

Introduction to Asylum Law Based on Sexual Orientation and/or Gender

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1.5 General CLE Credits

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Introduction to the asylum application process, focusing on asylum based on sexual orientation and/or gender

Asylum Law Basics

1. Sources of Law:

- a. **Asylum:** INA §208, 8 USC 1208
- b. **Withholding of Removal:** INA §241(b)(3)
- c. **U.N. Convention Against Torture** Implemented via 8 C.F.R. §208.16-18

2. Asylum Elements:

Applicant has a well founded fear of persecution by the government or groups the government is unable or unwilling to control, on account of one of five protected grounds.

a. Well founded fear – Must be both Subjective and Objective

- i. **Subjective** fear: expressed through written and oral testimony
- ii. **Objective** component:
 - 1. 10% chance of persecution – *Cardoza Fonseca*
 - 2. Reasonable person would fear persecution *Matter of Mogharrabi*

b. of Persecution

i. **Defined:**

“A threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive.”

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

- ii. Can be physical, psychological, economical
 - 1. Sexual assault, arrests, torture in detention
 - iii. Individual threat or
 - iv. Pattern and practice of persecution of people *similarly situated* to the applicant
 - v. Disproportionate punishment –prosecution for “crime” that is only specific only to lgbt people, for example: sodomy laws
 - vi. Cumulative persecution
- c. **On Account of**
- i. **REAL ID** – protected ground is at least **one central reason** for persecution
- d. **Protected grounds:**
- i. Race
 - ii. Religion
 - iii. Nationality
 - iv. Political opinion
 - v. **Membership in a Particular Social Group**
 - 1. *All* Homosexuals = Particular Social Group
– Karouni v. Gonzales 399 F.3d 1163 (2005)
 - 2. **Imputed** homosexuality
- e. **By the government**
- i. One police officer is enough
 - ii. Do not have to show applicant tried to report harm to police if government is the actor or if reporting would be futile
- f. **Or groups the government cannot or will not control**
- i. Skinheads, gangs
 - ii. family
- g. **Past persecution raises a presumption of a well founded fear:**
- i. Unless U.S. government rebuts with **changed country conditions that negate fear (ex., country enacts same sex marriage law) –NOTE: This does not necessarily end your case (societal backlash)**

- ii. And it would be **reasonable to relocate under all circumstances**

Bars to Asylum

- **One Year Bar**

Must file within a year of entering the United States unless **Changed or Extraordinary Circumstances** are present, and then filed within a reasonable time

Extraordinary Circumstances examples:

In status

Psychological disability resulting from persecution – PTSD, Depression

Physical disability – suffering from AIDS

Extreme Isolation from community that would advise about asylum process

Changed Circumstances Examples:

Did not come out until recently

Changes in country conditions

- **Firm Resettlement – obtained benefits in another country on way to U.S.**
- **Particularly Serious Crime: Aggravated Felonies**
- **Terrorist, Material Support to Terrorist organization**

Withholding of Removal –

More likely than not applicant will be persecuted on account of a protected ground:

Higher standard: 51% chance of persecution as opposed to 10% chance

1yr/firm resettlement Bars do not apply

CAT

More likely than not standard

Will be tortured by government or with government consent or acquiescence (govt. turns a “blind eye”)

Does **not** have to be on account of protected ground

Working with LGBT Asylum Clients

Special sensitivities:

Many clients are reluctant to discuss the full extent of harm they suffered

Some are psychologically incapacitated by the harm (PTSD)

Realize many are not educated, fluent in English, or sophisticated

Take time to build trust

Make clients feel comfortable

If you are openly out and okay with saying so, say so

Refer to client by name they use

Ex. : If MTF – refer to as she

LGBT – use what they say

Preparing the Application:

Application – Forms G-28, I-589

Declaration

Tell a story

When did they realize they were gay, lesbian, bisexual, transgender

How did they know

Were they teased or bullied when young

What happened when came out – if they came out

Documents – REAL ID

Vital Records – Identity

Client docs: Photos, medical records, police reports

Witnesses/Evaluations – support credibility

Country Conditions

Translator – be careful to avoid notarios

Preparing for the Interview

May need several sessions – clients are nervous and can freeze up

Psychological evaluations can help if you anticipate this happening

Attending the Interview

Not adversarial

Officer asks questions to elicit testimony

Can ask for supervisor if clearly homophobic or antagonistic officer

Can ask questions at the end or refer to specific docs if officer missed something

Decision Pick Up – 2 weeks

Benefits if Approved

Referral to Court if not approved

Denied if still in another status

Sometimes the asylum office sends the file to sent to HQ, or will send the decision in the mail

Asylum Related Resources:

Ninth Circuit Immigration Law Outline:

http://www.ca9.uscourts.gov/guides/immigration_outline.php

Immigration Equality: (LGBT Asylum Manual)

<http://www.immigrationequality.org>

Asylumlaw.org: Documentation packets online:

http://www.asylumlaw.org/legal_tools/index.cfm?fuseaction=&countryID=233

CGRS (document research):

<http://cgrs.uchastings.edu/country/memos.php>

Asylum Documentation Project:

<http://www.immigrantjustice.org>

Office of Refugee Resettlement: (benefits for asylees)

<http://www.acf.hhs.gov/programs/orr/index.html>

USCIS Affirmative Asylum Procedures Manual:

<http://www.uscis.gov/files/article/AffrmAsyManFNL.pdf>

Asylum Officer Basic Training Course (USCIS)