

Laws of Hospitality: Asylum and Refugee Law Panel

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Although the notion of offering protection to persons fleeing persecution was by no means novel, events of the 20th Century forced the international community to take unprecedented steps to recognize the right of persons to seek protection from persecution. Although many nation-states agreed that it had a responsibility to protect individuals from persecution, there was little consensus as to the type of protection each nation was obligated to provide and to whom protection was owed. The first step towards building an international consensus came with the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948. Article 14 of this document recognized the right of persons to seek asylum from persecution.¹ Since the Universal Declaration was not a treaty, the right to seek asylum was not immediately binding upon UN member states. Recognizing the need to implement a binding agreement, the international community responded by drafting the 1951 United Nations Convention Relating to the Status of Refugees. The 1951 Convention was an important milestone in refugee protection for two reasons. First, it established a universal definition for the term refugee² thereby creating a mechanism by which the international community could clearly identify those individuals owed protection. Second, it prohibited member states from expelling or returning individuals to a country where their life or freedom would be threatened on account of race, religion, nationality, political opinion or membership in a particular social group.³ Despite these innovations, the 1951 Convention was limited in its scope as it applied only to those individuals affected by events occurring before January 1, 1951 and allowed signatories to limit protection to

¹ [Universal Declaration of Human Rights](#), Art. 14, G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

² The term refugee includes those persons who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country." [1951 Convention Relating to the Status of Refugees](#), Art. 1, 189 U.N.T.S. 137, July 28, 1951.

³ *Id at* Art. 33.

those individuals affected by events occurring in Europe.⁴ The international community, quick to realize the inherent limitations of the 1951 Convention, drafted the 1967 Protocol Relating to the Status of Refugees to remove the time and geographic restrictions in place.⁵

Although the United States eventually acceded to the 1967 Protocol, US federal law was not amended to explicitly conform to these standards until the enactment of the Refugee Act of 1980. In so doing, the Refugee Act prohibited the United States government from removing any person to a country where he or she will face persecution on account of the five protected grounds.⁶ Even with the passing of the Refugee Act of 1980, many legal and procedural questions remained. For example, though the Refugee Act mandated that the Attorney General establish procedures to exercise discretion to grant asylum to refugees physically present in the United States, little guidance was provided as to the regulatory mechanisms to be created and the standards applied. In the years that have followed, the United States has carefully implemented procedures and policies that foster a hospitable environment in which asylum seekers are unencumbered in their effort to exercise the right to seek protection from persecution. In so doing, the United States has defined hospitable by ensuring that the affirmative asylum process is accessible, fair, and efficient. Moreover, the United States has implemented multiple levels of review to ensure that it is upholding its obligations under federal law and international treaty. Finally, the United States has provided opportunities for asylees to become part of the community and exercise their rights freely while living in the United States. The following discussion will highlight several areas in which the United States has done so in the context of the affirmative asylum process.

⁴ *Id* at Art. 1(A)(2), 1(B).

⁵ [1967 Protocol Relating to the Status of Refugees](#), 606 U.N.T.S. 267, January 31, 1967.

⁶ It should be noted that, in the American legal context, a distinction is made between the country's obligation to prohibit the removal a person to a country where they would face persecution and the discretionary benefit of asylum. Though the aim of both is to protect persons from persecution, the two forms of relief are distinct. For example, the former, also known as withholding of removal, is a mandatory and must be granted in all but a few narrow circumstances once it is determined that the person may face persecution if they return to their country; whereas asylum is a discretionary benefit. In addition, individuals granted asylum are entitled to a more generous benefit package than those granted withholding of removal. For the purposes of this discussion, I will focus my discussion on the affirmative asylum process.

1. The Creation of A Professional Workforce Whose Sole Responsibility Is To Adjudicate And Process Asylum Applications.

As previously stated, the Refugee Act of 1980 failed to provide the answers to many legal and procedural questions. After much debate, a final rule was promulgated in 1990 to answer many of these lingering questions.⁷ First, the rule created a corps of professional Asylum Officers, specially trained in international law and adept in country conditions, was created to adjudicate affirmative asylum claims.⁸ The purpose of creating the Asylum Corps was to develop a workforce that would be capable of responding to the unique needs of asylum-seekers. To accomplish this goal, Asylum Officers undergo extensive training. The current training for Asylum Officers includes two six-week residential training programs. The first course provides general instruction on the immigration laws, policies, and procedures of the United States whereas the second course provides extensive instruction on the laws, policies, and procedures relating to US asylum law specifically. In addition to receiving a thorough legal training, Asylum Officers also receive training from mental health professionals who have experience working with survivors of torture to better equip Asylum Officers to interview and adjudicate the asylum claims of individuals who have, in some cases, endured extreme hardship and who often face an uncertain future. Asylum Officers also receive extensive training in intercultural communication to ensure that the interview is conducted in a way that is sensitive to any cross-cultural issues that may create a communication barrier during the asylum interview. Finally, even after the six-week training courses are complete, Asylum Officers receive continual training in these issues in the form of weekly trainings conducted in their local offices in order to better respond to the needs of the immigrant populations served by their office.

2. Conducting Non-Adversarial Interviews Designed To Elicit All Testimony Relevant To An Individual's Eligibility for Asylum, To Educate Applicant's Of

⁷ 1990 Final Rule. 55 FR 30674-88.

⁸ [8 C.F.R. § 208.1\(b\)](#) (1990).

Their Rights And Responsibilities, And Foster An Environment In Which The Applicant Feels Safe To Present Their Claim

A key component of the affirmative asylum process is that all asylum interviews are non-adversarial.⁹ Unlike court proceedings or appeals, there is no government official arguing in opposition to the asylum applicant at an affirmative asylum interview. In other words, Asylum Officers cannot advocate for one side or another, they must remain a neutral decision-maker. The purpose of the non-adversarial interview is to allow the applicant to present his or her claim for asylum freely. Non-adversarial interviews are designed to minimize the feeling of vulnerability that the applicant may feel as a result of their prior experience with government officials, trauma, and discomfort with sharing intimate details of their life. To achieve this goal, Asylum Officers are given extensive training in interviewing techniques and are observed by their supervisors on a monthly basis to ensure that they continue implementing the interviewing skills they learned. In addition, asylum interviews are intended to be a forum to both gather information bearing upon the applicant's eligibility for asylum and a vehicle by which information on the asylum process can be disseminated. For example, Asylum Officers have an affirmative duty to elicit testimony and pursue all potential avenues of eligibility, thereby giving the applicant an opportunity to tell every aspect of their situation and relieving the applicant of responsibility of understanding the intricacies of asylum law. Moreover, asylum interviews are also valuable tool for disseminating information. For example, Asylum Officers must explain the purpose of the interview, the applicant's rights and responsibilities during the interview (namely the right to have counsel present at the interview and the duty to testify truthfully among others), and answers questions about the remaining steps in the asylum process. Finally, it has been determined that the asylum process should be kept strictly confidential so that the applicant can feel safe to provide any and all relevant testimony bearing on his or her eligibility for asylum. Under regulation, asylum interviews are to be conducted separate and apart from the general public.¹⁰ In practice, this means that asylum interviews are conducted in private offices

⁹ [8 C.F.R. § 208.9\(b\)](#) (1990).

¹⁰ [8 C.F.R. § 208.9\(b\)](#) (1990).

and applicants are not referred to by their name in public areas of the office. At the interview, applicants are advised that it is against the law for the Asylum Officer to share information about his or her asylum application with anyone outside of the United States government.

3. Working Within An Infrastructure That Stresses Proper Application of Law And Customer Service

In light of the seriousness of the protection sought, the United States government has taken many steps to ensure that the decisions made by its Asylum Officers are legally sufficient and correctly rendered. Two unique facets of the affirmative asylum process is the implementation of a hundred percent supervisory review of all decisions made by an Asylum Officer and the institutionalization of a quality assurance component both at local Asylum Offices and Asylum Division Headquarters. First, all cases are subject to one hundred percent supervisory review. This means that after an Asylum Officer completes a case, they must submit the entire file to their supervisor for review. Before a decision can be issued on a case, a Supervisory Asylum Officer must sign off on the decision thereby verifying its legal sufficiency. The legal sufficiency means that the decision is reviewed to ensure that each aspect of legal eligibility was correctly analyzed and to verify that there is support in the record for the Asylum Officer's conclusions. By implementing a hundred percent supervisory review, the Asylum Division has ensured that each asylum application is being thoroughly vetted and fairly adjudicated. Furthermore, another area where the Refugee, Asylum, and International Operations Division is unique is its commitment to quality assurance. Each office has at least one Quality Assurance Trainer whose sole responsibility is to arrange weekly trainings on interviewing techniques, decision-writing, procedures, and legal and country condition developments. In addition, Quality Assurance Trainers are tasked with ensuring the quality of the decisions produced by the office by reviewing random cases and also reviewing those cases designated for review at Asylum Division Headquarters. There, another team of specially trained Asylum Officers review cases from certain categories such as minors, diplomats, novel issues of law, cases involving national security

concerns, and cases involving detained applicants. In each case, the intent of the review is to ensure legal sufficiency and expedite processing of the case as appropriate.

In addition, another key component of the Asylum Program is stressing customer service and expediency owing to the fact that many of the individuals seeking asylum are in vulnerable situations, compounded by the uncertainty they feel as to their immigration status in the United States. To alleviate this stress, the United States has set up definitive case processing guidelines. Affirmative asylum applications are processed at one of several regional Service Centers and subsequently forwarded to the Asylum Office with jurisdiction over the applicant's place of residence to be scheduled for an interview. In most cases, applicants receive an interview notice within twenty-one days of submitting their asylum application.¹¹ On average, the applicant will be interviewed approximately forty three days after USCIS receives the completed application.¹² Of those interviewed, a majority will receive their decisions within two weeks of their asylum interview. Only in some limited situations, namely those cases where the applicant is in valid immigration status or must be placed on hold for headquarters review will the wait be longer.

4. Developing Procedures To Protect Those Among The Most Vulnerable: Children and Victims of Trafficking

While many asylum seekers may be considered vulnerable as a result of their fear of being returned to a country where they face a serious threat of harm and their lack of stable immigration status, the United States government has implemented additional safeguards to ensure that the government is responding adequately to their needs. With respect to victims of trafficking, the United States has taken several steps to address this ongoing problem by passing statutes specifically designed to protect and assist victims of trafficking. First, under the law, former trafficking victims may be eligible for asylum in certain circumstances. Second, there are visas available for victims of trafficking through

¹¹ *Affirmative Asylum Process*, US Citizenship and Immigration Services, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=888e18a1f8b73210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed March 28, 2011).

¹² *Id.*

USCIS provided they meet the necessary requirements. Third, Asylum Officers are provided with specialized training in order to help them identify men, women and children they suspect are at risk for trafficking and they are authorized to provide information, upon consultation with their local trafficking point of contact, on various government programs and services available to trafficking victims.

With respect to the treatment of children seeking asylum, the United States has adopted several laws, policies and procedures to ensure that children are not disenfranchised by the asylum process. First, children in the United States are allowed to apply for asylum on their own, without being included on a parent's application. Second, Asylum Officers receive extensive training on interviewing and adjudicating children's asylum claims. For example, the Asylum Division subscribes to the belief that the needs of child asylum seekers are best understood if the applicant is regarded as a child first and an asylum-seeker second. In keeping with that sentiment, Asylum Officers receive instruction on child development as part of their regular training. The purpose of this training is to train Asylum Officers how to interview children and how to evaluate a child's testimony. Third, procedurally, there are some important distinctions between the manner in which children and minors are treated in the asylum process. For example, the Asylum Division will make special efforts to allow siblings to interview on the same day with the same officer whenever possible. Moreover, a recent development in the law of the United States, namely the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Congress gave USCIS initial jurisdiction over any asylum application filed by an unaccompanied alien child. As a result, unaccompanied alien children filing for asylum who previously would have had their case heard by an immigration judge in the first instance now receive an affirmative interview with an asylum officer. This change was a significant development in asylum policy because it acknowledged that non-adversarial interviews are the preferred environment in which to develop asylum claims. Fourth, Asylum Officers receive extensive legal training on the types of asylum claims unique to children and any existing legal standards that are unique to children. For example, the types of claims that may be unique to children involve child abuse, domestic violence, gang recruitment, etc. As to the differing legal standards,

children under the age of 18 are generally exempt or qualify for an exception to the one-year filing deadline. In addition, several federal circuits have called upon adjudicators and immigration judges to consider a child's youth and dependency in assessing their ability to relocate within a given country or the severity of harm necessary to establish persecution. Fifth, children are invited to bring parents, legal guardians, or other trusted adults to the interview to serve as a support to help bridge the gap between the child's culture and the environment of a U.S. asylum interview. The function of the adult is not to interfere with the interview process or to coach the child during the interview, but to serve as a familiar and trusted source of comfort. In addition, when given permission by the child, the Asylum Officer is encouraged to ask any adult present with the child, particularly if it is not a parent or court appointed guardian, questions about their relationship with the child and the child's living situation to ensure that the child is not at risk. Finally, to ensure that all children's asylum claims are correctly determined, all cases involving minors are sent to Asylum Division Headquarters for concurrence. In the event that Headquarters does not concur, revision or re-interview may be necessary.

5. Rights of Asylum Applicants

Every person physically present in the United States, regardless of the manner in which they entered the United States, are able to file for asylum.¹³ To file for asylum, an applicant need only submit an I-589 application, as there is no fee to file for asylum.¹⁴ Asylum applicants may include their spouse and any unmarried who are under of the age of twenty-one as dependents on their asylum application. Upon receipt of the application, USCIS sends a notification for the applicant to go to their local Applicant Support Center for fingerprinting.¹⁵ These fingerprints are used to initiate security and background checks prior to the interview. As described above, the applicant will

¹³ *Obtaining Asylum in the United States*, US Citizenship and Immigration Services, at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed March 29, 2011).

¹⁴ *Id.* See also *Asylum: Questions and Answers*, US Citizenship and Immigration Services, at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1d36809c4410f010VgnVCM1000000ecd190aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed March 29, 2011).

¹⁵ *Affirmative Asylum Process*.

generally receive an asylum interview within 43 days of submitting their asylum application. Asylum applicants have a right to be represented by counsel but they are not entitled to legal representation at the expense of the United States government. While their cases are pending, affirmative asylum applicants are generally allowed to live freely in the United States with no restrictions imposed on their movements while their application is pending. Only in rare cases are affirmative asylum applicants detained by US Immigration and Customs Enforcement.¹⁶ Despite their freedom of movement, asylum applicants are not generally entitled to any financial assistance from the United States government, nor are they generally authorized to work.¹⁷ Generally, asylum applicants are only entitled to work authorization if 150 days have passed since the date the asylum application was filed and no decision has been made on the asylum application.¹⁸

6. Benefits Associated With A Grant of Asylum

Once an individual receives their asylum approval, they are eligible for many benefits as an asylee. First, asylees and their derivative/dependent family members are eligible to work in the United States as an incident of their asylum grant. In addition, asylees are eligible to use employment services from One-Stop Career Centers including job search assistance, career counseling, and occupational skills training.¹⁹ Second, asylees may immediately apply for an unrestricted Social Security Card.²⁰ Third, asylees can petition for their spouses and any unmarried children under the age of twenty-one (at the time the asylum application was filed) within two years of their grant of asylum so long as the

¹⁶ *Obtaining Asylum in the United States*

¹⁷ *Id.*

¹⁸ I-765, *Application for Employment Authorization*, US Citizenship and Immigration Services, at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=7d316c0b4c3bf110VgnVCM1000004718190aRCRD> (accessed March 29, 2011).

¹⁹ *Benefits and Responsibilities of Asylees*, US Citizenship and Immigration Services, at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=2d2e4b5bbfb73210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed March 29, 2011).

²⁰ *Id.*

relationship existed at the time of the grant of asylum.²¹ Fourth, asylees also may be eligible to receive help from an organization in his or her area funded by the Office of Refugee Resettlement (ORR) for a limited period of time following their grant of asylum.²² These services may include financial assistance, medical assistance, employment preparation and job placement, and English language training. Fifth, asylees and their dependent/derivative family members are eligible to obtain a refugee travel document that will enable them to travel internationally.²³ Finally, asylees and their dependent/derivative family members are eligible to apply for legal permanent residence after one year of living in the United States²⁴ and, assuming they satisfy all of the necessary requirements, may be eligible to apply for naturalization.

7. Procedural Safeguards To Protect Those Not Granted Asylum

In the event that an individual is not granted asylum, the United States has created procedural safeguards to ensure that each applicant receives just consideration. If the applicant is in possession of valid immigration status at the time the Asylum Officer decides not to grant asylum, the applicant receives a Notice of Intent to Deny in which the Asylum Officer provides a detailed explanation of the reasons that he or she is not inclined to grant asylum. The applicant is then given an opportunity to rebut the Asylum Officer's findings by providing a written response and supplementary evidence. Upon receipt, the Asylum Officer must determine if the rebuttal overcomes the reasons contained in the Notice of Intent to Deny. If it does, the Asylum Officer may grant. If it does not, then the Asylum Officer will render a final denial. Should the applicant want to pursue their asylum case again, they have the ability to re-file. If the asylum applicant is not in possession of valid immigration status at the time the Asylum Officer decides to not grant asylum, the applicant will be placed in removal proceedings and sent to

²¹ *Family of Refugees and Asylees*, US Citizenship and Immigration Services, at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3ea83e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=3ea83e4d77d73210VgnVCM100000082ca60aRCRD> (accessed March 29, 2011).

²² *Benefits and Responsibilities of Asylees*

²³ *Id.*

²⁴ *Id.*

Immigration Court.²⁵ Generally speaking, the individual will continue to be able to live freely in the United States and, assuming the requisite number of days expire before the Immigration Court has an opportunity to make a final decision on their asylum case, they may be eligible to apply for work authorization in the United States. In Immigration Court, the applicant will have an opportunity to renew their asylum application before the Immigration Judge *de novo*.²⁶ In other words, the Immigration Judge is not bound by the Asylum Officer's legal or factual findings and can hear the claim anew. These hearings are adversarial by nature but, like the affirmative asylum process, the applicant has the right to be represented by counsel at their own expense. It should be noted that all applicants referred to court by the affirmative asylum program are provided with a list of local free legal providers so that they may seek *pro bono* representation. In addition to the discretionary benefit of asylum, Immigration Judges are empowered to render decisions on other forms of relief not available to Asylum Officers including withholding of removal and relief under the Convention Against Torture.²⁷ If the Immigration Judge rules that the applicant is ineligible for asylum, the applicant then has the ability to appeal this decision to the Board of Immigration Appeals, an appellate adjudicative body authorized by the Attorney General to hear and rule on immigration appeals.²⁸ Should the Board of Immigration Appeals also fail to grant relief, the applicant finally has the option of seeking appellate relief in the Federal Circuit Courts and, eventually, the Supreme Court of the United States.

²⁵ *Obtaining Asylum in the United States*

²⁶ [8 C.F.R. § 208.18\(c\)](#) (1990).

²⁷ *Obtaining Asylum in the United States*

²⁸ *Id.*