244, the Attorney General may designate specified countries for Temporary Protected Status if, due to ongoing armed conflict, nationals of that country cannot safely return there, or, due to natural disaster or other extraordinary circumstances, the country cannot adequately handle the return of its nationals. The

31 8 C.F.R. § 1208.17.
TPS designation may be granted for a period of 6 to 18 months and may be renewed by the Attorney General if country conditions do not improve. TPS applies only to people already in the United States at the time of the TPS designation. Eligible individuals from qualifying countries must submit an application to USCIS; they will then be granted TPS unless certain disqualifying factors such as criminal convictions apply. The countries that currently have TPS designations (some applicable only to nationals who arrived in the U.S. many years ago) are El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, Sudan, South Sudan, Syria, and Yemen. A current listing of designated countries and criteria can be found on the USCIS website, www.uscis.gov. Persons with TPS are eligible for work authorization. Individuals with TPS are not precluded from applying for asylum.

3. Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, President Obama announced that the U.S. Department of Homeland Security would provide “deferred action” status to young people who would have qualified for relief under the DREAM Act (legislation stalled in Congress that would have granted lawful resident status to children brought to the U.S. at a young age who have lived and gone to school in the U.S. for much of their lives). Deferred action is a discretionary decision made by the government not to pursue enforcement action against an individual for a specified period of time. Although it does not confer lawful immigration status, a grant of deferred action does allow the person to obtain work authorization upon a showing of economic necessity.

Under the DACA program, individuals are eligible for deferred action if they can show that they (1) arrived in the U.S. before the age of 16; (2) continuously resided in

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32 On the USCIS website homepage, under “Other Services,” click on “Humanitarian.” Then click on “Temporary Protected Status.”

33 Sometimes, to protect a country from having to receive a sudden flood of returnees when TPS ends, the United States may provide a way for its nationals to avoid immediate removal. The status is called deferred enforced departure. It represents an exercise of Presidential authority and has no statutory basis. The only country currently covered under DED is Liberia.
the U.S. for at least five years as of June 15, 2012; (3) are currently in school, or have graduated from high school or obtained a GED, or have been honorably discharged by the military; (4) have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and do not otherwise pose a threat to national security or public safety; and (5) were not above the age of 30 as of June 15, 2012. Deferred action is granted for a two-year period, subject to possible renewal.

For eligible individuals already in removal proceedings, Immigration and Customs Enforcement (ICE), the branch of DHS that prosecutes removal cases, processes requests for deferred action. Persons who are not in removal proceedings (including those already under an order of removal) may submit an Application for Consideration of Deferred Action for Childhood Arrivals (Form I-821D) to USCIS.

On November 20, 2014, President Obama announced a new program providing deferred status to the undocumented parents of U.S. citizens and legal permanent residents called the Deferred Action for Parental Accountability (DAPA), together with an expansion of the existing DACA program. DAPA would extend deferred status and employment authorization for renewable three-year periods to undocumented parents of U.S. citizens or legal permanent residents if the parent has had continuous residence in the U.S. since January 1, 2010. The DACA expansion would extend eligibility to those who entered the U.S. by January 1, 2010 and were 16 or under at the time, remove the upper age limit, and extend the deferred action period from two years to three years. However, in February 2015, shortly before DAPA and the expanded DACA were scheduled to go into effect, a federal district court judge in Texas issued a nation-wide preliminary injunction barring implementation of the programs. The injunction was appealed to the Supreme Court which upheld the district court with a 4-4 deadlock in

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34 Forms and filing information can be found at the USCIS website; on the homepage, under the heading “Other Services,” click on “Consideration for Deferred Action for Childhood Arrivals Process.” Policy memoranda and other materials on Deferred Action are available in the Research Resources section of the “M drive” (the Clinic portion of the law school server), in the Asylum & Human Rights/Resources/ICE and DHS Policies/Deferred Action Requests folder.
June 2016. The case is now going to go forward on the merits, but it is unclear at this time when, if ever, the new programs will be implemented.

4. **Special Immigrant Juvenile Status**

Children who had to flee from an abusive family situation in their home country, or from harm their parents could not protect them against, may qualify for this form of relief. A juvenile court in the United States must find that the child has been abused, neglected or abandoned, is eligible for foster care or guardianship, and that it is not in the child’s best interest to return to his or her home country. In Connecticut, a juvenile court’s jurisdiction to make these findings lasts until age 18. An application may then be filed with USCIS for “Special Immigrant Juvenile” status under INA § 101(a)(27)(J), which, in the absence of certain bars, will lead to a grant of permanent residence. As long as the requisite juvenile court finding is obtained by age 18, an individual remains eligible for a SIJ grant up to age 21. If your client might qualify, you should consult with the Center for Children's Advocacy, which has experience handling juvenile court proceedings in SIJ cases.

5. **“T” and “U” Visas for Victims of Trafficking and Crimes**

The Victims of Trafficking and Violence Prevention Act of 2000 added these two new categories of visas in INA §§ 101(a)(15)(T) and (U). Aliens present in the United States who have been victims of severe forms of trafficking in persons, such as sex-worker trafficking, involuntary servitude or debt bondage, may be eligible for a “T” visa. Victims of certain serious crimes committed in the United States (including domestic violence and sexual assault) may qualify for a “U” visa. The individual must be able and willing to provide information to law enforcement authorities investigating or prosecuting of these crimes. Persons who have been granted “T” or “U” visas are eligible for permanent residency after three years.35

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35 A useful summary of the requirements for these visas can be found in AILA's Asylum Primer by Dree Collopy, available in the Clinic library.
6. **ABC Class Members**

In 1990, the settlement of the "ABC" class action, *American Baptist Churches v. Thornburgh*,\(^{36}\) gave a unique although temporary status to 150,000 Salvadoran and Guatemalan refugees then in the United States. The lawsuit alleged that INS asylum officers and immigration judges were categorically denying all Salvadoran and Guatemalan asylum claims. The result of the settlement was that these refugees obtained the right to have their asylum applications reviewed a second time by the INS. Certain Salvadoran and Guatemalan nationals who entered the U.S. in or before 1990 and filed an ABC class registration form by 1991 may still be eligible for this relief.

7. **NACARA and the Haitian Relief Act**

In 1997 Congress passed legislation that had an ameliorative impact on some of the harsh results of the 1996 IIRIRA legislation. The Nicaraguan and Central American Relief Act (NACARA) permits many Nicaraguans and Cubans, who would not otherwise be eligible, to remain in the United States and to adjust their status to permanent residence. NACARA also permits certain individuals from El Salvador, Guatemala, and the former Soviet bloc to apply for suspension of deportation and other relief under the more generous rules that were in place prior to IIRIRA. The eligibility criteria differ by country of nationality and must be checked carefully when representing a client from one of the designated countries. In 1998, the Haitian Refugee Immigration Fairness Act (HRIFA) prevented the removal of an estimated 48,000 Haitians who fled persecution in the early 1990s. The deadlines to apply for both of these forms of relief largely passed in 2000, although in some limited circumstances applications may still be accepted.

8. **Cuban Adjustment Act**

The Cuban Adjustment Act of 1966 allows Cubans who have been admitted or paroled into the U.S. (and most Cubans who present themselves to immigration

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authorities upon entering the U.S. will be paroled), together with their spouses and children, to apply for permanent residence status one year after their admission or parole.

9. **Cancellation of removal**

In rare cases, the Clinic's clients may be eligible for cancellation of removal under INA § 240A(b). This requires a showing of continuous residence in the United States for a minimum of ten years, good moral character, no convictions for certain criminal offenses, and that the removal would cause “exceptional or extremely unusual hardship” to certain U.S. citizen or legal permanent resident family members legally residing in the United States. This relief can be awarded only in immigration court proceedings (not by the USCIS Asylum Office). Check the statute and applicable regulations carefully if cancellation of removal appears to be a possibility. If it is a viable claim, it should be requested as part of the initial pleading filed in immigration court.37

10. **Derivative Citizenship**

If your client has a parent, grandparent, or, in some cases, even a great-grandparent who was born in the United States and/or held U.S. citizenship for other reasons, it is possible that your client can make a claim for derivative U.S. citizenship. Moreover, if it can be established that your client was born in the United States, he or she is a U.S. citizen. The rules regarding derivative citizenship are complex and have changed over time – and which version of the law applies often varies depending on when the client’s relative was born and/or lived in the U.S. If there is any possibility that your client may be eligible for citizenship, the issue should be carefully researched.

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37 There is also a version of cancellation of removal available for people who have been legal permanent residents for at least five years, have been in the U.S. at least seven years, and have not been convicted of an aggravated felony. INA § 240A(a). This comes into play when a person who is already an LPR becomes deportable (usually based on a criminal offense), and will rarely apply to Clinic clients.
11. **Prosecutorial Discretion**

Since the summer of 2011, the Department of Homeland Security has made a series of announcements concerning its intent to eliminate low priority cases from the immigration court dockets by offering termination of removal proceedings or “administrative closure” in appropriate cases. Asylum applicants whose cases have been referred to immigration court, as well as defensive asylum applicants in removal proceedings, may be considered by ICE for these forms of relief. Under a memorandum issued by the Secretary of Homeland Security in November 2014, ICE attorneys are strongly encouraged to exercise prosecutorial discretion in all cases that do not fit within DHS’s civil enforcement priorities. Those priorities focus agency resources on removing people who pose security threats; have been convicted of felony offenses, serious misdemeanors, or multiple misdemeanors; entered the U.S. unlawfully after January 1, 2014; or are already under an order of removal. Termination of removal proceedings and administrative closure, unlike “deferred action,” do not make a person eligible for work authorization, although some asylum applicants may qualify for work authorization on other grounds. (See the chapter of this manual on Asylum Applicants and Employment).

12. **Voluntary Departure**

An applicant who is denied asylum and withholding of removal may be eligible for voluntary departure (i.e., to leave the country voluntarily), as an alternative to forced removal. Voluntary departure, authorized under INA § 240B, allows an immigration judge to grant certain aliens a period of time in which to depart the country voluntarily.

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38 Administrative closure removes a case from active status on the immigration court's calendar, but proceedings can be resumed at any time at the request of either party.

39 Memorandum from DHS Secretary Jeh Johnson, “Policies for the Apprehension, Detention and Removal of Undocumented Aliens,” November 20, 2014, available at http://www.dhs.gov/immigration-action (click on “Executive Action” and then “Revise Removal Priorities”). Other DHS memoranda concerning prosecutorial discretion and the criteria used by ICE attorneys to exercise it can be found in the Research Resources folder on the Clinic’s M: drive: Asylum & Human Rights\Research Resources\ICE and DHS Policies\Prosecutorial Discretion.
in lieu of being removed. This remedy can be an important one, particularly for an individual who may be able to immigrate lawfully at some future date. Leaving the country under a removal order results in a bar to future admission to the U.S. for a minimum of five (or, in many situations, ten or twenty) years. By contrast, leaving under an order of voluntary departure permits an alien to reenter lawfully if he or she is able to secure a visa for travel to the U.S. Voluntary departure may also be attractive to an individual who has the ability to travel to another country in which he or she would be safe from persecution. However, voluntary departure can also have significant disadvantages: a person granted voluntary departure who fails to comply with its conditions may be subject to penalties that leave him or her worse off than if there had been an order of removal.40

The requirements for voluntary departure vary, depending on whether it is sought at the conclusion of a removal hearing or is requested earlier. The early-request form of voluntary departure has looser eligibility requirements and somewhat more liberal terms -- but it requires the applicant to withdraw all other requests for relief (including any claim for asylum, withholding or CAT relief). To be eligible for voluntary departure at the conclusion of a removal hearing, an individual must establish that he or she was present in the United States for at least one year before being placed in removal proceedings, has been a person of “good moral character” for the preceding five years, holds a valid and current passport, and has the financial means and intention to depart. An applicant who receives this form of voluntary departure will be required to post a removal bond of at least $500. A grant of voluntary departure at the conclusion of proceedings does not preclude an appeal, and the individual will be allowed to remain while the appeal is pending. See INA § 240B and 8 C.F.R. § 1240.26 for the specific conditions and restrictions, and penalties for failure to depart, applicable to each form of voluntary departure.

III. **Asylum procedures**

Individuals may apply for asylum either upon arrival in the United States or within a relatively short time thereafter. One of the amendments made to the INA by IIRIRA in 1996 was a new requirement, contained in INA § 208(a)(2)(B) & (D), that an asylum application must be submitted within one year of the applicant’s arrival in the United States. Applicants have the burden of establishing “by clear and convincing evidence” that they have satisfied this requirement. This can be difficult for applicants who entered without documentation, many of whom have little but their own testimony to confirm when and how they arrived. Applicants who fail to meet the one-year filing deadline are ineligible for asylum unless they fall within one of the exceptions set forth in the statute: that there were *extraordinary circumstances* for not filing within the first year, or *changed circumstances* materially affecting eligibility for asylum. Regulations found at 8 C.F.R. § 208.4 and 1208.4 elaborate on when these exceptions may apply.\(^{41}\) By statute, unaccompanied minors are not subject to the one-year deadline. INA § 208(a)(2)(E).\(^{42}\)

As noted, applicants must be physically present in the United States to apply for asylum or withholding. However, their immigration status in the United States does not affect their eligibility for relief. They may apply for asylum and withholding whether they

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\(^{41}\) For detailed information on how the USCIS Asylum Office interprets and applies the one-year deadline and its exceptions, see the one-year deadline chapter of the Asylum Officer Basic Training Course, a copy of which is in available in the Clinic library. *See also* Philip Schrag et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L. Rev. 651 (2010).

The immigration reform bill passed by the U.S. Senate on June 27, 2013 included a provision that would repeal the one-year deadline for asylum. At this time, however, it appears unlikely that any immigration reform legislation will be approved by both houses of Congress.

\(^{42}\) The USCIS Asylum Office takes the view that being a minor, whether unaccompanied or not, will generally qualify as an “extraordinary circumstance” that excuses a late filing. *See* Asylum Officer Basic Training Course, One-Year Deadline chapter.
are here legally or not. An asylum application may be filed either affirmatively with USCIS or as a defense in removal proceedings.

An affirmative asylum application is initiated by filing an asylum application form, Form I-589, with a USCIS Service Center (in our part of the country, the Vermont Service in St. Albans, VT). Great care must be taken to ensure that I-589 is properly filed within the one-year deadline. Supporting materials, which typically consist of a legal brief and an indexed and tabbed package of documentary evidence (which may contain a detailed affidavit from the client, witness statements, reports of medical, psychological, country conditions or other experts, country conditions reports, newspaper articles, etc.), may be submitted to the Asylum Office in advance of the asylum interview. (The Newark Asylum Office requires that materials be submitted no later than seven days before the scheduled interview date. The New York Asylum Office only requires that materials be submitted the morning of the interview, though if you have an extensive filing, it might be prudent to send it in a few days in advance.)

Affirmative applications are reviewed by USCIS asylum officers, who are specially trained to evaluate asylum claims.\footnote{Detailed information about the procedures followed by USCIS in processing asylum applications can be found in the Affirmative Asylum Procedures Manual, last revised May 2016, available at https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf. A copy is also available on paper in the Clinic library, and on the \textit{M:} drive in the "Research Resources" folder. The Asylum Officer Basic Training Course (also available in the Clinic library and on the \textit{M:} drive), includes several chapters that provide guidance on how an asylum officer should conduct an interview and prepare a decision.} Many are lawyers, although some are not. Asylum interviews for applicants from Connecticut (and elsewhere in the northeast) are typically conducted at USCIS's Newark Asylum Office, in Lyndhurst, New Jersey.\footnote{For applicants who live in Massachusetts or further north, interviews are conducted at the Boston sub-office of the Newark Asylum Office.} Asylum Office guidelines provide for scheduling the asylum interview no more than 45 days after the I-589 is filed. However, as a result of the recent surge in Central American arrivals at the southern U.S. border, asylum officers in the Newark Asylum
Office now spend much of their time conducting screening interviews at detention centers, resulting in long delays – as much as 3 years – in the scheduling of affirmative asylum interviews. Interviews of asylum applicants who are minors are scheduled on an expedited basis, and sometimes do take place relatively quickly. The Newark Office will also consider requests to expedite the scheduling of an interview if there are compelling reasons, such as a spouse or child who remains at risk in the client’s home country. Unfortunately, the Newark Asylum Office does not consider representation by a law school clinical program to be a compelling reason. The New York Asylum Office (located in Bethpage, Long Island) has less of a backlog, and generally is able and willing to schedule cases for law school clinics within about 45 days. We have developed a system where, after the filing of the asylum application with the Vermont Service Center and its initial assignment to the Newark Asylum Office, we can get the case transferred from Newark to New York to facilitate the scheduling of an interview.

Asylum interviews typically last anywhere from one to three hours. The interview is supposed to be non-adversarial, but officers do sometimes engage cross examination-like questioning to probe for inconsistencies or implausibilities. The applicant may be represented by an attorney or other representative at the interview, but the advocate’s role is limited. Most asylum officers allow the representative to ask additional questions of the client (usually after the asylum officer is done questioning), and the representative is always allowed to make a closing statement. Beyond that, asylum officers vary in the degree to which they allow an applicant’s representative to participate. However, the advocate’s advance work in preparing the application packet and preparing the client for the interview (including “moots” so that the client is prepared to respond to tough questioning) is crucial to success.

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After the interview, the asylum officer will set a date, usually exactly two weeks after the date of the interview, for the applicant to return to the USCIS Asylum Office to pick up the decision.\textsuperscript{46} The decision will be a grant (or a recommended approval\textsuperscript{47}) of the asylum application, or, if the asylum officer does not feel that the application should be approved, a referral of the case to Immigration Court for removal proceedings.\textsuperscript{48} If the case is referred to the Immigration Court, the applicant will be served with a “Notice to Appear,” the charging document that states the factual and legal grounds upon which the government seeks to remove the individual from the United States. The applicant has the right to renew his or her asylum claim with the immigration judge as a defense to the government’s allegations and charges. The hearing is a \textit{de novo} proceeding; that is, the fact that the asylum officer did not grant asylum is not a negative factor in the new proceedings against the applicant.\textsuperscript{49}

A “defensive” application is an asylum application that is initially filed with the Immigration Court as a defense to removal. Defensive applications may be filed in three types of cases. First, if a non-citizen living in the United States, who has not filed

\begin{footnotesize}
\textsuperscript{46} In certain categories of cases, the Asylum Office’s proposed decision must be reviewed by Asylum Office Headquarters in Washington, a process that can take a few months to a few years. In these cases, the Asylum Office will mail the decision to the applicant and his or her representative when it is ready, rather than requiring the applicant to return to pick up the decision. Mail-outs may also be used in other situations where the Asylum Officer anticipates that the completion of a decision within two weeks will not be possible.

\textsuperscript{47} A recommended rather than final grant is issued if the required security checks have not been completed. A recommended grant will become final upon the completion of security checks, unless disqualifying information is discovered through that process.

\textsuperscript{48} In certain situations, the asylum officer may deny the application rather than refer the case to an immigration judge. See 8 C.F.R. \textsection 208.14. The most common denial situation occurs when a person is still “in status” at the time of the decision (e.g., someone who is lawfully in the U.S. under an unexpired visa, or someone who has TPS). In such cases, the individual simply retains his or her existing immigration status, and is not referred to Immigration Court.

\textsuperscript{49} However, statements that the applicant made at the asylum interview may be introduced as evidence in removal proceedings. The trial attorney for ICE may call the asylum officer as a witness to the applicant’s statements during the interview (this rarely happens), or may seek to introduce into evidence the “Assessment to Refer” and/or interview notes prepared by the asylum officer (this happens more frequently).
\end{footnotesize}
an affirmative application for asylum, is apprehended by immigration authorities and put into removal proceedings (typically, this would be an undocumented person or someone whose visa has expired who is arrested by ICE for being in the U.S. unlawfully), that person may file a Form I-589 and have the asylum/withholding of removal claim adjudicated by the immigration judge. A second category of defensive asylum claims involves unauthorized entrants who are apprehended or turn themselves in to DHS officials at the border, or are caught within 100 miles of the border within 14 days after entry. Under INA § 235, added by IIRIRA in 1996, such individuals are subject to “expedited removal” – removal by DHS without a hearing before an immigration judge. However, if a person expresses a fear of harm in their home country, the person cannot be summarily returned,50 but must be held for a “credible fear” interview, conducted by USCIS Asylum Officer, to determine if the person has reasonable possibility of succeeding with an asylum claim. An applicant who successfully makes it through this credible fear screening is issued a Notice to Appear and placed in removal proceedings, where an asylum application may be filed and will be adjudicated by the immigration judge.

The third category of defensive claims are those filed by unaccompanied minors. Under the 2008 Trafficking Victims Protection Reauthorization Act, they are not subject to expedited removal or credible fear screening. Instead, DHS releases them into the custody of the Department of Health and Human Services’ Office of Refugee Resettlement (ORR). ORR is supposed to care for the child in an appropriate facility until the child can be released into the care of a responsible adult in the U.S. Such children are served with a Notice to Appear and placed in removal proceedings. They may file an application for asylum with the Immigration Court, but, provided that the child’s unaccompanied minor status has not been terminated, the child has an

50 In February 2005, the U.S. Commission on International Religious Freedom issued a report which found serious flaws in the expedited removal system that have resulted in inappropriate removals of individuals who may face persecution in their home country. The report is available at the USCIRF’s website, www.uscirf.gov (click on “Issues,” and then “Asylum and Refugees”).
opportunity to have the asylum application adjudicated through a non-adversarial proceeding in the USCIS Asylum Office.\textsuperscript{51} The immigration court will put the removal case on hold while this occurs. If the Asylum Office does not grant asylum, the removal proceedings will resume and the asylum application will be adjudicated by the immigration judge as part of the removal proceedings.

The Immigration Court, unlike the USCIS Asylum Offices, is not part of the Department of Homeland Security. It belongs to the Executive Office for Immigration Review ("EOIR"), a branch of the United States Department of Justice. The trial attorneys who represent the government in immigration court proceedings (who serve, in effect, as prosecutors), are employees of the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE). Removal proceedings are adversarial, with the ICE trial attorney on one side, the "respondent" and his or her counsel on the other, and the immigration judge as impartial adjudicator. Our cases before the Immigration Court are generally in Hartford, on the sixth floor of the federal courthouse at 450 Main Street, where Immigration Judges Michael W. Straus and Philip Verrillo preside.\textsuperscript{52}

All applicants asserting a claim to asylum in removal proceedings (including those referred after an Asylum Office interview) must first appear, as directed in the Notice to Appear, at a "Master Calendar" hearing before an immigration judge. At this hearing, the applicant is called upon to plead in response to the Notice to Appear. If the applicant has not yet submitted an asylum application, the judge will set a deadline for submitting the I-589, and schedule another Master Calendar hearing for this purpose.

\textsuperscript{51} INA § 208(b)(3)(C).

\textsuperscript{52} Sometimes judges from other courts visit and preside over cases in Hartford, so it is possible that an IJ other than Judge Straus or Judge Verrillo may hear your case. Generally, the Court provides advance notice of the name of the presiding judge. A third judge based in Hartford, Daniel Morris, presides only at cases of persons held in immigration detention, so we do not generally see him in our cases.
At the Master Calendar hearing, provided the applicant has filed an I-589, the judge will also set a date for a hearing on the merits (the “Individual hearing”). In Clinic cases, we make considerable efforts to arrange to have the Individual hearing scheduled late in the semester so that all interns will have time for thorough preparation.

Between the Master Calendar and the Individual hearing dates, the applicant and his or her advocate locate and prepare additional evidence for the record, and may identify fact and/or expert witnesses who will testify in person, by telephone, or by written affidavit. The advocate will help to prepare his or her client (and any other witnesses) for direct examination at the hearing, and for cross-examination by the ICE trial attorney, and may also submit a legal brief (the Clinic routinely does this). All exhibits and briefs must be served on the ICE trial attorney and filed in Immigration Court at least fifteen days before the Individual hearing, unless the judge orders a different filing date.

Most removal hearings are open to the public, but hearings involving an asylum claim will be closed to the public if the applicant so requests. Individual hearings are generally scheduled for three hours, although longer or shorter hearings are possible. At the hearing, the applicant’s advocate presents testimonial and documentary evidence from the applicant and from any other witnesses, defends the applicant and the applicant’s witnesses during cross-examination (e.g., by objecting to improper questions and conducting redirect examination), and makes a closing statement in support of asylum and any other relief that is requested. The judge generally issues an oral

53 8 C.F.R. § 1003.27.

54 Asylum applicants generally have a right to maintain the confidentiality of all information pertaining to the asylum application. See 8 C.F.R. § 208.6 and 1208.6. Accordingly, an immigration court hearing involving an application for asylum or withholding of removal will be closed to the public if the applicant so requests. 8 C.F.R. § 1240.11(c)(3)(i). Such requests may be made orally at the hearing.

55 Counsel for ICE also has the right to call witnesses to provide evidence that the applicant should not be granted asylum. 8 C.F.R. § 1240.11(c)(3)(iv). However, the government rarely presents its own witnesses.
decision and opinion at the end of the hearing. However, there are times when a judge continues the hearing for further testimony or takes the case under advisement and issues an oral or written decision at a later date.\textsuperscript{56}

If the judge does not grant asylum or other relief, the judge will order the applicant removed to a specific country, usually the person’s country of citizenship. In limited circumstances, an applicant may make a motion to the immigration judge to reopen or reconsider an adverse decision.\textsuperscript{57} An adverse ruling by the immigration judge may be appealed within 30 days to the Board of Immigration Appeals (the Notice of Appeal must be received at the BIA’s office in Falls Church, Virginia, by the 30th day after the judge’s decision was rendered). Asylum applicants generally are not detained while their appeals to the BIA are pending. However, the Department of Homeland Security has authority to detain asylum seekers during their proceedings.\textsuperscript{58}

IV. United States Immigration Law

Asylum law is an important but small segment of U.S. immigration law. This section of the overview is intended to describe the U.S. immigration system generally,
for context. Immigration law is a constantly changing field, so you should not rely on the information contained in this section as a basis for advising your client without doing further research.

During FY 2014, USCIS approved 14,758 asylum applications, with immigration judges granting asylum in another 8,775 cases. During FY 2014, USCIS approved 14,758 asylum applications, with immigration judges granting asylum in another 8,775 cases. By contrast, the United States admitted over a million immigrants as lawful permanent residents (people who receive "green cards") in FY 2014. The people who obtain asylum, therefore, represent only a small fraction of U.S. immigrants.

A. Legal Immigration and Lawful Permanent Residence

In addition to adjustment of status after a grant of asylum, people may become lawful permanent residents in the following ways:


61 Of all those who were granted permanent residence in FY 2014, only 3.8% were asylees. Another 9.5% were refugees admitted through the overseas refugee resettlement program. Family-sponsored immigrants were by far the largest group, constituting 63.5% of the total. Employment-based immigrants were the next largest, at 14.9%. Id., Table 2.

62 In addition to the categories listed here, a person of good moral character who entered the United States before 1972 and has maintained continuous residence may apply for permanent residence. The Immigration Act of 1990 also provides for adjustment of status for "special immigrants," defined as certain religious workers, present or former United States government employees abroad, former Panama Canal Zone government employees, foreign medical graduates, Amerasian children, military aliens, and juveniles found to be dependent by a state Juvenile Court. Persons granted cancellation of removal in immigration court (discussed above in Section II.C) also have their status adjusted to permanent resident.
1. **Family-Based Petitions**

a. **Immediate Relatives.** A spouse, parent, or unmarried child under age 21 of a United States citizen (these are called "immediate relatives") may immigrate to the United States and obtain United States residence comparatively easily. There is no annual or per country cap on their admission.

b. **Family-Sponsored Preferences.** More remote relatives of United States citizens (children over 21, children who are married, and siblings) and the spouses and unmarried children of lawful permanent residents may qualify to immigrate under various family preference categories, subject to numerical limits. The maximum number of family-preference visas is determined annually, but may not go below 226,000 persons per year. Furthermore, there are annual per-country sublimits. Once the sublimit is reached, a waiting list is formed, and a person must wait for a visa to be issued. The length of the wait varies with the preference category; for some categories, it can be years. Monthly visa bulletins issued by the U.S. State Department, which are available on their website, can be consulted for current waiting times.

2. **Employment-Based Petitions**

Prospective employers can sponsor certain categories of employees for residency in the United States. The limit on the number of visas issued in these categories is 140,000 annually. Many of the employment preference categories are backlogged as well. There are far more of these visas available for skilled workers (those with advanced degrees or special skills) than for unskilled workers, and in most cases an employer must prove to the Department of Labor that there are no United States workers available and willing to perform the job offered to the non-citizen employee.

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63 INA § 201(c). In addition, there are annual sublimits for each of the four family preference categories.

64 This limit is increased by the number of available family-sponsored preference visas that went unused in the previous year, if any. INA § 201(d).
3. **Refugees**

People who apply for refugee status while outside of the United States (e.g., at embassies or refugee camps) may seek admission based on a well-founded fear of persecution (the same standard applied to asylum applicants, who, by definition, apply from within the United States or at its border). The maximum number of refugee admissions, with further limits by region, is determined by the President annually and is currently set at 85,000. Individuals admitted as refugees, like asylees, are eligible to apply to become lawful permanent residents after being physically present in the United States for one year.

4. **Diversity Immigrants**

The United States holds an annual lottery to admit 50,000 "diversity" immigrants, with preference given to people from countries whose nationals have not immigrated legally to the United States in high numbers within the prior five year period. People from certain countries are ineligible to receive diversity visas. Winners are selected at random from among the tens of millions of applications. To be eligible, a lottery applicant must have a high school diploma or its equivalent, or have been employed in a job requiring a minimum of two years training or experience. The dates to apply are announced in the summer of each year. There is usually a one- to two-month window

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65 INA § 207(a). The annual Presidential determination, in addition to setting an overall refugee limit, creates further geographic limitations. For FY 2016, these regional refugee ceilings are 25,000 for Africa, 13,000 for East Asia, 4,000 for Europe and Central Asia, 3,000 for Latin America and the Caribbean, 34,000 for the Near East and South Asia, and 6,000 as an “unallocated reserve.” See Presidential Memorandum – Refugee Admissions for Fiscal Year 2016 (September 29, 2015), available at https://www.whitehouse.gov/the-press-office/2015/09/29/presidential-determination-refugee-admissions.

66 INA § 209. A refugee whose adjustment of status application is approved becomes a permanent resident as of the date he or she first arrived in the United States. INA § 209(a)(2).

67 INA §§ 201(e) and 203(c). The INA authorizes 55,000 diversity visas each year, but under the Nicaraguan and Central American Relief Act of 1997 (NACARA), 5,000 are set aside for use under the NACARA program.
between October and December in which people can apply. If you are in the Clinic in the fall semester, you might want to consider applying for this lottery for your client.

Note that, although undocumented aliens are eligible to enter the diversity lottery, many will face bars to adjusting their status to that of a permanent resident even if they “win.” Before advising an undocumented client to enter the diversity lottery, you should carefully research this issue.

B. Unlawful Immigration

There are approximately 10.9 million unauthorized immigrants living in the United States. These unauthorized residents either entered the United States without inspection or overstayed visas that were granted for temporary purposes (such as tourist or student visas). A Comprehensive Immigration Reform bill that passed the U.S. Senate on June 27, 2013 would have allowed many unauthorized immigrants who entered the U.S. before 2012 to acquire a provisional lawful status that would provide a path to eventual permanent residence and citizenship. The House of Representatives did not act on the bill, however, and immigration reform legislation is unlikely to make progress in the current Congress.

C. Temporary Admissions

About 61 million people came to the United States in FY 2013 with non-immigrant admissions, which authorized them to remain temporarily. There is a

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dizzying array of non-immigrant visa categories, each usually referred to by a capital letter that corresponds to the applicable subsection of INA § 101(15). Some of the more common types are:

- **B 1-2**: Visitors (tourist or business)
- **E**: Traders or investors
- **F, J, M**: Students
- **H1**: Specialty occupation
- **H2-A**: Agricultural workers
- **H2-B**: Temporary non-agricultural workers
- **L**: Company transferees
- **K**: Fiancees of U.S. citizens and their children
- **O, P**: Artists, entertainers and athletes; outstanding individuals in their fields
- **R**: Religious workers

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70 Kurzban’s Immigration Law Sourcebook, which we have in the Clinic library, is a good source of information about visa issues.