

HIV + ASYLUM LEGAL HIGHLIGHTS

Oasis Legal Services

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- Our mission: Oasis Legal Services proudly provides quality legal immigration services to under-represented low-income groups with a focus on LGBTQIA+ communities. By acknowledging, respecting, and honoring their struggles, we empower immigrants so that dignity grows and integrity blooms.
- We are a nonprofit 501(c)(3) organization providing comprehensive legal services to assist LGBTQIA+ immigrants:
 - Screening for immigration relief
 - Affirmative asylum
 - Residency
 - Citizenship
 - Family petitions

OASIS LEGAL SERVICES

An Introduction



AGENDA

- Asylum Review
- Introduction of Case Hypotheticals
- Where does an HIV+ diagnosis come into play in an asylum case?
 - Past persecution
 - Well Founded Fear
 - Other Serious Harm
 - One Year Filing Deadline
 - Credibility
- Best Practices for Competently Representing an HIV+ Asylum Seeker
 - Confidentiality
 - Education
 - Connection to resources



ELEMENTS OF AN ASYLUM CASE

INA § 101(A)(42)(A); *SEE ALSO* 8 CFR § 208.13

1. Harm that rises to the level of persecution
2. On account of ("nexus")
3. Protected grounds
 - race,
 - religion,
 - nationality,
 - political opinion, or
 - particular social group
4. By the government **OR** by non-government actors that the government is unable or unwilling to control



PARTICULAR SOCIAL GROUP

1. **Immutable or fundamental characteristic:** members of the group cannot change or should not be required to change because the characteristic is fundamental to their individual identities or consciences

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)

2. **Socially distinct:** the group is perceived as a group by society and treated distinctly

Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006)

3. **Particular:** the group is defined in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons

Matter of W-G-R-; *Matter of M-E-V-G-*; *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008)



HOW TO ESTABLISH ASYLUM ELIGIBILITY

1. Past persecution + rebuttable presumption of a well-founded fear of future persecution
 - Government burden to rebut by preponderance of evidence
 - Changed circumstances OR
 - Reasonable Internal Relocation
2. Well-founded future persecution

Even where future fear has been rebutted, two ways to discretionary asylum grant:

1. Humanitarian Asylum: Other Serious Harm (no nexus requirement)
 - Past persecution + other serious harm upon return
 - E.g. harm from criminals/gangs; medical/health harm
2. Humanitarian Asylum: "Severe and Atrocious"
 - Compelling reasons for not returning based on the severity of past harm



EXCEPTIONS TO ONE YEAR FILING DEADLINE

INA § 208(A)(2)(D);
SEE ALSO 8 CFR §§ 208.4(A)(4),(5)

Extraordinary circumstances “relating to the delay in filing the application within [1 year]”

- Serious illness or mental or physical disability
- Lawful status
- Legal disability
- Ineffective assistance of counsel (with procedural hurdles)
- Other circumstances

Changed circumstances which “materially affect the applicant’s eligibility for asylum” + reasonable time

- Change in applicant’s country
- Change in applicant’s personal circumstances



CASE HYPOTHETICALS

Fernando

- Asylum seeker from Brazil
- Diagnosed with HIV in Brazil in 2017
- In Brazil:
 - Faced employment discrimination and ultimately fired from his job because of being HIV+
 - Experienced physical abuse from his partner and neighbors for being HIV+
 - Had difficulty consistently accessing HIV medication
- Entered the U.S. in Sept 2021, applied for asylum in February 2022

William

- Gay asylum seeker from Honduras
- In Honduras:
 - Experienced sexual abuse where the abuser insulted him for being gay
 - Experienced physical abuse from his parents for being feminine
- Entered the U.S. in December 2005
- Diagnosed with HIV in the United States in 2017
- Submitted his asylum application in June 2021



POLLS



WHERE DOES HIV+ STATUS COME INTO PLAY IN **FERNANDO'S** ASYLUM CASE?

Past Persecution

1. What is a possible particular social group for Fernando?
2. What harm did he experience because of this PSG?
3. How do we show nexus?



WHERE DOES HIV+ STATUS COME INTO PLAY IN **FERNANDO'S** ASYLUM CASE?

Well-Founded Fear

1. Rebuttable presumption because of past persecution!
2. Likelihood of Harm
3. Severity of Harm
4. Reasonableness of Relocation



WHERE DOES HIV+ STATUS COME INTO PLAY IN **FERNANDO'S** ASYLUM CASE?

Other Serious Harm

1. Future looking analysis
2. Need to have first established past persecution
3. Harm that rises to the level of persecution BUT no nexus for the harm



WHERE DOES HIV+ STATUS COME INTO PLAY IN WILLIAM'S ASYLUM CASE?

Well-Founded Fear and Other Serious Harm

1. How does his HIV diagnosis impact the well founded fear analysis?
2. Would William have a rebuttable presumption of a well-founded fear?
3. Can we argue other serious harm in his case as well?



WHERE DOES HIV+ STATUS COME INTO PLAY IN WILLIAM'S ASYLUM CASE?

One Year Filing Deadline

1. Could his HIV diagnosis be a changed circumstance for William? (remember entry in 2005, HIV diagnosis in 2017, asylum application filed in 2021)
2. Could his HIV diagnosis be used in another way to help William overcome the one year filing deadline?



CASE HYPOTHETICALS ROUND 2

Gerardo

- Gay asylum seeker from Mexico
- In Mexico:
 - Always in the closet, never out to anyone about his sexual orientation
 - Called homophobic slurs in school
- Entered the United States in 2010
- Diagnosed with HIV and Kaposi Sarcoma in December 2021
- Applied for asylum in July 2022

Paul

- Gay asylum seeker from the Philippines
- In the Philippines:
 - Experienced physical abuse as a child from parents for being gay
 - As an adult, experienced domestic violence from partner and discrimination at work
- Has entered the United States a total of 5 times using his tourist visa
- Diagnosed with HIV in the United States 2 months after his last entry



POLLS



WHERE DOES HIV+ STATUS COME INTO PLAY IN GERARDO'S ASYLUM CASE?

Well Founded Fear

1. How does his HIV+ diagnosis affect the well founded fear analysis?
2. What kind of evidence do we need to provide to support the well founded fear arguments around his HIV diagnosis?



WHERE DOES HIV+ STATUS COME INTO PLAY IN GERARDO'S ASYLUM CASE?

One Year Filing Deadline

1. How can we use his HIV diagnosis to get over the one year filing deadline?
2. Is an HIV diagnosis a “material change?”
3. Does it matter that the asylum application was filed more than 6 months after his HIV diagnosis?



WHERE DOES HIV+ STATUS COME INTO PLAY IN PAUL'S ASYLUM CASE?

Well Founded Fear and Credibility

1. How does Paul's 5 entries to the United States impact his case?
2. Does his recent HIV diagnosis change any of that analysis?
3. How does his HIV diagnosis strengthen his asylum case?





BEST PRACTICES FOR WORKING WITH HIV+ ASYLUM SEEKERS

CONFIDENTIALITY

- Many layers of legal protections for a client's right to keep HIV+ status confidential
 - State
 - California Civil Code
 - Health and Safety Code
 - California Constitution
 - Tort Law
 - Confidential Medical Information Act (CMIA)
 - Federal
 - U.S. Constitution
 - Health Insurance Portability and Accountability Act (HIPAA)



HOW TO MAINTAIN CLIENT CONFIDENTIALITY

- Explain your duty to maintain confidentiality
- Communicate with your client about who they are comfortable sharing their HIV status with
- Keep client information and documents secure (case file, medical records, digital/electronic records)
- Do not share client's HIV status to anyone without their express and written permission



EDUCATION

- Familiarize yourself with HIV+ prevention tools and medical care and treatment available to HIV+ folks in the United States and your client's home country
- Understand the difference between being HIV+ and having an AIDS
- Understand what it means to be “undetectable”
- Listen to your client about how being HIV+ affects their life and how it doesn't – don't make assumptions!
- Remember that your client may not know what it's like to be HIV+ in their home country and it may be triggering or re-traumatizing to be asked to investigate country conditions and treatment options
- On the flip side, clients may only want to focus on their fear around accessing HIV medication in their home country to avoid talking about past trauma



CONNECTING A CLIENT TO RESOURCES

Why?

- Client may have recently arrived in the U.S. and not connected to medical care yet
- Client may be recently diagnosed and not well connected to medical care or dislike the current care they are receiving
- Client may not be able to focus on their immigration case because of worry and fear over connection to HIV treatment

How?

Oasis Legal Services

Northern California

HIV/AIDS Resource Guide

https://drive.google.com/drive/folders/1J_HRW6QxwIz0Uww7U_p1krJ0VJ3N55a8?usp=sharing



- 🔗 FOLLOW your client - listen to what they say and then always do your best
- 🔗 Give your client CHOICE and respect for their decisions
- 🔗 RESPECT their humanity - treat them as you would want to be treated
- 🔗 EMPATHISE with the pain and trauma your client has experienced - They experienced harm, but they are not broken
- 🔗 CELEBRATE their diversity - be open to learning from them



FINAL TIPS ON BEING A GOOD PROVIDER

How to work with HIV+ folks
in an affirming way



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To refer a community member to assess asylum eligibility:

- email legal@oasislegalservices.org
 - provide at least: patient/community member's preferred name, contact info, pronouns, and preferred language
 - best if you can also provide full legal name, SOGI identity, **when** you first talked to them about the possibility of applying for asylum/ referred them to the legal service provider, and if patient/client has been diagnosed HIV+ within the last 6 months, exact date of diagnosis
 - confirm that patient/community member has given you permission to provide us with their contact information and whether it is okay for us to contact them directly
- call or text 510-666-6687
- submit a consultation request at <https://www.oasislegalservices.org/get-help>

QUESTIONS?

