
Representing Asylum Seekers with Disabilities: Relevant Law

This fact sheet is designed for attorneys and accredited representatives who represent disabled¹ asylum seekers before the immigration court and asylum office. It provides information about the application of federal disability law in immigration cases and procedures to request accommodations for clients with disabilities. The information provided does not, and is not intended to, constitute legal advice; instead, it is offered for general informational purposes only. Nor is it meant to provide a comprehensive overview of every scenario. For any particular case, attorneys should perform their own due diligence and consult the relevant law before offering legal advice.

Federal law prohibits discrimination based on disability in immigration proceedings and requires the government to provide reasonable accommodations to enable asylum seekers and other immigrants an equal opportunity to fully participate in, and enjoy the benefits of, their proceedings.² Attorneys should be familiar with these requirements to help ensure that their clients' rights are protected.

Does federal disability law cover asylum seekers in the United States?

Yes. Federal disability law protects any person present in the United States³, regardless of immigration status, including people seeking asylum. It applies at all stages of immigration proceedings.

The Rehabilitation Act is federal legislation passed in 1973 aimed at remedying disability discrimination. Section 504 of the Rehabilitation Act prohibits discrimination because of a person's disability in programs or activities conducted by federal agencies.⁴

Adjudication of asylum applications is managed by federal agencies. Depending on which agency has jurisdiction over a case, an asylum application may be adjudicated by either the United States Citizenship and Immigration Services (USCIS) asylum office or the Department of Justice's Executive Office for Immigration Review (EOIR) immigration court. USCIS is part of the Department of Homeland Security (DHS). Both USCIS and EOIR are federal executive agencies. Asylum adjudication is therefore an activity of federal agencies, so Section 504 applies.⁵

¹ There is ongoing discussion within the disability community about using person-first language (e.g. person with autism) versus identify-first language (e.g. autistic person). This fact sheet alternates between both approaches. For more perspective from a disabled person, see Jevon Okundaye, *Ask a Self-Advocate: The Pros and Cons of Person-First and Identity-First Language*, Massachusetts Advocates for Children, (April 23, 2021), <https://www.massadvocates.org/news/ask-a-self-advocate-the-pros-and-cons-of-person-first-and-identity-first-language>.

² See 28 CFR § 39.160(a)(1) ([in Department of Justice programs the agency should provide accommodations] "to afford a [disabled] person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.").

³ See 29 U. S. C. § 794 (Rehabilitation Act applies to any qualified "individual" in the United States); *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, (C.D. Cal. Apr. 23, 2013) (permanent injunction holding that the Rehabilitation Act requires the government to provide noncitizens with serious mental disabilities detained in Arizona, California, and Washington with counsel in their immigration proceedings).

⁴ 29 U. S. C. § 794

⁵ See, e.g., 28 C.F.R. § 39.130 (applying the Rehabilitation Act to the Department of Justice); 6 C.F.R. § 15 (applying the Rehabilitation Act to the Department of Homeland Security); *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, (C.D. Cal. Apr. 23, 2013) (applying the Rehabilitation Act Section 504 to immigration proceedings)

Disability protections also apply in all other DHS programs, including for those people subject to expedited removal who participate in credible fear screenings, and for any one in Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) custody.⁶

Who is covered by federal disability law?

Federal disability law covers people who a) have a physical or mental condition that “*substantially limits*” one or more major life activities, b) have a *history* of such a condition, or c) are *perceived by others* as having such a condition.⁷

Some examples of major life activities are: seeing, hearing, caring for oneself, performing manual tasks, sleeping, walking, learning, concentrating, thinking, communicating, and working.

Post-traumatic stress disorder (PTSD), which affects many asylum seekers, may qualify as a disability under federal law. Courts have recognized PTSD as a disability under the Americans with Disabilities Act (ADA) in other contexts.⁸ The ADA and the Rehabilitation Act are generally interpreted coextensively.⁹ Federal agencies, including the U.S. Equal Employment Opportunity Commission (EEOC) and the Social Security Administration (SSA), have recognized PTSD as a disability under federal law and provided for reasonable accommodations for people with PTSD and other mental health conditions.¹⁰

Post-traumatic stress disorder is only one example of a mental health disability that often affects asylum seekers. Many clients have one or more disabilities as defined under federal law. Lawyers should not attempt to diagnose their clients or assume that any client has a disability. Lawyers should work with their clients and other professionals like social workers and psychologists to identify if the client could benefit from accommodations in their proceedings and be covered by the federal definition of disability.

How does federal disability law apply in asylum adjudications?

Asylum seekers with disabilities are entitled to participate meaningfully in all stages of their immigration proceedings.¹¹ The asylum office¹² and immigration court¹³ may not discriminate against any disabled asylum seeker and may not deny them the opportunity to participate in or benefit from the asylum application and adjudication process.

⁶ 6 C.F.R. § 15 (applying the Rehabilitation Act to the Department of Homeland Security)

⁷ 42 U.S.C § 12102, 29 U.S.C § 705(9)

⁸ See, e.g., *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004) (analyzing claim that employer failed to accommodate employee's PTSD and recognizing PTSD as a disability) *Felix v. New York City Transit Auth.*, 154 F. Supp. 2d 640 (S.D.N.Y. 2001) (holding that plaintiff's PTSD, which lasted four years after a traumatic incident, was of sufficient duration to qualify as a disability).

⁹ 42 U.S.C.A. § 12201(a) (2009) (ADA regulations on construction: “. . . nothing in this chapter shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.”); *Cash v. Smith*, 231 F.3d 1301, 1305 n.2 (11th Cir. 2000) (“Cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa”).

¹⁰ U.S. Equal Employment Opportunity Commission, *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights* (Dec. 12, 2016), <https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights> (technical assistance document issued by a federal agency describing reasonable accommodations for PTSD and other mental health conditions in the employment context); Social Security Administration, *Disability Evaluation Under Social Security: 12.0 Mental Disorders – Adult: 12.15 Trauma- and stressor-related disorders*, https://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm#12_00B11 (describing posttraumatic stress disorder and other trauma and stressor related disorders as qualifying as disabilities).

¹¹ *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, (C.D. Cal. Apr. 23, 2013) (finding that mentally disabled people in ICE detention had demonstrated harm by “not being able to meaningfully participate in their removal hearings”)

¹² 6 C.F.R § 15.30

¹³ 28 C.F.R § 39.130

What accommodations are asylum seekers with disabilities due under federal law?

Under federal law, the asylum office¹⁴ and immigration court¹⁵ must provide reasonable accommodations for asylum seekers with disabilities, unless the government entity can demonstrate that the requested accommodation would impose an undue hardship on their operations or fundamentally alter the nature of the program/activity.¹⁶

In EOIR immigration court, regulations published by the Department of Justice regarding disability nondiscrimination and “effective communication” apply.¹⁷ These regulations require EOIR to give primary consideration to the request of the disabled person when arranging auxiliary aids for communication (like readers, Brailled material, interpreters, live transcription, etc.).¹⁸ DHS also has effective communication regulations, which require DHS and the asylum office to give primary consideration to the request of the disabled person when arranging auxiliary aids.¹⁹

An asylum seeker may be required to show that the reasonable accommodation requested is related to the disability. Although neither the Rehabilitation Act nor the Supreme Court has explicitly required a nexus between the accommodation requested and the disability, lower court judges routinely require a nexus between the reasonable accommodation and the disability.²⁰

Some examples of reasonable accommodations an asylum seeker with a disability could request in immigration court or the asylum office might include, but are not limited to:

- Providing sign language and Certified Deaf Interpretation²¹ for a d/Deaf or hard-of-hearing asylum seeker²²;
- Allowing an attorney to provide additional context to questions posed in immigration court for a client with cognitive and/or intellectual disabilities;
- Not requiring an asylum seeker with PTSD and/or other mental health or cognitive disability (that substantially limits their ability to testify) to orally testify about particularly upsetting aspects of their story (and instead relying on their written declaration and/or testimony from other witnesses) without drawing any adverse credibility inferences from their oral testimony waiver, and/or limiting questioning by a DHS attorney during a hearing;
- Scheduling an asylum interview/hearing with an afternoon start time for an asylum seeker with mobility issues, which can make early morning asylum interview/immigration court start times particularly challenging;
- Providing breaks in proceedings every hour (or other requested time interval) for asylum seekers with a variety of disabilities, such as chronic medical disabilities, who require breaks in order to fully participate in their proceedings.

These are a few examples, but each person’s situation is unique. Lawyers should have conversations with their client and should consider consulting with the client’s treating physician/mental health professional about what they might need or

¹⁴ 6 C.F.R. § 15.30

¹⁵ 28 C.F.R. § 41.51

¹⁶ 6 C.F.R. § 15.50, 28 C.F.R. § 39.150

¹⁷ 28 C.F.R. § 39.160

¹⁸ *Id.*

¹⁹ 6 C.F.R. § 15.60

²⁰ See *Three Formulations of the Nexus Requirement in Reasonable Accommodations Law*, 126 Harv. L. Rev. 1392 (2013).

²¹ Deaf communicators, interpretation experts, and Deaf education experts generally agree that both an ASL or other sign language interpreter and a certified deaf interpreter are necessary for effective communication in the courtroom. See Carla Mathers, *Deaf Interpreters in Court: an accommodation that is more than reasonable*, The National Consortium of Interpreter Education Centers, (March 2009), http://www.interpretereducation.org/wp-content/uploads/2011/06/Deaf-Interpreter-in-Court_NCIEC2009.pdf

²² The USCIS Affirmative Asylum Procedures Manual mandates that the asylum office provide and pay for a sign language interpreter (USCIS Affirmative Asylum Procedures Manual May 2016, available at: <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>)

want in order to participate in their case. The accommodation requests should be supported by documentation and particular to their circumstances.

How do disability accommodation requests differ from a motion for a competency hearing and safeguards in immigration court?

Immigration lawyers may be familiar with competency hearings in removal proceedings.²³ Under federal immigration law, the government must provide safeguards to protect an individual's "rights and privileges" where they are not competent to participate in their immigration court proceedings.²⁴ A 2011 Board of Immigration Appeals decision, *Matter of M-A-M-*, lays out a framework for assessing competency and providing safeguards.²⁵ Under this framework, the immigration court is required to evaluate appropriate safeguards if it determines that an individual is not competent to proceed.²⁶ An attorney may file a motion for safeguards to request any accommodations necessary for a fair proceeding, such as continuing the case or waiving an individual's testimony. A motion for safeguards may be appropriate even if a client is deemed competent.²⁷

In addition, a detained unrepresented person who is determined to not be competent to represent themselves must be assigned counsel under the National Qualified Representative Program (NQRP),²⁸ which was created in the wake of a federal court decision that relied on Section 504 of the Rehabilitation Act to require the appointment of counsel for detained individuals who were deemed not competent to represent themselves.²⁹ Individuals who are assigned counsel under NQRP may also request other safeguards to ensure a fair hearing.

At the asylum office, the *M-A-M* framework is not binding, but the asylum office has published some procedures for competency inquiries, including stating that a close relative or other close person may testify and appear on their behalf if certain criteria are met.³⁰ USCIS also must explore competency concerns during credible fear and reasonable fear inquiries, although due to the nature of these interviews, which frequently take place telephonically, without counsel, in detention, and on a compressed timeline, advocates and DHS have acknowledged that competency concerns may go unaddressed.³¹

While competency proceedings apply where asylum seekers with immigration court cases may not be competent to participate in proceedings or represent themselves, often due to mental health or cognitive disabilities, a request for reasonable accommodations may relate to a broader range of disabilities than are relevant in competency determinations.

There are many asylum seekers who have mental health disabilities or other types of disabilities who are competent to participate in their proceedings but may nonetheless require or greatly benefit from reasonable accommodations. The Rehabilitation Act generally sweeps more broadly than the *M-A-M* framework and requires agencies to affirmatively accommodate and remove discriminatory policies and practices, and to provide meaningful access to programs and services, including immigration court proceedings.³²

²³ For more information about protections for asylum seekers using the competency framework, see: Immigrant Legal Resource Center, *Advocating For and Representing Clients with Mental Illness in Detained Immigration Removal Proceedings* (June 2022) and CLINIC, *Representing Noncitizens with Mental Illness* (May 2020).

²⁴ 8 U.S.C §1229a (b)(3)

²⁵ *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3711.pdf>;

²⁶ *Id.*

²⁷ *Id.*

²⁸ Vera Institute of Justice, *National Qualified Representative Program*, <https://www.vera.org/projects/national-qualified-representative-program>

²⁹ ACLU of Southern California, *Franco v. Holder*, <https://www.aclusocal.org/en/cases/franco-v-holder>

³⁰ USCIS, *Affirmative Asylum Procedures Manual* (May 2016), <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>

³¹ DHS Equity Plan 2022 ("It is also challenging to elicit testimony and make credible fear determinations when individuals have mental health or capacity issues."); CRCL Retention Memo, *Allegations Relating to Competency Concerns in Protection Screening*, June 24, 2022 (https://www.dhs.gov/sites/default/files/2022-09/06.24.2022%20CRCL%20Retention%20Memo%20to%20USCIS%20and%20ICE%20-%20Competency%20in%20Protection%20Screening_Redacted_508_0.pdf).

³² *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 200 (2d Cir. 2014); *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982)

Competency proceedings and protections do not contemplate all forms of disability. Even in cases where competency proceedings are relevant, disability accommodations under the Rehabilitation Act are useful because they may cover additional protections. In immigration court, attorneys may request safeguards and accommodations under the competency framework and Section 504 of the Rehabilitation Act.³³

Why is it crucial to make a request for disability accommodations?

Reasonable accommodations may be necessary for asylum seekers with disabilities to participate in their proceedings. They also serve to notify the court or asylum office of a client's disabilities before the hearing or interview and to remind the government of its obligations under federal disability law. Even if the immigration court or the asylum office does not grant the request, it is also important to create a record of the request so that the issue is preserved for future appeals and/or other litigation.

Submitting a reasonable accommodations request may help ensure that a client's substantive case is not negatively impacted due to their disability. For example, an asylum seeker with a traumatic brain injury (TBI) that affects their ability to recall specific dates, times, and events, may be deemed not credible by the court because of their memory issues if they are not accommodated during their testimony. However, if the court is alerted to their memory challenges and the client receives accommodations which, for example, limit their need to testify, they may be less likely to be erroneously deemed not credible.

According to the asylum office policy manual, the asylum office gives primary consideration to the specified requests of the person with a disability when evaluating an accommodation request.³⁴ Department of Justice disability regulations require the government to give primary consideration to the specific requests of the disabled person in the effective communication (e.g., interpretation) context, which may provide a basis to argue that they should give primary consideration to the requests of the disabled person in accommodation requests where the disabled person has preferred accommodations.³⁵

If the disabled person does not know what accommodation would be most helpful, the government should assess the available options and suggest accommodations.³⁶

Where should a reasonable accommodation request be submitted?

Asylum Office: Representatives and people seeking asylum may write to the director of the asylum office in advance of the interview with their request and documentation in support thereof. USCIS [instructs](#) asylum applicants to use their online accommodations request [form](#) or call the USCIS Contact Center at 800-375-5283 (TTY 800-767-1833) to request a disability accommodation.³⁷

Immigration court: EOIR does not have a published policy or procedure for requesting reasonable accommodations. Lawyers typically file a motion for reasonable accommodations with the immigration court in advance of their hearing date. For general guidance about filing a motion with the immigration court, see the [Immigration Court Practice Manual](#), Section 5.2 (Filing a Motion).

³³ A sample competency motion for safeguards by Laura Lunn which also invokes Section 504 of the Rehabilitation Act is available here: <https://www.cliniclegal.org/file-download/download/public/3766>

³⁴ USCIS Affirmative Asylum Procedures Manual, Page 37, <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf> (May 2016)

³⁵ 28 C.F.R. § 39.160(a)(1)(i)

³⁶ See generally *Pierce v. D.C.*, 128 F. Supp. 3d 250, 254 (D.D.C. 2015) for discussion of the government's affirmative obligations to assess and evaluate the need for accommodations in the detained context.

³⁷ USCIS confirmed to Human Rights First in September 2023 that asylum applicants may now use the online request tool, although Ask Emma (a computer-generated virtual assistant on the USCIS website) still indicates that asylum applicants must call and may not use the online form.

What evidence should be filed with a request for accommodations?

There is no singular approach to including evidence with a motion for reasonable accommodations to the immigration court or an accommodations letter to USCIS. It will depend on the client's specific situation, the accommodations requested, and the procedural stage of the client's case at the time the representative files the motion, sends the letter or otherwise makes the request.

Some examples of evidence attorneys may include are: medical or psychological letters or evaluations, relevant academic or other expert report on the disability, other reports or resources that help explain the relevant disability to the government, and other supporting documentation of the client's disability.

Where else should representatives consider disability?

Protection claims

Clients may also have a viable claim for asylum or statutory withholding of removal claim based on a disability-based particular social group (PSG). To be granted these forms of protection, asylum seekers must establish that race, religion, nationality, political opinion, or particular social group was or would be at least one central reason for their persecution. Circuits have recognized PSGs on the basis of a range of disabilities. See, e.g. *Hernandez Arellano v. Garland*, 856 F. App'x 351 (2d Cir. 2021) (recognizing "individuals with intellectual disabilities who lack family protection" as a PSG); *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014) (holding that "individuals with bipolar disorder who exhibit erratic behavior" is a cognizable particular social group); *Angel-Lopez v. U.S. Att'y Gen.*, 853 F. App'x 440 (11th Cir. 2021) (recognizing "mentally ill individuals in El Salvador suffering from schizophrenia" as a PSG). Clients may also have a disability that puts them at risk for torture if returned to their home countries, which could give rise to eligibility for protection under the Convention Against Torture (CAT).

Immigration detention

Practitioners may utilize disability law and policies to advocate for clients' release if they are detained. ICE, which runs immigration detention centers, must act affirmatively to prevent disability discrimination.³⁸ Scholars have recently advanced arguments that release from detention is sometimes a necessary reasonable accommodation.³⁹ Practitioners may submit custody redetermination requests for disabled clients in ICE detention. Section V of the Immigration Legal Resource Center [practice advisory](#) on representing clients with mental illness in removal proceedings includes additional resources and guidance on advocating for release.

³⁸ ICE Performance Based National Detention Standards, *4.8 Disability Identification, Assessment, and Accommodation*, 2011 (<https://www.ice.gov/doclib/detention-standards/2011/4-8.pdf>)

³⁹ Margo Schlanger, Elizabeth Jordan, Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, Harvard Law & Policy Review 17, no. 1 (2022) (<https://harvardlpr.com/wp-content/uploads/sites/20/2023/02/HLP101.pdf>).