
BASICS OF ASYLUM

Asylum seekers are refugees seeking safety in the United States

The United States has a long and proud history of allowing people to request asylum and providing refuge to victims of religious, political, ethnic, and other forms of persecution. This tradition reflects a core component of this country's identity as a nation committed to freedom and respect for human dignity. The increasing displacement of people in the Western Hemisphere has led to higher numbers of individuals seeking asylum in the United States.

Asylum seekers come from all walks of life. They can be journalists, teachers, preachers, human rights advocates, farmers, parents, or political dissidents. Their list of home countries reflects the arc of recent world history and conflict—Venezuela, Afghanistan, the People's Republic of China, Egypt, Eritrea, Nicaragua, Russia, and Cameroon—as well as the pernicious presence of persecution in many other places.

The United States' asylum statutes implement protections for refugees found in the 1951 United Nations Refugee Convention (and its 1967 Protocol), developed in the wake of the Second World War.¹ An individual seeking asylum protection is sometimes referred to as an asylum seeker. An individual can request asylum from within the United States or at the U.S. border, whether after entering the country between ports of entry or at a port of entry.²

Asylum seekers must prove they meet the definition of a “refugee”

To be eligible for asylum in the United States, the applicant must, among other things, demonstrate that they meet the statutory definition of a “refugee.” Generally, this requires an applicant to demonstrate they are:

- **Unable or unwilling to return** to that country and unable or unwilling to avail themselves of the protection of that country;
- Because of [past] persecution or a **well-founded fear of persecution**
- **On account of** race, religion, nationality, membership in a particular social group, or political opinion.³

In addition to meeting the statutory definition of “refugee,” asylum seekers must also demonstrate that race, religion, nationality, membership in a particular social group, or political opinion was or would be “one central reason” for the persecution.⁴ The statute does not apply the “one central reason” standard to statutory withholding of removal, but the

¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.”) (internal citation omitted).

² 8 U.S.C. § 1158 (“Any [individual] who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .) . . . irrespective of such [an individual’s] status, may apply for asylum.”).

³ 8 U.S.C. § 1101(a)(42).

⁴ 8 U.S.C. § 1158(b)(1)(B)(i).

Board of Immigration Appeals held otherwise, and the Federal Courts of Appeals are split on the matter.⁵ Applicants must file within one year of their arrival in the United States, absent extraordinary circumstances.⁶

While applying for asylum, applicants often seek additional, lesser forms of relief like 1) statutory withholding of removal and 2) protection under the Convention Against Torture, which can take the form of withholding or deferral of removal.⁷ These forms of relief have higher standards of proof (e.g., “more likely than not” compared to “well-founded fear”), but have less bars to eligibility than asylum and afford less protection and benefits.⁸ Asylum provides the ability to work, travel abroad, sponsor family members for visas, and apply for legal permanent resident status, while withholding of removal merely provides protection against removal and the ability to work.⁹

Asylum seekers can file an affirmative application for asylum with USCIS or a defensive application before an immigration judge

An applicant can file for asylum affirmatively or defensively. An applicant files an affirmative application with United States Citizenship and Immigration Services by submitting [Form I-589, Application for Asylum and Withholding of Removal](#). If an Asylum Officer denies the application, it may refer the asylum seeker to Immigration Court.¹⁰ Individuals in removal proceedings before an Immigration Judge can apply for asylum as a defense to removal. Despite the adversarial nature of these proceedings, most asylum cases referred from USCIS are ultimately granted by an Immigration Judge.¹¹

Applications for asylum can be voluminous, including declarations from applicants detailing past persecution or grounds for a fear of future persecution, medical and police records corroborating physical harm, research establishing country conditions related to the alleged persecution consistent with the applicant's declaration, and translations of all documents in foreign languages, although case law has made clear that the credible testimony of the applicant alone can sustain their burden of proof.¹²

⁵ Hillel R. Smith, Cong. Research Serv., LSB10046, The Application of the “One Central Reason” Standard in Asylum and Withholding of Removal Cases (Dec. 18, 2017), <https://crsreports.congress.gov/product/details?prodcode=LSB10046>.

⁶ 8 U.S.C. § 1158(a)(2)(B).

⁷ 8 U.S.C. § 1231(b)(3)(A).

⁸ 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(b), (c)(2); 8 C.F.R. § 1208.17; see *INS v. Cardoza-Fonseca*, 480 U.S. 423 (1987); see Hillel R. Smith, Cong. Research Serv., LSB10815, An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part One) at 2 (Sept. 7, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10815>.

⁹ Compare 8 U.S.C. §§ 1158(c)(1), 1159, 8 C.F.R. § 1208.21, with 8 U.S.C. § 1231(b)(3)(A), 8 C.F.R.

§ 274a.12(a)(10).

¹⁰ 8 U.S.C. § 1208.14(c).

¹¹ Citizenship and Immigration Services Ombudsman, Annual Report 2022, at 52 (June 30, 2022), https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf.

¹² See Amy Grenier, Am. Imm. Lawyers Assoc., High Stakes Asylum: How Long an Asylum Case Takes and How We Can Do Better (June 2023), <https://www.aila.org/aila-files/91508EE0-B02C-4D8F-869C-78B697B68E56/23061202.pdf>; 8 U.S.C. § 1158(b)(1)(B)(ii).

Asylum seekers are not required to be placed in expedited removal, a resource-intensive, due process deficient process

Expedited removal is a statutory authority created in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 that allows immigration officers to order certain individuals deported without further review if they were not paroled or properly admitted to the country and cannot show they have been continuously physically present in the country for at least two years.¹³ However, Congress enacted specific protections, the credible fear screening, within the law for asylum seekers. Individuals subject to expedited removal who express an intent to seek asylum or fear of return to their country of nationality *must* be referred for a preliminary fear screening (in what is referred to as a Credible Fear Interview or CFI) by a USCIS asylum officer.

An individual must demonstrate to an asylum officer that they possess a “credible fear of persecution,” such that there is a “significant possibility” that the applicant would be eligible for asylum after a full hearing.¹⁴ An asylum seeker who demonstrates this must then be referred for a full adjudication of their claim. If an asylum officer determines that an individual does not have a significant possibility of establishing asylum eligibility and that determination is not reversed by an immigration judge or reconsidered by USCIS, the asylum seeker may be deported.

DHS is not required to use expedited removal and has the authority to directly refer asylum seekers for full asylum hearings rather than first requiring them to pass a credible fear screening. Research on expedited removal has documented refugees who have been persecuted, tortured, and murdered after being wrongfully deported.¹⁵ The United States Commission on International Freedom has also cataloged significant deficiencies in the implementation of expedited removal that resulted in bona fide asylum seekers being returned to harm.¹⁶ Moreover, the USCIS Ombudsman has noted the questionable value of credible fear screenings attributing the backlog in affirmative asylum applications to the credible and reasonable fear screening workloads that divert significant USCIS resources.¹⁷

¹³ 8 U.S.C. § 1225(b)(1).

¹⁴ 8 U.S.C. §§ 1225(b)(1)(B)(ii), (v); Human Rights First, *Credible Fear: A Screening Mechanism in Expedited Removal* (Feb. 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/Credible_Fear_Feb_2018.pdf.

¹⁵ Human Rights First, *Biden Administration Move to Eliminate Requests for Reconsideration Would Endanger Asylum Seekers, Deport Them to Persecution and Torture* (Sept. 2021), <https://humanrightsfirst.org/library/biden-administration-move-to-eliminate-requests-for-reconsideration-wouldendanger-asylum-seekers-deport-them-to-persecution-and-torture/>; Human Rights Watch, *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse* (Feb. 5, 2020), <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportationpoliciesexposesalvadorans-death-and>; Am. Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom* (Dec. 2014), https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf; Kate Morrissey, *A Legitimate Fear of Death Doesn't Always Matter in the U.S. Asylum System*, San Diego Union Tribune (Oct. 11, 2020), <https://www.sandiegouniontribune.com/news/immigration/story/2020-10-11/us-asylum-system-gangviolencehonduras>; Human Rights First, *Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies* (Aug. 2022), <https://humanrightsfirst.org/wpcontent/uploads/2023/01/PretenseofProtection-21.pdf>.

¹⁶ Elizabeth Cassidy & Tiffany Lynch, U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (Aug. 2, 2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

¹⁷ Citizenship and Immigration Services Ombudsman, *Annual Report 2022*, at 52 (June 30, 2022), https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf (“Based on decision outcomes, the value of the credible fear screening is questionable. From FYs 2016 to 2020, approximately 83 percent of the nearly 357,000 individuals screened received a positive credible fear determination. During this same time period, the Executive Office for Immigration Review (EOIR) vacated approximately 26 percent of USCIS’ negative credible fear determinations.”).

“Significant possibility” credible fear standard intended to ensure access to asylum

At the time of its creation, expedited removal was viewed by many in Congress as “an abandonment of our historical commitment to refugees”¹⁸ while Senator Patrick Leahy also alerted that provisions of the law “may well violate our treaty obligations and undercut our world leadership on this issue.” UNHCR has warned that “the credible fear prescreening within expedited removal has, since its inception, diverged from international standards for accelerated procedures.”¹⁹ International refugee law norms set out that only claims assessed on their merits to be manifestly unfounded or clearly abusive (i.e. clearly fraudulent or not relating to the criteria for refugee status) may be screened out from referral for full asylum adjudication.²⁰ The “significant possibility” credible fear standard deviates from international standards in raising the evidentiary requirement to access full asylum proceedings.

Nonetheless, Congress intended for the “significant possibility” credible fear screening standard to be “a low screening standard for admission into the usual full asylum process” to ensure that there would be “no danger that a non-citizen with a genuine asylum claim will be returned to persecution.”²¹

“Reasonable possibility” screening standard conflicts with the fundamental protections of the 1951 Convention and elevates risk of refoulement

Similar to how a CFI screens an individual for the ability to apply for asylum using the “significant possibility” standard, a Reasonable Fear Interview (RFI) screens for the ability to apply for the lesser protections of withholding of removal or protection under the Convention Against Torture in the case of individuals with reinstated removal orders and those barred from applying for asylum.²² Individuals subject to a RFI face a higher standard of proof than those subject to a CFI, and they must demonstrate a “reasonable possibility” that they will face persecution or torture.

International law requires that asylum screening procedures and standards protect against the risk that refugees are denied access to asylum protection or are returned to places where they face persecution in violation of the principle of non-refoulement, a non-derogable provision of international human rights and refugee law, enshrined in Article 33(1) of the 1951 Convention.²³ UNHCR has warned that the “reasonable possibility” of persecution or torture standard improperly raises the evidentiary threshold an asylum seeker must meet to have their claim fully

¹⁸ 146 Cong. Rec. 111 (Sept. 19, 2000), <https://www.govinfo.gov/content/pkg/CREC-2000-09-19/html/CREC-2000-09-19-pt1-PgS8752.htm>.

¹⁹ UNHCR, Comment Submitted by UNHCR on Asylum Interim Final Rule (June 1, 2022), <https://www.regulations.gov/comment/USCIS-2021-0012-5305>.

²⁰ UNHCR Exec. Comm., Conclusion No. 30 of its Thirty-Fourth Session, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, ¶ 97(2)(e), U.N. Doc. A/38/12/Add.1, (Nov. 8, 1983), <https://www.refworld.org/docid/3ae68c630.html>; see also UNHCR, UNHCR Comments on Circumvention of Lawful Pathways NPRM, Regulations.gov (Mar. 20, 2023), <https://www.regulations.gov/comment/USCIS-2022-0016-7428>.

²¹ 142 Cong. Rec. S11491 (Sept. 27, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm>; H.R. Rep. No. 104-469, Pt. 1, at 158 (1996), <https://www.govinfo.gov/content/pkg/CRPT-104hrpt469/pdf/CRPT-104hrpt469-pt1.pdf>

²² 8 C.F.R. §§ 1208.31(c) and (e).

²³ UNHCR, UNHCR Comments on Circumvention of Lawful Pathways NPRM, Regulations.gov (Mar. 20, 2023), <https://www.regulations.gov/comment/USCIS-2022-0016-7428>.

considered, which will reduce access to asylum procedures, elevate the risk of refoulement, and will fail to advance the fundamental protections of the 1951 Refugee Convention and its 1967 Protocol.²⁴

In violation of the credible fear standard created by Congress, the Biden administration's [final rule](#) ("[asylum ban](#)") published on May 16, 2023, imposes a higher screening standard in credible fear screenings. Compared to those who have a regular credible fear screening, people subject to the asylum ban and its higher screening standard are more than [three times as likely](#) to fail their screenings and be ordered deported without a chance to apply for asylum. This rigged process has already resulted in deportation orders against [nearly 23,000 people](#) subjected to the ban between May 12 and September 30, 2023. People seeking protection who were deported through expedited removal under the ban [include](#) asylum seekers who testified to their fear of harm because of their race, Indigeneity, and disability. [Others](#) who were ordered deported through expedited removal under the ban but whose deportation was only narrowly averted due to intervention by legal service organizations or human rights advocates include asylum seekers fleeing harm because of their political opinion, religious beliefs, sexual orientation, and gender identity.

Moreover, UNHCR has alerted that the "more likely than not" standard of proof required to qualify for withholding of removal and protection under the Convention Against Torture fails to meet non-refoulement commitments, as it requires a standard of proof higher than asylum ("well-founded fear") and would exclude those rightfully considered refugees under international law from protection.²⁵

Asylum seekers must prove their credibility

An asylum applicant bears the burden of establishing their credibility.²⁶ An applicant does not enjoy a presumption of credibility, even where an adjudicator makes no adverse credibility determination.²⁷ An adjudicator can base an adverse credibility finding on almost anything related to the way an applicant behaves, has said, or submitted in writing, regardless of whether it bears on the elements of their claim.²⁸ Adjudicators can request, and applicants must provide (or demonstrate that they do not possess or "cannot reasonably obtain") evidence that corroborates even credible testimony.²⁹

²⁴ *Id.*; see also Brief for UNHCR as Amicus Curiae Supporting Plaintiffs-Appellees at 21-22, *E. Bay Sanctuary Covenant v. Barr*, 950 F.3d 1242 (9th Cir. 2020) (Nos. 19-16487, 19-16773), <https://www.refworld.org/docid/5dccc03354.html> (stating that the higher bar required to demonstrate persecution for withholding of removal will result in refoulement of legitimate refugees under the Convention).

²⁵ UNHCR, UNHCR Comments on Circumvention of Lawful Pathways NPRM, Regulations.gov (Mar. 20, 2023), <https://www.regulations.gov/comment/USCIS-2022-0016-7428>; compare *Huang v. Holder*, 744 F.3d 1,149, 1,152 (9th Cir. 2014) ("[T]he bar for withholding of removal is higher; an applicant 'must demonstrate that it is more likely than not that he would be subject to persecution'" in his country of origin (quoting *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001)), with *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-40 (stating that an asylum determination requires an applicant to show "to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for the same reasons be intolerable if he returned there." (quoting UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 42, U.N. Doc. HCR/1P/4/ENG/REV.4 (April 2019))).

²⁶ 8 U.S.C. § 1158(b)(1)(B)(ii).

²⁷ 8 U.S.C. § 1158(b)(1)(B)(iii).

²⁸ *Id.*

²⁹ 8 U.S.C. § 1158(b)(1)(B)(ii).

If applying affirmatively, a USCIS Asylum Officer will carefully question an applicant to establish their credibility. If before an Immigration Judge, the Immigration Judge will question or the Trial Attorney will cross-examine the applicant, often challenging the applicant's credibility

Asylum applicants who otherwise meet the definition of a refugee can be barred or excluded from asylum³⁰

In addition to the following statutory bars to eligibility, the Immigration and Nationality Act affords the Executive Branch the discretion to impose additional bars to eligibility.³¹ Statutory bars to asylum include:

- Applicants who have engaged in the persecution of others (8 U.S.C. 1158(b)(2)(a)(i))
- Applicants who have been convicted of a particularly serious crime and constitute a danger to the United States or, if there are serious reasons to believe they committed, a serious nonpolitical crime outside the United States (8 U.S.C. 1158(b)(2)(a)(ii)-(iii))
- Applicants for whom there are reasonable grounds to regard as a danger to the security of the United States (8 U.S.C. 1158(b)(2)(a)(iv))
- Applicants who have engaged in terrorist activity (8 U.S.C. 1158(b)(2)(a)(v))
- Applicants who have been "firmly resettled" in another country before arriving in the United States (8 U.S.C. 1158(b)(2)(a)(vi))
- Applicants who failed to file their applications within one year of arrival, absent changed or extraordinary circumstances (8 U.S.C. 1158(a)(2)(B), (D))

Asylum applications are subject to multiple layers of anti-fraud and abuse protections

- Both USCIS and the Executive Office of Immigration Review (which is responsible for the Immigration Courts), have dedicated anti-fraud units, the [Fraud Detection and National Security Directorate](#) and the [Fraud and Abuse Prevention Program](#), respectively.
- Adjudicators can use [Homeland Security Investigations' Forensic Laboratory](#) and the State Department's Overseas Document Verification process to establish the authenticity of documentation provided by an applicant.

³⁰ See Hillel R. Smith, Cong. Research Serv., LSB10816, An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part Two) (Sept. 7, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10816>.

³¹ 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum.").

- Applicants must submit to biometric screening and be checked against the law enforcement and national security databases before an adjudicator can grant them asylum.³²
- Applicants who file frivolous asylum claims are barred from receiving any immigration benefit from the United States at any time in the future, which would include work authorization or lawful permanent resident status.³³

³² 8 U.S.C. § 1158(d)(5)(A)(i); 8 C.F.R. § 1003.47.

³³ 8 U.S.C. § 1158(d)(6).