

CHAPTER 1
INTRODUCTION TO ASYLUM AND THE MANUAL

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§ 1.1 Introduction

A. Asylum protection today¹

People who have fled their country because they fear persecution, and who are either in the United States or at the border, have the right to seek asylum in the United States. Asylum is a form of protection granted to individuals who meet the international definition of a “refugee” in the United Nations 1951 Refugee Convention and its 1967 Protocol (“the Convention and Protocol”), to which the United States is a signatory.² The Convention and Protocol protect asylum-seekers and incorporate the doctrine of “non-refoulement,” an international law principle that prohibits countries from forcing someone to return to a place where their life would be threatened or they would suffer irreparable harm. In 1980, Congress passed the Refugee Act in order to bring U.S. law into conformity with the Convention and Protocols. The United States carries out its obligations through asylum law as well as the U.S. Refugee Admissions Program, which provides a pathway to resettlement for refugees who are located outside the United States.³

According to the United Nations High Commissioner for Refugees (UNHCR), an estimated hundred million people are refugees or otherwise forcibly displaced worldwide.⁴ The majority of them are internally displaced people who reside in their country of origin. About 27.1 million are refugees under the UNHCR mandate and 4.6 million are asylum seekers. Although debates about asylum and refugee policy often focus on asylum seekers who seek refuge in high-income

¹ Professor Richard Boswell contributed to this chapter.

² The United States is a signatory only to the Protocol, which includes most of the obligations of the original Convention.

³ See INA § 207.

⁴ United Nations High Commissioner for Refugees, *Figures at a Glance*, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last accessed Mar. 21, 2023).

countries, low- and middle-income countries host eighty-three percent of the world's refugees. Moreover, seventy two percent of refugees live in a country neighboring their country of origin.⁵

Although the number of people who are granted asylum in the United States has increased over the last thirty years,⁶ many critics of the U.S. asylum system have pointed out that the chances of the U.S. government granting a refugee asylum depend on more than whether they fear persecution, meet the statutory eligibility criteria, and warrant a favorable exercise of discretion. Asylum cases often depend on U.S. foreign policy interests, domestic political debates over immigration policy, American society's cultural values, and the race or ethnicity of the applicants; rather than the asylum eligibility criteria.⁷ The Trump administration implemented numerous draconian measures that gutted the U.S. asylum system and drastically cut the number of refugees allowed to resettle in the United States.⁸ Although the Biden administration initially rescinded some of these anti-asylum measures upon taking office, it has since embraced others and has continued many of the previous administration's unprecedented attacks on the right to asylum.⁹ Of particular concern, a series of restrictive policies implemented in recent years seeks to impede asylum seekers' ability to reach the United States to request asylum altogether.

Nevertheless, over the last thirty years, our understanding of the different types of harm inflicted on individuals and of the complex socio-cultural, economic, and political conditions that give rise to such harms has also challenged U.S. courts' interpretation and application of asylum law. This has expanded and narrowed asylum protection over the years. For example, survivors of domestic violence had historically faced much resistance from the U.S. government when they filed claims for asylum. While the government did officially begin to recognize domestic violence as a form

⁵ *Id.* The last two statistics include the figure of Venezuelans residing abroad excluding Venezuelan asylum seekers and refugees, which UNHCR counts as a separate group and estimates to comprise 4.4 million people.

⁶ According to the U.S. Department of Homeland Security (DHS), in 1990, approximately 8,500 individuals were granted asylum affirmatively. By 2000, this number had increased to about 32,500. The number of asylum grants have fluctuated since then, but have averaged 27,524 per year. See DHS, *Yearbook of Immigration Statistics: 2021, Individuals Granted Asylum*, Table 16 <https://www.dhs.gov/immigration-statistics/yearbook/2021>.

⁷ Since 2019, Guatemala, El Salvador, and Honduras have had the highest number of asylum denials in immigration court. With the exception of 2022, Mexico had the fourth highest number of denials. Transactional Records Access Clearinghouse (TRAC) Immigration Reports, Asylum Decisions, <https://trac.syr.edu/phptools/immigration/asylum/> Together with Haiti, these countries represent the five nationalities with the lowest asylum grant rates in immigration court over the past twenty years with grant rates ranging from fifteen to twenty percent of cases. TRAC Immigration Reports, *The Impact of Nationality, Language, Gender and Age on Asylum Success*, <https://trac.syr.edu/immigration/reports/668/>.

⁸ Human Rights First, Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees (Jun. 11, 2020), <https://humanrightsfirst.org/library/grant-rates-plummet-as-trump-administration-dismantles-u-s-asylum-system-blocks-and-deports-refugees/>; Amnesty International, *Trump's Efforts to End Asylum Are an All-Out Assault on Human Rights* (Feb. 27, 2020), <https://www.amnesty.org/en/latest/news/2020/02/trumps-efforts-end-asylum-assault-human-rights/>; Zolan Kanno-Youngs and Michael D. Shear, *Trump Virtually Cuts Off Refugees as He Unleashes a Tirade on Immigrants*, N.Y. Times (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/politics/trump-refugees.html>.

⁹ E.g., Circumvention of Lawful Pathways NPRM, 88 Fed. Reg. 11,704 (Feb. 23, 2023).

of persecution, the Trump administration attempted to narrow the recognized bases for asylum, including to significantly restrict domestic violence-based claims.¹⁰ This attempt in turn was reversed in 2021 and previous case law recognizing domestic violence as a basis for asylum has been restored. Furthermore, people who identify as lesbian, gay, bisexual, transgender, queer, intersex, asexual/agender, and others on the gender-identity spectrum (LGBTQIA+) have also advocated for asylum adjudicators to broaden their understanding of personal characteristics such as sexual orientation and gender identity. In the 2010s, a significant number of children and their families, fleeing gang violence in Guatemala, El Salvador, and Honduras are facing a reluctance by the U.S. government to recognize their claims for asylum that echoes the reluctance it showed to those who fled the civil wars in Guatemala and El Salvador a generation earlier.

The first hurdle for any asylum case, particularly in the current climate, is gaining access to the legal process and the right to be heard. Throughout this manual, we will reference new policies that restrict an asylum seeker's access to legal protections in the United States, beginning with restriction on entry and the ability to present an asylum claim. For those that are able to enter and present a claim, various court decisions and policies undercut the due process afforded asylum seekers throughout the process.

PRACTICE TIP: Keeping up to date on developments in asylum law. Asylum law and procedure has been in upheaval over the last several years despite being enshrined under international law and immigration law for nearly half a century. Policy changes and legal challenges make this a very volatile area of immigration practice. This manual provides an accurate overview of asylum at this time, but given the tumult, it is important to check for important updates impacting both substantive law and procedure.

B. Asylum in historical context

Though asylum itself is an ancient concept, the contemporary framework of asylum law comes from the 1951 Convention, which sought to address the devastating humanitarian crises of the first half of the twentieth century. The widespread displacement in the aftermath of World War I brought refugees, stateless persons, and internally displaced persons to the attention of the newly founded League of Nations.¹¹ Still, concrete refugee protections largely failed to materialize in individual countries. The interwar period also coincided with a series of harsh immigration restrictions and national quotas in the United States.¹² As World War II began, many people fleeing persecution were unable to find safe countries that were willing to take them in. Although the United States admitted many refugees fleeing Nazi persecution, it turned many others away.¹³

¹⁰ In June 2018, the Attorney General issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), a decision that he certified to himself for review that attempted to eviscerate years of asylum jurisprudence to deny asylum to survivors of domestic violence, gang violence, and other persecution by nongovernmental actors.

¹¹ See UNHCR, Fridtjof Nansen: 1920-1930, <https://www.unhcr.org/en-us/fridtjof-nansen-1920-1930.html>.

¹² See, e.g., Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153 (1924).

¹³ One example is the voyage of the MS *St. Louis*, a passenger ship that left Hamburg, Germany in 1939 carrying 937 passengers, primarily Jewish refugees fleeing Nazi persecution. When the ship landed in Cuba, the government refused to admit all of the passengers except for a small number who had valid travel documents. The ship attempted to land in the United States and Canada, but both countries turned it away.

The aftermath of World War II brought a shift in refugee policies, both because of the horrors of the war and the fact that millions of people remained displaced in its aftermath. Finally, in 1951, the Refugee Convention formalized refugee protection as a matter of international law obligation.¹⁴

The United States did not sign the Refugee Convention, though it later signed the 1967 Protocol to the Convention. However, it passed its own set of refugee protection laws beginning in 1948.¹⁵ In practice, foreign policy considerations played an influential role in U.S. refugee policy. The United States admitted many refugees from Communist Bloc countries throughout the Cold War.¹⁶ In some cases, the United States enacted country-specific policies for these refugees, such as the 1966 Cuban Adjustment Act.¹⁷ In the aftermath of the Vietnam War, the United States admitted large numbers of refugees from Southeast Asia. In 1975, Congress passed the Indochina Migration and Refugee Assistance Act to create a resettlement program for refugees from Vietnam, Cambodia, and Laos.¹⁸

The Refugee Act of 1980 was intended to provide clear standards for asylum protection, but these standards often remained secondary to political and foreign policy considerations. In the 1980s, the Immigration and Naturalization Service (the legacy INS) granted asylum to a majority of persons escaping Communist Bloc countries. However, it denied asylum to more than ninety-seven percent of refugees escaping the well-documented horrors of civil war and human rights abuses in El Salvador, Guatemala, and Haiti, countries whose governments and militaries the United States government supported. In part due to this injustice, the 1980s saw the emergence of many immigrants' rights and services groups. The unfair treatment of the hundreds of thousands of Central American refugees rallied these groups together, including groups composed of the refugees themselves. Refugee rights advocates and practitioners challenged the government's disparate application of the Refugee Act, which has contributed to a number of important changes referenced above and provided protection against deportation for hundreds of thousands of people.

In the early 1990s a hopeful trend emerged in asylum practice. The legacy INS separated the adjudication of affirmative asylum cases from its regular Examinations Branch. This permitted the development of a corps of asylum officers who specialize in asylum law. The creation of the asylum corps also coincided with a shift in U.S. asylum policy away from large-scale programs granting automatic relief to whole groups of asylum seekers and towards requiring each asylum seeker to apply and make their case individually. In 1996 Congress enacted draconian changes in

Ultimately, the governments of the United Kingdom, France, Belgium, and the Netherlands accepted to take in the remaining refugees. During the war, all of these countries except for the United Kingdom fell under Nazi occupation. As a result, 254 former passengers of the St. Louis's transatlantic voyage were murdered in the Holocaust. See United States Holocaust Memorial Museum, *Voyage of the St. Louis*, <https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis>.

¹⁴ Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137.

¹⁵ See Displaced Persons of Act of 1948, Pub. L. 80-774, 62 Stat. 1009 (1948).

¹⁶ Following the initial resettlement of displaced Europeans after World War II, a major focus of the U.S. refugee resettlement program was people fleeing Communist states. U.S. Dep't of Health and Human Servs., Office of Refugee Resettlement, History, Nov. 12, 2021, <https://www.acf.hhs.gov/orr/about/history>.

¹⁷ Cuban Adjustment Act, Pub. L. 89-732, 80 Stat. 1161 (1966).

¹⁸ Indochina Migration and Refugee Assistance Act, Pub. L. 94-23, 89 Stat. 87 (1975).

asylum procedure that have resulted in many genuine refugees being sent back to their homelands.¹⁹ Congress expanded the bars to asylum eligibility, preventing asylum seekers from applying after they have been in the country for a year, absent certain circumstances, and expanded the criminal bars to asylum. In 2005, the Real ID Act raised the burden of proof that asylum seekers must meet to demonstrate eligibility.²⁰ These changes present challenges for asylum advocates and our society in general to create a truly fair and humane refugee policy.

Unfortunately, in recent years, the Trump and Biden administrations have erected more barriers to the asylum process. The Trump administration sought to virtually obliterate the asylum system in the United States through hundreds of nativist executive orders, regulations, policies, and Attorney General precedent rulings, while maligning asylum seekers through xenophobic propaganda. The policies, rules, and precedent include a long list of restrictions on the asylum process, including heightened legal standards to demonstrate eligibility for asylum, severe restrictions on eligibility for employment authorization for asylum applicants, deliberate separation of families at the border, expulsions of asylum seekers at the southern land border, and indefinite closure of the southern border based on false pretenses through the Title 42 executive order.²¹

Upon taking office, the Biden administration rescinded several of these policies and promised to restore the asylum system. The administration moved slowly, and many of its measures were stymied by court challenges. However, the first few months of 2021 saw several positive developments for asylum, notably the vacatur of several anti-asylum rulings from Trump administration Attorneys General.²² These rulings, which were issued in June and July 2021, represent the high watermark of the Biden administration's efforts to restore asylum to date.

After the summer of 2021, the administration reversed course. In September 2021, it announced a comprehensive strategy to carry out a mass expulsion of asylum seekers from Haiti. The U.S. government summarily expelled thousands of asylum seekers without affording them an opportunity to seek asylum.²³ The administration promulgated regulations creating a new "Asylum Merits Interview" process that stripped away many due process protections for people claiming asylum at the U.S. border. The administration delayed terminating the Title 42 order, a Trump administration executive order that closed the border to asylum seekers, pretextually due to COVID-19 concerns. Though the administration finally issued a memo terminating the order in 2022, the order was kept in place until May 11, 2023, due to court challenges. Regulations

¹⁹ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009–546 (1996). As the name of the act indicates, these changes resulted from the general anti-immigrant politics of the mid-'90s. The provisions of IIRIRA were incorporated into the Immigration and Nationality Act (INA).

²⁰ Real ID Act, Pub. L. 109-13, 119 Stat. 302 (2005).

²¹ National Immigrant Justice Center, *A Timeline of the Trump Administration's Efforts to End Asylum*, (Aug. 2020), <https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2020-10/10-06-2020-asylumtimeline.pdf>.

²² See *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021); *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021); *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021).

²³ See Julia Neusner, Human Rights First, *A Year After Del Rio, Haitian Asylum Seekers Expelled under Title 42 Are Still Suffering*, Sept. 22, 2022, <https://humanrightsfirst.org/library/a-year-after-del-rio-haitian-asylum-seekers-expelled-under-title-42-are-still-suffering/>.

outlining particular social group-based protections for asylum seekers that were planned for the fall of 2021 have still not been issued.

The Biden administration has created several parole programs for nationals of specific countries experiencing civil strife and instability, allowing eligible individuals to avoid a dangerous journey to the border and enter the United States with permission and seek asylum or other forms of legal status, such as Temporary Protected Status. While this expansion of parole programs represents a positive step, the administration has promoted them in tandem with restrictive measures blocking access to asylum. As such, these parole programs are seemingly offered as a substitute for the right to asylum. Compared with asylum status, parole offers fewer protections, is only temporary, and the eligibility criteria favor wealthy applicants rather than those who are most in need of protection. As a result, many expelled asylum seekers will be shut out from the parole programs that are intended to replace their access to the asylum system.

Most recently, in the wake of the expiration of the Title 42 order, the Biden administration implemented a new asylum ban on May 11, 2023. The policy is similar to the Trump administration's 2019 transit ban. In conjunction with the new policy, the Biden administration has resumed the Trump administration's practice of holding credible fear interviews while people are still being initially detained in Customs and Border Protection facilities. Rather than restoring the asylum system following its unprecedented disruption, the Biden administration has opted to continue the Trump administration's policy of raising barriers to asylum access, stripping away due process protections, and swiftly deporting asylum seekers. The administration is also reportedly exploring other Trump-era measures including reopening family detention centers. The Trump administration's xenophobic propaganda may have given way to today's sanitized technocratic jargon of "incentive structure," "lawful pathways," and "safe, orderly, and humane processing," but the resulting policies are strikingly similar.²⁴

C. Asylum advocates play a crucial role in safeguarding asylum protections

The availability of legal services for asylum-seekers is vital in order to ensure that their stories are heard by those deciding their individual cases and by society at large. The percentage of persons who win their asylum cases is about five times higher for those who have legal representation.²⁵ Yet many asylum seekers remain unrepresented. Given the current political climate, asylum seekers face even more legal challenges. Currently, some new applications are meant to be fast-tracked through the system, which increases the likelihood that an asylum seeker will remain unrepresented.

This manual was created in the hope that it will contribute to effective asylum advocacy. One key to fulfilling that hope will be that practitioners learn asylum law so well that they can teach its basic framework to their clients. Additionally, practitioners have the opportunity to learn from their clients and other resources about the conditions and culture in their clients' home countries.

²⁴ See Department of Homeland Security, *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration*, Apr. 27, 2023, <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration>.

²⁵ TRAC Immigration Reports, *Asylum Denial Rates Continue to Climb*, Oct. 28, 2020, <https://trac.syr.edu/immigration/reports/630>; TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, (Nov. 28, 2017), <https://trac.syr.edu/immigration/reports/491/>.

Once both the practitioner and the client understand what the law requires of them, they can focus on telling the story of the client’s fear. The real fears in asylum cases are often buried below the technicalities of law and procedure, and cultural and language barriers. Working together with our clients, we can best uplift their stories.

§ 1.2 The Statute: Legal Requirements for Asylum Eligibility

The Refugee Act of 1980, which is incorporated into federal law as § 208 of the Immigration and Nationality Act (INA), provides the eligibility requirements and procedural framework for people who are physically present in the United States to apply for *asylum*. Persons who are outside the United States must apply for *refugee* status pursuant to INA § 207. Applicants for refugee status abroad and applicants for asylum in the United States must both meet the same legal definition of “refugee.”

The definition of “refugee” is set out in INA § 101(a)(42) and includes the legal elements of an asylum. This is incorporated by reference into the basic asylum statute at INA § 208(b)(1).

PRACTICE TIP: The refugee definition is the key to asylum law. A refugee is defined as a person who:

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.

Understanding and applying the refugee definition is the key to asylum law.

To meet this standard, the asylum applicant must show that they have:

1. A well-founded fear.²⁶
2. Of persecution.²⁷
3. On account of race, religion, nationality, membership in a particular social group, or political opinion.²⁸

Or

4. That they experienced such persecution in the past provided that certain other conditions are met.²⁹

In addition to these foundational sections of the INA, the Trafficking Victims Protection and Reauthorization Act (TVPRA) of 2008³⁰ created important procedural protections for children asylum applicants who are classified as “unaccompanied children” (UCs), also often referred to

²⁶ See Chapter 2.

²⁷ See Chapter 2.

²⁸ See Chapter 3.

²⁹ See Chapter 2.

³⁰ Pub. L. No. 110-457, tit. II, § 235(d)(7)(B), 122 Stat. 5044, (2008), codified at 22 U.S.C. § 7101.

as “unaccompanied minors.”³¹ The one-year bar to asylum, discussed in **Chapter 4**, does not apply to UCs. Therefore, UC asylum applicants do not need to worry about demonstrating an exception to the one-year bar if they file their application past the deadline. Additionally, under the TVPRA, U.S. Citizenship and Immigration Services (USCIS) has the initial jurisdiction over *any* asylum application filed by a UC applicant, even where the applicant is in removal proceedings.³² UC applicants for asylum are otherwise required to meet the definition of a refugee outlined above.

Presenting a case to meet this legal standard is a daunting task. Asylum seekers often arrive in the United States with no documents, connections, or resources. Without a legal advocate to assist, understanding which parts of their personal story are relevant to the adjudicator is a mystifying venture. This process is complicated by the psychological impact of trauma, lack of documents, and possibly incarceration. People charged as “arriving [noncitizens]” who seek asylum at the border are generally detained and must express fear of return and prove their claim from inside a detention center, with limited contact with family and friends who might help support their claim.

§ 1.3 Bars to Asylum Eligibility³³

Once a person has established that they meet the definition of a refugee, they must also show that they are not barred from eligibility for asylum. There are various statutory and regulatory bars to eligibility for asylum. The bars to asylum are different from the grounds of inadmissibility. Applicants can be barred from asylum due to conduct in their country of origin, such as participating in the persecution of others, or in the United States, such as convictions for certain criminal offenses. One of the most common obstacles is referred to as the “one-year bar,” which requires an applicant for asylum to apply within one year of entering the United States, or meet one of the exceptions to this rule. This new formulation, added through the enactment of IIRIRA in 1996, results in the denial of asylum to many genuine refugees. Practitioners should carefully review and understand all the bars before proceeding with an asylum case. The statutory bars to asylum eligibility in effect as of July 2023 are discussed in depth in **Chapter 4**.

§ 1.4 Asylum’s Last Hurdle: Discretion³⁴

Asylum is discretionary. Therefore, in addition to meeting the refugee definition and showing they are not subject to any bars, the applicant must also demonstrate that asylum should be granted in the exercise of discretion. The applicant will want to show that they are deserving of a grant of asylum by demonstrating positive equities that should incline the adjudicator to grant asylum.

³¹ The statutory term in federal law is “unaccompanied alien child” or “UAC.” Recognizing the xenophobic and derogatory nature of the term “alien,” the ILRC and many other advocates favor the term “unaccompanied child” or “UC.”

³² See TVPRA § 235(d)(7)(B).

³³ See Chapter 4.

³⁴ See Chapter 4.

§ 1.5 The Sources of Asylum Law beyond the Statute: The Regulations, the BIA, Appellate Court Decisions, and the UN Handbook

Immigration laws are administered and enforced by three separate divisions within the Department of Homeland Security: Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE). The secretary of DHS oversees USCIS, ICE, and CBP. Therefore, bear in mind that all references to DHS in this publication can refer to one of these three separate divisions.

Some immigration decisions remain under the authority of immigration judges, who work for the Executive Office for Immigration Review (EOIR). EOIR is part of the Department of Justice, under the direction of the Attorney General. Asylum applications that were initially filed with USCIS through the *affirmative* asylum process may be referred to immigration judges for an ultimate decision on the case. Otherwise, immigration judges also decide *defensive* asylum applications filed directly with the court by someone already in removal proceedings. The affirmative and defensive asylum application processes are discussed in **Chapters 9 and 10**, respectively.

A. The statute and regulations

The Refugee Act, as incorporated into the Immigration and Nationality Act at § 208, is implemented by the “procedures established by the Attorney General,” which are regulations.³⁵ The asylum regulations are published in the Code of Federal Regulations (CFR) under Title 8, where they discuss application procedures and legal standards and define many key terms. The regulations are administered by USCIS and the Executive Office of Immigration Review (EOIR).

The regulations on asylum law, 8 CFR § 208 *et seq.*, were rewritten substantially in 1990, and in many respects these changes were more generous to asylum applicants.³⁶ These regulations apply to asylum cases that were filed after October 1, 1990, and before April 1, 1997. DHS amended the regulations in 1997 to implement changes in asylum law and procedure legislated in IIRIRA in 1996. In addition, the REAL ID Act of 2005 amended the statute and resulted in numerous changes to the regulations, particularly regarding credibility findings and bars associated with suspected support for terrorist groups. Most recently, and in 2020 in particular, the Trump administration attempted to significantly restrict asylum by amending asylum-related regulations through the rulemaking process.³⁷ These regulatory changes have since been rescinded or remain blocked by court challenges. The Biden administration issued regulations in 2022 making changes to the expedited removal process as it relates to asylum and creating the “Asylum Merits Interview” framework. In 2023, it promulgated a regulation imposing a transit bar for certain asylum seekers. Both are discussed in **Chapter 6**.

³⁵ INA § 208(b)(1).

³⁶ The asylum regulations are reproduced in their entirety in Appendix A, located at the end of the manual.

³⁷ National Immigrant Justice Center, *A Timeline of the Trump Administration’s Efforts to End Asylum*, (Aug. 2020), <https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2020-10/10-06-2020-asylumtimeline.pdf>.

B. The BIA and the appellate courts

If an asylum applicant wishes to appeal a denial from immigration court, which adjudicates asylum cases in removal hearings,³⁸ that appeal must be made to the Board of Immigration Appeals (BIA). The BIA is an administrative court that also operates under the Attorney General. Appeals to the BIA may be made by either the person applying for asylum or by USCIS or ICE if they disagree with the immigration court's decision. In addition, the Attorney General has the authority to review BIA cases and decisions that: (1) the Attorney General directs the BIA to certify for review; (2) the BIA refers for review, and (3) DHS refers for review.³⁹

If the BIA or the Attorney General denies asylum, the asylum seeker can appeal to the federal court of appeals. The BIA's and Attorney General's published case decisions are the controlling law (precedent) for asylum unless a federal court overrules the decision. If a federal court of appeals adopts a different rule than the BIA or Attorney General, that rule is applied within that court's jurisdiction or circuit. This is important in asylum law because some circuit Courts of Appeal have interpreted some elements of asylum law more generously than the BIA and Attorney General. A Circuit's interpretation would only be binding within that Circuit.

C. The Asylum Officer Basic Training Course (AOBTC)

The Asylum Officer Basic Training Course (AOBTC) contains interpretations of substantive law that can arguably be construed as DHS positions on these matters. While the lesson modules are not legally binding, they offer a strong indication of the appropriate standards to be used in evaluating asylum claims. They also offer case law citations for the various legal rules and examples discussed. The AOBTC used to be available on the USCIS website. However, between March and April 2017, twenty six documents related to the AOBTC, including all of the "Lesson Modules," and the links to training documents contained therein, were removed from the USCIS website.⁴⁰ Many of the AOBTC materials are still accessible to American Immigration Lawyers Association (AILA) members through AILA's website and some training modules are available on other websites.

D. The UN Handbook

In enacting the Refugee Act of 1980, the Congress rewrote its basic immigration law in order to bring U.S. law into accordance with the international refugee treaties to which the United States was already a party. Because U.S. law in this area is based on international law, we have access to an important tool for asylum cases: the *Handbook on Procedures and Criteria for Determining Refugee Status*, referred to as the UN Handbook, written by the United Nations High Commissioner for Refugees (UNHCR).⁴¹ The U.S. Supreme Court and other courts have

³⁸ 8 CFR § 1003.

³⁹ 8 CFR § 1003.1(d)(7), (h).

⁴⁰ Sunlight Foundation, *Removal of 26 Documents for Asylum Officer Training from the USCIS Website: Access Assessment Report*, (May 29, 2018), <https://sunlightfoundation.com/wp-content/uploads/sites/2/2018/05/AAR-6-USCIS-Asylum-Training-Materials-180529.pdf>.

⁴¹ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Feb. 2019),

approved the use of the UN Handbook as a source in interpreting U.S. asylum and refugee law.⁴² Experienced asylum practitioners have said it is close to malpractice for an attorney representing an asylum client to not have access to the Handbook.

E. Other sources

In addition to these sources of law, regulations, and interpretations, many other sources are sometimes useful. These consist of case law, settlement agreements, Operating Instructions, Implementation Wires, Memos from the Director of DHS, and local policies, both written and unwritten, by the district director, immigration judges, detention officers, DHS Examination Officers, the DHS Director of Asylum, etc. Depending on the case, these documents and authorities may provide useful support for specific arguments on behalf of your client.

In addition, several organizations provide support through resources and advisories that are critical to advocates building an asylum case. The Center for Gender and Refugee Studies (CGRS), for instance, maintains a database of information on different types of claims and can offer case-specific support, including country conditions and expert statements.⁴³

§ 1.6 How to Use This Manual

This manual provides an overview of asylum law and practice and is intended as a guide to help legal practitioners understand the basic requirements of an asylum claim and how to fulfill them. In **Chapters 2 and 3**, we examine the legal components, or elements, of an asylum claim and provide practical guidance on how to craft successful arguments to fulfill each element. We then move on to discuss the various bars to asylum in **Chapter 4**. For claims for withholding of removal or claims under the Convention Against Torture, we provide a thorough description of the legal requirements involved in **Chapter 5**. In **Chapter 6**, we discuss access to asylum procedures for people arriving at the U.S. border to seek asylum, which has been the subject of multiple policy changes in recent years.

The chapters that follow address the procedural steps required for filing an asylum application. In **Chapter 7**, we look at how to prepare an asylum application and how to assemble the various pieces of necessary evidence, including the client declaration. In **Chapter 8**, we discuss how to work with asylum clients. **Chapter 9** provides an overview of the affirmative asylum process, while **Chapter 10** covers the defensive asylum procedure in immigration court. Finally, **Chapter 11** discusses the various benefits granted to an individual once they have successfully been granted asylum protection.

Practitioners should also review the instructions and sample materials included in the appendices. They include samples for both adult and unaccompanied minor cases. We also urge you to stay abreast of the latest procedural updates issued by USCIS and EOIR and to seek the support of our asylum experts if necessary.

<https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [hereinafter “UN Handbook”].

⁴² See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁴³ CGRS, *Accessing Assistance from CGRS*, <https://cgrs.uclawsf.edu/about-technical-assistance-program>.

§ 1.7 Summary of This Manual

CHAPTER 2, PERSECUTION AND WELL-FOUNDED FEAR. A person will prevail on an asylum claim if they can demonstrate that they suffered persecution in the past or have a “well-founded fear” of future persecution. Although the term “persecution” is not defined in the law, a common definition from case law is, “the infliction of suffering or harm upon those who differ in a manner that is regarded as offensive.” Thus, the harm need not rise to the level of long-term detention and torture. However, harm or the danger of harm because of a personal vendetta, criminal prosecution, war, anarchy, or the like does not normally constitute actionable persecution unless it is connected to a protected ground. The persecution can be inflicted or threatened by a government or its agents, such as the army or police, or by persons or groups “that the government is unable or unwilling to control.” This chapter includes a section regarding persecution in children’s asylum claims.

CHAPTER 3, PROTECTED GROUNDS. The persecution must be *on account of* at least one of five enumerated grounds: political opinion, race, religion, nationality, or membership in a particular social group. This chapter addresses each ground for asylum separately and includes sections specifically addressing some of the most common and evolving forms of “particular social groups,” such as those involving children and youth, gang violence, groups based on gender and LGBTQIA+ identities. In addition, if a persecutor *believes* that the asylum seeker possesses characteristics within these grounds, whether or not they actually possess them, they can prevail on the asylum claim if they suffer fear or persecution as a result of the persecutor’s wrong belief. For instance, a foreign government may believe that a person holds a particular political opinion based on the political opinions expressed by his activist wife; and it may thus persecute him based on that belief. This is an example of what could be an asylum claim based on imputed political opinion. Additionally, a claim can be based on more than one ground, or based on a protected ground and an unprotected one. A claim with two bases is common and each should be emphasized.

CHAPTER 4, BARS TO ASYLUM. A person may be barred from receiving asylum for any of the following: if they have persecuted others based on a protected ground; if they have committed a serious non-political crime before coming to the United States; if they have been convicted of certain crimes in the United States; if they are a danger to the security of the United States; or if they have been “firmly resettled” in a third country (i.e., has received an offer of permanent residence in a third country); or if they can be removed pursuant to a “safe third country” agreement. They may also be denied asylum as a matter of discretion.

In addition, a person must file the asylum application within one year of their last entry into the United States, with two exceptions. One exception allows for a late application when there are “changed conditions” in the person’s home country or changes in the U.S. laws. The allows for late filing where an applicant can demonstrate “extraordinary circumstances” which delayed filing, examples of which may include things like illness; a person having been in lawful status (such as a visa) after they entered the United States; a person grappling with personal or cultural barriers, such as the “coming out” process for many LGBTQIA+ people escaping persecution in their home country. As discussed in this chapter, the one-year deadline and safe third country bar do not apply to unaccompanied children (UCs).

CHAPTER 5, WITHHOLDING OF REMOVAL AND THE CONVENTION AGAINST TORTURE.

Persons who are ineligible for asylum for any of the above reasons may be eligible for other related forms of relief. One is called “Withholding of Removal” (“withholding”) and the other is protection under the Convention Against Torture (CAT). Although they all offer a form of protection against being deported to the country where persecution is feared, the standards for each are very different, as are the benefits they grant. Applying for withholding, for example, has the advantage of allowing a person to seek protection even though they did not file an application within one year of entering the United States. However, to be granted withholding, such an applicant is also required to show a higher likelihood of persecution than they would be required to obtain asylum. If granted withholding, a person is not eligible to obtain a travel document with which to travel outside and then re-enter the United States, nor will they ever qualify for adjustment of status based on withholding. Protection under CAT does not require that the feared harm be on the basis of a protected ground, but it does require a showing that the person is more likely to be tortured than not, if removed to their country of origin.

CHAPTER 6, ACCESSING ASYLUM AT THE U.S. BORDER. Over the last several years access to asylum process has become complicated, especially for people who recently arrived in the United States or are presenting themselves at the U.S. border to seek asylum. The expedited removal and credible fear process creates an initial hurdle for many asylum seekers to overcome. In addition, a series of policy measures in recent years have sought to restrict access to the asylum system for people arriving in the United States, especially at the southern border. The most recent example is the Biden administration’s new asylum ban, which has taken effect in the wake of the expiration of the Title 42 order. The Asylum Merits Interview (AMI) process and the asylum process for unaccompanied minors created unique frameworks where some asylum seekers can have their initial asylum claim adjudicated by the USCIS asylum office, though the AMI process does so at the expense of crucial due process protections. Court challenges to many of these measures add another layer of confusion to an already complicated process. As a result, and despite plain language in INA § 208 allowing for asylum seekers to apply regardless of their manner of entry, access to asylum at the border has experienced an unprecedented degree of uncertainty.

CHAPTER 7, PREPARING AN ASYLUM APPLICATION. There are two different procedural ways for a person to file for asylum: “affirmatively” with USCIS and “defensively” in immigration court. Both procedures involve the same application form and the same legal standards apply. This chapter, therefore, provides detailed guidance on how to complete the Application for Asylum and Withholding of Removal, on Form I-589, and how to assemble the evidentiary documentation that must accompany it, including the applicant’s declaration.

CHAPTER 8, WORKING WITH CLIENTS. Building a successful lawyer-client relationship is key to winning an asylum case. Therefore, working in partnership with the client in the preparation and the presentation of a case will greatly help both you and your client. Finally, because many asylum applicants have experienced severe trauma and other difficult situations that their asylum claim requires them to talk about, this chapter provides tips for practitioners on how to skillfully establish trust and the ability discuss traumatic events and difficult emotional experiences. This is covered in various sections, including the section dedicated to working with children.

CHAPTER 9, AFFIRMATIVE ASYLUM PROCESS. An *affirmative asylum application* is filed by persons who are in the United States and not in removal proceedings. The application is filed with

USCIS, after which a person will be asked to submit their biometrics and attend a non-adversarial interview with an asylum officer. The asylum officer can grant asylum or can refer the person to immigration court. This process is described here with special practice tips for attorneys and their clients.

CHAPTER 10, APPLYING FOR ASYLUM IN IMMIGRATION COURT. An asylum applicant can end up in immigration court in several ways. They could be referred to immigration court when USCIS did not grant their asylum application (if they are not otherwise in lawful immigration status); they could be sent to immigration court after undergoing a “credible fear interview” because they expressed a fear of returning to their home country at the airport or other port of entry upon arrival to the United States; or they could be in removal proceedings because they were charged with being removable from the United States for other reasons. An application filed while in proceedings is considered a *defensive asylum application* because it is filed in defense to removal. In a defensive asylum context, DHS is actively seeking to deport or remove the person from the country; and an asylum application serves as the defense to removal.

In the defensive process, an adversarial hearing is held before an immigration judge, where testimony is presented and witnesses may be introduced. If either the asylum applicant or DHS is not satisfied with the judge’s decision, an appeal can be made to the BIA. In this context there are important strategic considerations that warrant attention, such as regulations related to work authorization, which have recently undergone significant changes. This chapter, therefore, explores the *defensive asylum application* process in detail and provides practice tips for how to prepare to represent asylum clients in immigration court.

CHAPTER 11, BENEFITS OF ASYLUM STATUS. This chapter guides you through the benefits of asylum after an application has been granted. If an asylum claim is approved, the applicant can proceed to apply for a variety of benefits, including an employment authorization document, a refugee travel document, asylum status for their spouse and children, certain public benefits, and the right to apply for permanent residence. This chapter gives an overview of these benefits and highlights the main points to keep in mind and to advise clients about when their asylum claim is granted. This chapter includes special warnings about travel abroad and ensuring protection for minor children under the Child Status Protection Act (CSPA).