



o a s i sTM
L E G A L S E R V I C E S

REPRESENTING AN LGBTQ/HIV+ CLIENT IN AN AFFIRMATIVE ASYLUM
CASE

Oasis Legal Services: An Introduction

- 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

Our Staff

- Our staff of ten includes four attorneys and four Board of Immigration Appeals Accredited Representatives.
- We have over 45 years of professional experience combined in immigration legal services for the LGBTQIA+ community, and we've helped over 850 LGBTQIA+ immigrants obtain asylum in the United States, with a 99% success rate in obtaining asylum for our clients.

Asylum

THE BASICS OF ASYLUM LAW

The Basics of Asylum Law

- Definition of a Refugee
 - A refugee is 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 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. INA § 101(a)(42)(A); *see also* 8 CFR § 208.13 (establishing eligibility for asylum).

The Basics of Asylum Law

- Affirmative vs. Defensive Asylum
- Substantive elements and bars
- Credibility

Elements

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

Past or Future

Asylum protection can be granted based on harm in the past OR harm in the future.

Past Persecution*

Well-founded fear of future persecution

- Subjective fear
- Objective fear

- o *Gives rise to a legal presumption of future persecution, but can be rebutted by government showing of reasonable internal relocation or changed circumstances

Persecution

- What rises to the level of persecution?
 - Poverty; harassment; discrimination generally not enough
 - Physical harm consistently sufficient: repeated severe beatings, rape, detention
 - Threats may rise to the level of persecution if severe enough and imminent

Race, Religion and Nationality

- Race:
 - broadly defined
- Religion:
 - may overlap with political opinion (Falun Gong/Tibetans) or ethnicity (Jews/Tibetans)
- Nationality
 - not just citizenship
 - may be ethnic or linguistic group
 - may overlap with race

Political Opinion

- Broader than you might think
- Actual v. Imputed
 - actual - what someone really believes
 - E.g. "I campaigned for the opposition."
 - imputed - an opinion that the persecutor believes the applicant to have, regardless of the applicant's actual opinion or lack of opinion.
 - E.g. "The soldiers accused me of organizing the farmworker protest, even though I had not been involved."

Particular Social Group (PSG)

According to the BIA there are three factors that make a 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)

PSG continued.....

Common PSGs:

- LGBTQIA+ / “Sexual minorities”
 - E.g. “Lesbian women in El Salvador”
- Child abuse
 - E.g. “Guatemalan children viewed as property by virtue of their position within the familial relationship”
- Domestic violence
 - E.g. “Married women in Guatemala who are unable to leave their relationship” *Matter of A-R-C-G-*, 26 I&N Dec. 288; *but see Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018) and subsequent USCIS policy memos
- Gender Norms
 - E.g. “Ethiopian females who violate gender norms.”
- Family
 - E.g. “Family members of Juan Sandoval” *But see Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017)

PSG membership: Must demonstrate membership; can be actual or imputed

Nexus

- Harm must be “on account of” the enumerated ground
- "One central reason" mixed motive
 - 'But for' causation
 - Generalized violence and random crime not enough
- How to prove this?
 - direct evidence:
 - E.g. “I am doing this to you because you are gay.”
 - indirect / circumstantial evidence:
 - E.g. “He was always making comments to his friends that all gay people deserved to be beaten. Not long afterwards he cornered me in an ally and beat me saying that I deserved it.”
 - E.g. “My father always beat me when he found me playing with girl’s toys or putting on my sister’s dresses. He told me boys were not allowed to do that. He didn’t beat my siblings.”
 - E.g. “When she saw the text message from my boyfriend, she whipped me.”

Key cases for LGBTQ asylum

Matter of Toboso-Alfonso 20 I&N Dec. 819 (BIA 1994): established sexual orientation as “membership in a particular social group” and paved the way for asylum based on sexual orientation.

Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004): reaffirmed that a “gay man with a female sexual identity” belongs to a particular social group and equated a government willfully turning a blind eye to severe physical abuse by non-government actors to acquiescence in the torture

Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005): holding that a gay Mexican man with AIDS who was sexually and physically abused by a Mexican police officer was statutorily eligible for asylum.

LGBT cases continued...

***Castro-Martinez v. Holder*, 641 F.3d 1103 (9th Cir. 2011)**: terrible decision denying asylum to gay, HIV-positive Mexican man, in part because he never reported childhood sexual abuse to authorities

***Bringas-Rodriguez v. Sessions*, 13-72682, (9th Cir. 8 March 2017)**: En banc decision that overruled Castro-Martinez and found based on credible written and oral testimony that the Mexican government was unwilling and unable control Mr. Bringas-Rodriguez's persecutors

***Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015)**: CAT case with useful state action language and forceful rebuke to agency misunderstandings of the LGBT community

How to Establish Eligibility for Asylum - Recap

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

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 Past Harm
 - Compelling reasons for not returning based on the severity of past harm; “severe and atrocious”

Bars to Asylum

- Firm resettlement
- Serious crimes and other offenses
 - aggravated felonies
 - persecutor of others
 - material support
- Prior deportation/removal order jurisdictional bar
- One-year filing dead line

Exceptions to One-year Bar

- Extraordinary circumstances within first year after entry + reasonable time
 - serious illness or mental or physical disability
 - lawful status
 - legal disability
 - Ineffective assistance of counsel (with procedural hurdles)
 - Other circumstances
- Changed circumstances + reasonable time
 - change in applicant's country
 - change in applicant's personal circumstances

Evidence

- Real ID Act (2005)
 - Credible testimony
 - Corroborating evidence
- Country conditions documents
- Expert witness

Preparing Your Client

REPRESENTATION AT THE ASYLUM INTERVIEW



The Life of An Asylum Case

- Write declaration and gather supporting documents (e.g. psychological evaluation)
- File Asylum Application
- Receive receipt and fingerprint notice
- Apply for work permit
- Interview notice received
- Submit country conditions and supporting document packet
- Prepare client for interview
- Attend Interview
- Decision
- Residency
- Citizenship

Preparing For The Asylum Interview

- Pick up and review the file
 - Identify the case theory
 - Confirm all necessary documents are present
 - Identify any potential problems
- Arrange a time to meet with the client
- Meet with your client
- Attend the asylum interview

Reviewing the file

Break up into groups of two or three people to answer the following questions:

- Which of the paths to asylum does the client qualify for?
 - (past pers + WFF / past pers + other ser harm / humanitarian / WFF)
- What is the persecution?
- What is the protected ground and the nexus to the protected ground?
- What bars may apply?
- Does the client qualify for an exception to any bars?
- Any other concerns about the case?

Meeting with your client

- Arrange a time to meet with the client and interpreter
- Explain logistics of the asylum office and the interview to the client
- Review the basics of asylum law, credibility, and discretion with the client
- Do a practice interview where you pretend to be the asylum officer and go through the whole application
- Go over all changes to the application with the client
- Client Health – employ best practices for working with survivors of trauma

Representing at the Asylum Interview

- Inform the officer of any changes to the application
- Take as close to verbatim notes as possible
- Reasons to intervene during the interview:
 - If there is a misunderstanding that does not clear itself up
 - If the officer is acting in an inappropriate manner
- When to ask the client follow-up questions at the end of the interview:
 - If important information did not come out during the interview
 - If a misunderstanding or problem needs to be cleared up
 - Only ask follow-up questions when you know what the answer will be
- Ask if the officer has any issues with the case
- Make a closing statement or ask to submit a written statement if necessary
- Discuss necessary case follow-up, such as RFEs, with the officer

Advocating at the interview

Three types of appeals:

- Reason
- Ethics
- Emotion

Advocating at the Interview (con't)

Appropriate times to intervene

- Mistranslation
- Multiple question
- Timeline confusion
- Efficiency
 - Eg, summary of employment, residences
- If you misheard something

Appropriate way to intervene

- Generally let the testimony go forward, then suggest a clarification

Demeanor

Consider appropriate demeanor for a non-adversarial interview

Do's

- Smile
- Act professional
- Deferential
- Confident

Don'ts

- Make exaggerated gestures
- "Object"
- Exhibit what might be perceived as attempts to influence the client's responses

Client health and safety

Client care during the interview

- Breaks
- Tissues
- Water
- Stress toy
- Energy in the room

Take specific notes of any inappropriate language and demeanor of officer; intervene if egregious and/or significantly impacting client's ability to testify

Troubleshooting

DIFFICULTIES WITH THE ASYLUM INTERVIEW



Trouble-shooting

- Nexus

Trouble-shooting

- One Year Bar