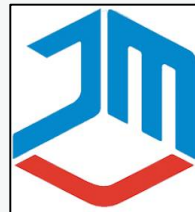


# LGBTQI (PLUS) AND HIV RELATED ASYLUM CLAIMS



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## BASIC CONCEPTS AND DEFINITIONS RELATED TO LGBTQI (PLUS) ASYLUM CLAIMS

<b>Sexual Orientation</b>	An emotional, romantic, or sexual attraction to or desire for others.
<b>Gender Identity</b>	A self-concept as being female, male, both, neither or other gender identity.
<b>Gender Expression</b>	One's external appearance of one's gender identity perceived as masculine or feminine.
<b>Transgender</b>	Gender identity, assigned at birth, does not conform to self-assigned gender identity.
<b>Gender Transition</b>	Alignment of gender identity with outward appearance and behavior of specific gender.
<b>Gay</b>	(Homosexual) Men who are attracted to men.
<b>Lesbian</b>	(Homosexual) Women who are attracted to women.
<b>Bisexual</b>	Emotionally, romantically or sexually attracted to more than one sex, gender or gender identity though not necessarily simultaneously, in the same way or to the same degree.
<b>Heterosexual or Straight</b>	People who are attracted to another sex.
<b>Intersex</b>	People whose genitalia is atypical in physical appearance (independent of Gender Identity)

For more information see Human Rights Campaign Glossary at: <http://www.hrc.org/resources/glossary-of-terms>

# IMPORTANT FORMS AND REQUESTS

## G-639 FOIA REQUEST

- Can send by email: [USCIS.FOIA@uscis.dhs.gov](mailto:USCIS.FOIA@uscis.dhs.gov) and ask for expedited Track 3 if pending hearing in EOIR

## G-28 AND/OR EOIR-28

- Entry Of Attorney Appearance

## I-589 APPLICATION FOR ASYLUM AND WITHHOLDING OF REMOVAL

- Copy of principal for each derivative applicant

## I-765 APPLICATION FOR EMPLOYMENT AUTHORIZATION

- ASYLUM CLOCK:  
Eligible, if applicant has not caused any delays, only 180 days after application has been pending, BUT can file after 150 days because USCIS takes 30 days to process

## BIOMETRICS

- DHS serves notice, but can file with USCIS, for those 14 and older



# COMMON SOURCES OF ASYLUM LAW



International Law (UN Conventions, Treaties; Convention Against Torture important)

Immigration and Nationality Act (“INA”) §208 or US Code (8 U.S.C. §1158)

## Refugee Act of 1980

Illegal Immigration Reform and Immigrant Responsibility Act

U.S.A. Patriot Act

## The REAL ID Act

The Trafficking Victims Protection Reauthorization Act of 2008

Code of Federal Regulations

## Board of Immigration Appeals Decisions

Federal Court Case Law

## Attorney General Opinions

Policies, Manuals, by Federal Administrative Agencies, etc.

Foreign Law

## GENERAL ASYLUM ELIGIBILITY: THE STARTING POINT

The applicant must be present in the U.S. (( Section 208(a)(1) of the Immigration and Nationality Act (“INA” or “the Act”)))

There is no third country to which the alien can be safely removed (Section 208(a)(2)(A)).

The applicant must have applied for asylum within one year of arrival to the U.S. (Section 208(a)(2)(B) unless inapplicable under §§208(a)(2)(D) or (E)).

The applicant’s asylum claim has not been previously denied (Section 208(a)(2)(C)) unless inapplicable under §§208(a)(2)(D) or (E)).

The applicant credibly proves that he or she is a refugee (Section 208(b), refugee defined under §101(a)(42) of the Act).

The applicant is not or has been 1) a persecutor, 2) convicted of a particularly serious crime, 3) an aggravated felon, 4) a terrorist, or 5) an applicant who resettled in another country prior to coming to the U.S. (See §208(b)(2)(A) of the Act).

## DERIVATIVES

Status at the time of filing  
the application or prior to  
final decision

Spouses, unmarried children under 21 years old  
born or conceived prior to decision, step-  
children if relationship existed prior to age 18

Proof of relationship: birth certificate, marriage  
license, divorce decrees, adoption papers

Now that DOMA has been repealed, same-sex  
spouses qualify

# AFFIRMATIVE VS. DEFENSIVE ASYLUM

Affirmative is with the asylum office, USCIS

Unaccompanied Alien Children (UAC)

Has valid immigration status (visitor visa, TPS) or status has elapsed

Entered without inspection and not in removal proceedings

Defensive is with EOIR, when client is in removal proceedings

Served with NTA and case filed, after either:

Referred to IJ if found ineligible for affirmative asylum, or

Caught at port of entry or within U.S. without proper documents, or

CBP caught you trying to enter without documents, given credible fear interview (must show "significant possibility" you can establish eligibility with IJ)



# ONE YEAR BAR

Must apply for asylum within one year of most recent entry into the U.S. (day zero)



Lodge, file at window EOIR, or mail to USCIS prior to one year deadline (“clear and convincing evidence”)

## Exceptions



Unaccompanied Alien Children



Changed Circumstances materially affects eligibility



Extraordinary Circumstances directly related to delay



Delay not caused by applicant Matter of Y-C-, 23 I&N Dec. 286 (BIA 2002)

For Exceptions, must demonstrate “to the satisfaction of the AG”, low standard



Gather evidence, ask DHS if this is at issue or stipulation

Must file within “reasonable period”



Considering education, socioeconomic status, age, mental health, etc.

# ONE YEAR BAR FOR LGBTQI

- Unaware that sexual orientation/gender identity is ground for asylum
- PTSD
- Family or community isolation
- “Sur Place”: new events give rise to claim...
  - Takes time to accept identity
  - HIV/AIDS new diagnosis or medical complications
  - Gender transitioning/can’t “pass”
  - Marriage to same-sex partner
  - Country recent crackdown on LGBT rights



# REFUGEE

“Any person ...who is unable or unwilling to return to, and 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....

## Difference between refugee and asylee:

<b>Refugee</b>	Outside U.S. territory, falls under INA § 207
<b>Asylee</b>	Already physically present in the U.S., need protection and seek admission



## UNABLE/UNWILLING TO RETURN, AND UNABLE/UNWILLING TO AVAIL SELF OF GOVERNMENT PROTECTION

If persecutor non-government, must show government unable/unwilling to control/protect from persecution

If persecutor government – no need to demonstrate that client sought their protection. *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004).

Can show through Country Conditions, Direct Statements from Persecutor...

Exs: War, ethnic cleansing, law enforcement and judiciary corruption, failure to enforce laws, inability to express beliefs safely, etc.



## PERSECUTION DEFINED

“A threat to the life or freedom, 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, 222 (BIA 1985), *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

Clear Examples:	Other serious harm that may rise to the level of persecution:
Genocide, Slavery, Torture, Inhuman/Cruel/Degrading Treatment, Rape, Sodomy, Other Sexual Violence, Violation to be recognized as a person in the law, Violation of right to freedom of thought, conscience, religion or belief.	Threats to life, Sexual assault, Sexual abuse, Female genital mutilation, Coercive population control, Beatings, Threats or Physical attacks, Arrests, Forced labor, Forced “treatments,” Denaturalization, Deportation, Kidnappings coupled with threats or beatings, Inability to earn a livelihood, Deprivation of education, Confiscation/deprivation of property, Compulsion to engage in acts against deepest beliefs, etc.

### Past persecution

- Creates rebuttable presumption that applicant has well-founded fear of future persecution
- DHS will argue change of circumstances/country conditions or internal relocation
- May be more difficult to establish for LGBTI who kept lives secret

### Well founded fear

- “Reasonable possibility” of persecution if return: less than a 10% chance sufficient. See *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987); *Matter of S-S-*, 21 I&N Dec. 121, 122 (BIA 1995); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987)
- Can argue well founded fear even if applicant never experienced past persecution
  - Ex. Someone who came out recently after living in the U.S. or contracted HIV here

### If past persecution, but no well founded fear, argue Humanitarian Asylum:

- Compelling reasons, severity of past persecution, reasonable possibility other serious harm. See *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); See *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012)
- No nexus required for other serious harm; forward-looking



## PERSECUTION CASE LAW

Physical Harm	See <i>INS v. Stevic</i> , 467 U.S. 407 (1984)
Threats	See <i>Salazar-Paucar v. INS</i> , 281 F.3d 1069, 1074 (9th Cir. 2002), amended by 290 F.3d (9th Cir. 2002).
Psychological Harm	See <i>Mashiri v. Ashcroft</i> , 383 F.3d 1112 (9th Cir. 2004), <i>Khup v. Ashcroft</i> , 376 F.3d 898, 904 (9th Cir. 2004)
Harm to Family Members or Third Parties	See <i>Matter of A-K-</i> , 24 I&N Dec. 275, 278 (BIA 2007)
Severe Economic Disadvantage or Deprivation of Essentials of Life	See <i>Matter of Laipenieks</i> , 18 I&N Dec. 433, 456-57 (BIA 1983), <i>Matter of T-Z-</i> , 24 I&N Dec. 163 (BIA 2007), <i>Baballah v. Ashcroft</i> , 367 F.3d 1067, 1075 (9th Cir. 2004), and others.
Arrests and Detention	See <i>Mihalev v. Ashcroft</i> , 388 F.3d 722 (9th Cir. 2004)
Harassment and Discrimination	Generally not enough alone. However, harm must be considered in the aggregate. See <i>Matter of O-Z- &amp; I-Z-</i> , 22 I&N Dec. 23, 26 (BIA 1998)
One Incident can be enough	See <i>Mihalev v. Ashcroft</i> , 388 F.3d 722 (9th Cir. 2004)



## PERSECUTION OF LGBTQI AND HIV

Rape, or threats like  
“ill teach you how to  
be a real woman”

Discrimination in work  
place, economic  
deprivation, or with  
the courts

Cumulative  
harrassment

Beatings

Torture

Medical experiments

Therapy or programs  
meant to “cure”  
people of their gender  
identity or sexual  
orientation

Arrests, Prosecution  
or Imprisonment for  
being gay (or for  
“immoral acts” or  
other crimes like rape)

Being forced to “out”  
friends to police

Forced marriage  
(lesbians at higher risk,  
often less powerful  
than men and defined  
by role as “wife”)

Pressure to stay  
closeted or identify as  
particular gender  
(Intent to harm is not  
always required)

Denial of access to  
HIV medication or  
transition  
hormones/surgery

## PARTICULAR SOCIAL GROUP (PSG) AND NEXUS

“persecution...on account of...  
membership in a particular social  
group...” (§101(a)(42) of the ACT).

Nexus: “on account of” = one  
central reason for persecution



## MEMBERSHIP IN A PSG

Step One:  
Articulate a  
Cognizable  
Group. In order  
to have a  
cognizable group  
the group must:

Composed of  
members who  
share common,  
innate  
characteristic,  
immutable or  
fundamental to  
their identity  
(*Matter of Acosta*)

Defined with  
particularity and  
social visibility  
(*Matter of S-E-G-*,  
24 I&N Dec. 579,  
584-88 (BIA  
2008); *Matter of*  
*M-E-V-G-*, 26 I&N  
Dec. 227, 239  
(BIA 2014))

For LGBTQI:  
Start with Sexual  
Orientation  
(makes the group  
much stronger):

For example,  
HOMOSEXUAL  
(Immutable and  
Fundamental)

Follow with  
visible  
characteristic  
(ocular not  
required, *Matter*  
*of M-E-V-G-*) such  
as Gender  
Expression or  
Gender  
Transition:

For example,  
EFFEMINATE  
(Fundamental)

Refine with a  
Fundamental  
or Immutable  
Characteristic:

For example,  
RUSSIAN  
(Fundamental)

Narrow down  
with Gender  
Identity:

For example,  
MALES  
(Fundamental)

Close with a  
final immutable  
or fundamental  
characteristic:

For example,  
LIVING WITH  
HIV

Can't be  
circular/defined  
by the harm:  
"Men raped for  
being gay"

“Homosexual Effeminate Russian Males living with HIV”

# LGBTQI AS (IMPUTED) POLITICAL OPINION

- Must provide some evidence,” “direct or circumstantial,” that the persecutor was motivated by a belief that the applicant held the political opinion. See *Khudaverdyan v. Holder*, 778 F.3d. 1101, 1111 (9th Cir. 2015)
- Testimony regarding a persecutor’s statements about motive is direct evidence that the applicant’s political opinion motivated the persecution. *Singh v. Holder*, 764 F.3d 1153, 1159 (9th Cir. 2014).

Political protesting

Flying flag

Telling persecutor  
that you have rights

Exposing human  
rights abuses

Reporting crime to  
police or testifying  
as witness

Voting for party  
that supports rights  
or membership in  
activist group

- Imputed: A petitioner’s “association with, or relationship to, people who are known to hold a particular political opinion” may serve as indirect evidence of imputed political opinion.

Appearance that you are in any of these groups,  
supporting family or friends

Persecutor has made statements about your “beliefs” as a  
reason for the harm

# PRECEDENT AND RESOURCES FOR LGBTQI/HIV PSG

*Castro – Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011) (amended by *Castro – Martinez v. Holder*, WL 6016162, Dec. 5, 2011 (9th Cir. 2011) - gay man from Mexico

*Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005) - internal relocation unreasonable: cumulative evidence of serious harm to gay man in Mexico because unable to obtain required medication

*Pangilinan v. Holder*, 568 F.3d 708 (9th Cir. 2009) - transsexual woman from the Philippines

*Eneh v. Holder*, 601 F.3d 943 (9th Cir. 2010) - man living with AIDS from Nigeria

**SEMINAL CASE:** *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) - recognizing homosexuality as an immutable characteristic

*Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) - all alien homosexuals are member of PSG

*Morales v. Gonzales*, 472 F.3d 689 (9th Cir. 2007) - transgender identity

*Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) - transgender women distinct from gay men

*Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

Legacy INS memo - HIV is PSG -  
<http://www.immigrationequality.org/wpcontent/uploads/2011/07/HIV-asylum-memo.pdf>

United Nations High Commissioner for Refugees (UNHCR), Protection, Policy, and Legal Advice Section. <http://www.unhcr.org/refworld/docid/48abd5660.html>

Memorandum USCIS, Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals (January 14, 2009).

Memorandum USCIS, Adjudication of Petitions and Applications Filed by or On Behalf Of, or Document Requests by, Transsexual Individuals (April 16, 2004).



### Client Declaration

Important to request FOIA and review statements made to ICE, CBP, Asylum Officer during credible fear interview (if there is one)

### Country Conditions

- EOIR Virtual Law Library good starting point: <https://www.justice.gov/eoir/virtual-law-library>
- CGRS
- Human Rights Watch LGBT division, Amnesty International, International Gay and Lesbian Human Rights Commission

## WHAT TO FILE

### Legal Brief

If affirmative filing with USCIS, can be cover letter  
If EOIR, make sure to follow judge order

### ID Documents and Corroborating Evidence

Birth certificate and other ID documents (certified translation into English)  
Other Evidence from client

# EVIDENCE TO GATHER FROM CLIENT

## EVIDENCE CORROBORATING HARM AND PSG (\*IF POSSIBLE! OFTEN UNABLE TO GET EVIDENCE; CREDIBLE TESTIMONY ALONE SUFFICIENT)

- Medical records of injuries, or related to PSG such as transition procedures, hormones, etc.
- Photos of injuries
- Text messages, emails, etc. from persecutor
- Police reports
- Expert and Lay Witness affidavits
- Psych. Eval. (therapist must be willing to testify)
- News articles specific to client
- Membership in LGBTI groups

## GRANTING ASYLUM AS MATTER OF DISCRETION

- Letters of Support from schools, religious organizations, family, friends, employer
  - (working without EAD is not a bar to asylum, but may need to waive at AOS level for unlawful presence)
- Tax returns
- Any charitable work
- Education, learning English
- Discuss life here, hopes for future



The background of the image is a horizontal rainbow flag with six distinct bands of color: red at the top, followed by orange, yellow, green, blue, and purple at the bottom. The colors have a slightly textured, paper-like appearance. In the center of the image, there is a white rectangular box with a thin black border. Inside this box, the text "THANK YOU FOR HELPING THE LGBTQI (PLUS) AND HIV COMMUNITY!" is written in a bold, black, sans-serif font, all in uppercase letters.

THANK YOU FOR HELPING THE  
LGBTQI (PLUS) AND HIV COMMUNITY!