

# Special Report:

## Asylum, Refugees, Restriction of Removal and Temporary Protected Status



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U.S. immigration law recognizes that there are situations where a person should be permitted to stay in the United States based on humanitarian reasons. The situation in a person's home country may be so dangerous that a person fears for his or her life and liberty. Certain aspects of U.S. law address this problem.

Asylum exists to protect a person from facing persecution in his or her home country based on that person's race, religion, nationality, membership in a particular social group or political opinion. Restriction on removal exists to help those people who face removal, find their life or liberty threatened in their home country, but do not qualify for asylum. Finally, where the situation in a person's home country is so dangerous that a return to that country places his or her life in jeopardy, the United States may grant temporary protected status.

This report is meant to provide a brief overview of each of these aspects of U.S. law. This report is not meant to replace the advice of a qualified legal professional. Anyone who wishes to seek the protection of U.S. law based on any of these programs should consult with a knowledgeable legal professional.

## **Asylum**

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Asylum is a legal program that serves the humanitarian purpose of allowing a person who fears persecution in his or her home country to stay in the United States. A person who has been granted asylum, called an asylee, may apply for permanent residency in the United States one year after asylum has been granted. An asylee may also apply for "derivative asylum status" for his or her spouse and children under the age of twenty-one.

### **Who Can Apply for Asylum**

In order for a person to be able to apply for asylum, that person must be physically present in the United States or at a port of entry. A person who is not present in the United States cannot apply for asylum, but can apply for refugee status.

To be eligible for asylum the person must be unable or unwilling to return to his or her home country because of persecution or a well-founded fear of persecution. The persecution must be because of the person's race, religion, nationality, membership in a particular social group or political opinion.

A person may not be able to apply for asylum if he or she had previously applied, and the application was denied by an Immigration Judge or the Board of Immigration Appeals. However, the person may be able to demonstrate that there are changed circumstances which materially affect his or her eligibility for asylum. For example, if the situation in the applicant's home country have changed that cause the person to fear persecution if he or she returned, he or she may be able to show that circumstances have changed.

### **Persecution**

The term "persecution" is not well-defined under U.S. law. The threat of death, torture or

kidnaping certainly qualify as persecution. But, the term includes more than simply a threat to a person's life and freedom. On the other hand, mere harassment, discrimination or annoyance does not qualify as persecution. It is difficult to create a uniform definition of these concepts. This means that the U.S. Government official making the decision on the asylum application often has a good deal of discretion. An asylum applicant, therefore, must be able to show a convincing case, with supporting documentation, that the situation in his or her home country qualifies as persecution.

Some courts have said that minor beatings and short detentions do not qualify as persecution. Other courts have said if a person will suffer because he or she is different from other people in his home country, that qualifies as persecution. Suffering can be due to being detained for a prolonged period of time, being intentionally denied the chance to earn a living, forced military service in some instances, or the combination of similar factors. An applicant for asylum should be prepared to show that he or she suffered some serious wrongs, or that serious wrongs would likely result if he or she returned to the home country. The acts that the applicant claims amount to persecution should not be the result of the exercise of legitimate government action. For example, a legitimate detention as punishment for an actual crime will not constitute persecution.

The actions against the applicant may be committed by the government of the applicant's home country. But, government action may not be required in all cases. If a person who is not part of the foreign government commits the acts in question, this may still qualify as persecution. The applicant must show that the foreign government was either unwilling or unable to protect the applicant.

### **Well-Founded Fear**

An applicant for asylum must have a real, personal fear of being persecuted. Also, that fear must be "well-founded," meaning that it must be based on reality. That is, there must be a reasonable possibility of persecution.

This means that the applicant must provide evidence documenting the reason for his or her fear of persecution. Reports from the U.S. State Department or human rights organizations, or newspaper articles providing details of the conditions in the applicant's home country can be helpful in demonstrating that the applicant's fear is well-founded.

### **Reason for the Persecution**

In order to qualify for asylum, the persecution that the applicant fears must be based on some specific characteristic of the applicant. The characteristics that qualify for asylum are listed in the law. They are: race, religion, national origin, membership in a particular social group and political opinion.

### **Race**

Persecution because of a person's race often involves extreme discrimination based on a person being part of a social group having common descent. Often, outward characteristics help define a person's race, such as skin color. For example, during the 1980s, members of the Miskito Indian tribe were granted asylum on the basis of persecution by the Sandinista government of Nicaragua on account of race.

### **Religion**

When a person faces persecution because of religious beliefs, that person may qualify for asylum. For example, a Muslim converted to Christianity in Afghanistan when the Taliban was in power. That person was persecuted for possessing Christian Bibles and engaging in Christian activities. A court found that he had been persecuted based on religion.

### **National Origin**

Nationality does not always refer to a person's country of citizenship. Rather, nationality often involves membership in a social group sharing a common ancestry, common religion, and common social values. The multi-national country of Iraq, for example, is the home of Arabs, Kurds and Persians. It has been argued that Kurdish nationals suffered persecution under Saddam Hussein.

### **Social Group**

A social group involves people who share certain characteristics. These characteristics can include where the people live, their gender, their family background, or their shared past experiences. The characteristics must be something that the people either cannot change about themselves, or should not be required to change because it is a fundamental part of their identity.

Women who face an extreme level of abuse may qualify for asylum based on membership in a particular social group. For example, asylum has been granted to women who either face genital mutilation or who have been subject to genital mutilation.

Systematic harassment due to a person's sexual orientation can qualify as persecution on the basis of membership in a particular social group. Similarly, extreme forms of discrimination because a person has AIDS may also qualify.

### **Political Opinion**

Finally, asylum may be granted when a person faces persecution based on a political opinion. The political opinion can be one that is openly expressed. For example, participation in demonstrations, membership in certain political organizations, and even certain union activities can

qualify as an expression of political opinion.

However, there are situations where a person can qualify for asylum based on persecution for political opinion even where the person has not expressed that opinion. This can occur when the applicant can show that the persecutor believes that the applicant has a certain political opinion. For example, a persecutor may believe that people who live in a certain village hold anti-government political opinions. If the persecutor acts on that belief by persecuting village members, those village members may qualify for asylum even if they do not actually hold anti-government political opinions.

In 1996, the United States passed a law which said that forced family planning may qualify as persecution based on political opinion. Thus, a person who has been forced to undergo sterilization or forced to have an abortion may qualify for asylum based on persecution for a political opinion.

### **Reasons to Deny Asylum**

Although a person may have a well-founded fear of persecution if he or she returned to the home country, there may still be reasons to deny asylum.

#### **Safe Third Country**

If another country is willing to grant the applicant asylum, the applicant may be barred from receiving asylum in the United States. This could occur, for example, if the third country has a treaty or agreement with the United States to accept certain refugees, or if the country is part of a multilateral agreement concerning certain refugees.

#### **Participation in Persecution**

If the applicant has participated in the persecution of any person due to race, religion, nationality, membership in a particular social group or political opinion, that person cannot receive asylum in the United States.

#### **Crimes**

The conviction of certain crimes can make a person ineligible to receive asylum in the United States. For example, a conviction of a particularly serious crime will bar a person from receiving asylum. Whether a crime is a particularly serious crime depends on certain factors. They are: (1) the nature of the conviction; (2) the sentence imposed; (3) whether it was a crime against a person or a crime against property; and (4) whether the person is a danger to society.

A person is barred from receiving asylum if there are serious reasons to believe that the

person committed a serious, non-political crime before coming to the United States. Under this category or crimes, the U.S. Government does not need an actual conviction to bar the applicant from receiving asylum.

Finally, a person is barred from receiving asylum if he or she was convicted of an “aggravated felony.” Aggravated felonies include:

1. murder
2. rape
3. sexual abuse of a minor
4. money laundering
5. crimes of violence with a jail term of at least 1 year
6. kidnapping
7. trafficking in illegal drugs, firearms, explosives, or people.

### **Danger to U.S. Security/Terrorism**

A person who poses a danger to the national security of the United States cannot be granted asylum. A person who has engaged in terrorist activities, or who is likely to engage in terrorist activities, will be barred from receiving asylum. A person who has incited terrorist activities, is a member of a terrorist organization, or is a member of a group that has publicly endorsed terrorism will be barred from receiving asylum. If a person, under any circumstances, has show an intention to cause another person death or serious bodily harm, he or she cannot receive asylum in the United States.

### **Firm Resettlement**

If a person has been firmly resettled in another country before coming to the United States, that person will not be granted asylum in the United States. This may happen when a person enters another country with an offer of permanent residency, citizenship or some other type of permanent resettlement. However, even if offered such permanent status, a person will not be considered firmly resettled if the person’s rights to work, own property, or obtain housing or other rights and privileges were considerably restricted.

### **Application Process**

An application for asylum must be filed within one year of arriving in the United States. There are two exceptions to this rule: (1) changed circumstances in the person’s home country now cause a person to have a well-founded fear of persecution if he or she returns; and (2) extraordinary circumstances delayed the filing of the application for asylum.

## **Required Forms and Documents**

To apply for asylum, a person first files an Application for Asylum and for Withholding of Removal, which is also known as Form I-589. The Application for Asylum should also include a Declaration from the applicant. The Declaration is simply a written statement that gives the applicant an opportunity to tell his or her story. The Declaration should be a personal story, telling about past acts of persecution and explain why the applicant fears returning to his or her home country.

Along with the Application for Asylum, an applicant should file documents that support his or her case. For example, if there is an international organization that has issued a report on the human rights violations that exist in the applicant's home country, the applicant should include that report. Also, if there are newspaper articles detailing specific incidents of persecution, the applicant should include them along with the application. Essentially, the goal of the application package is to convince the U.S. Government that the applicant has a real fear of returning to his or her home country, and that the fear is grounded in fact.

Where to file the Application for Asylum depends on the circumstances surrounding the request for asylum. For example, if the person seeking asylum has never requested asylum before, and is not in removal proceedings, he or she files the Form I-589 and supporting documentation with the U.S. Citizenship and Immigration Service (USCIS) Service Center that has jurisdiction over his or her place of residence. If the applicant has previously applied for asylum, but has been denied, he or she must file the application in the Asylum Office that has jurisdiction over his or her place of residence. A person who is in removal proceedings should file the Form I-589 with the Immigration Court.

The Application for Asylum is unique among the immigration forms filed with the U.S. Government because there is no fee to process the application.

## **Time Lines**

Twenty-one days after filing the Application for Asylum, the applicant should receive a receipt from USCIS, and a notice setting a date for the Government to take his or her fingerprints. Children 14 and under, and adults 80 or over will not be required to have their fingerprints taken. At this time, the applicant should also receive a notice setting an appointment for an interview with a USCIS official.

The interview should take place within forty-three days of filing the Application for Asylum. The decision on the Application for Asylum should occur within sixty days the filing date.

An asylum officer may be unable to approve of the application. If this happens, but the applicant has a valid immigration status under U.S. law, he or she will receive a Notice of Intent to

Deny. This notice should explain the reason why the asylum officer cannot approve of the application. The applicant will have sixteen days to respond. If the applicant does not respond, or if the response is not enough to convince the asylum officer to approve of the application, the applicant will receive a Final Denial.

If the asylum officer cannot approve of the application, and the applicant does not have a valid immigration status under U.S. law, the asylum officer will refer the applicant's case to Immigration Court. The applicant will receive charging documents and be placed in removal proceedings. The Immigration Court will then make a decision on the Asylum Application. The decision should come from the Immigration Court within 180 days of the original filing date.

### **Background Checks**

All applicants for asylum will undergo a background check. USCIS will forward the applicant's biological information to the FBI and the CIA. USCIS will also check for the applicant's name in law enforcement databases. The applicant's fingerprints will also be sent to the FBI for a background check.

An applicant could receive a Recommended Approval of Asylum if the asylum office believes that the application should be approved, but USCIS has not received the results of the background check. If the background check results in a discovery of a reason to deny the application, the application may then be denied, and the matter referred to an Immigration Judge.

### **The Asylum Interview**

All asylum applicants will be required to attend an interview. The applicant should bring every person listed as a dependent on the Application for Asylum to the interview, such as a spouse or a child. Children under the age of twenty-one do not need to attend the interview.

The applicant can bring an attorney to represent him or her during the asylum interview. The applicant can also bring witnesses to testify in support of the Application for Asylum.

USCIS will not provide an interpreter. If an applicant needs an interpreter, he or she must bring an interpreter to the interview. The interpreter can be any person over the age of eighteen who speaks both English and the applicant's native language fluently. However, certain people cannot act as the interpreter. They are the applicant's attorney, any witnesses testifying on the applicant's behalf, and a representative or employee of the applicant's home country.

The asylum interview will last at least one hour. The applicant and any witnesses will be asked to take an oath to tell the truth during the interview. The asylum officer will then verify the applicant's identity and ask questions concerning the Application for Asylum. These questions can be about the applicant's biographical information, and can be about the reasons why the person is

applying for asylum.

The asylum interview can be a traumatic experience. The applicant may be asked to relive painful experiences that led up to the Application for Asylum. Although it may be emotionally painful, the applicant must be willing and able to relate specific incidents that caused him or her to leave the home country.

It is important that the applicant's interview is consistent with the information provided in the Application for Asylum and the applicant's Declaration. The asylum officer will have the opportunity to determine if the applicant is telling the truth, and can deny the application if he or she believes the applicant is lying.

The applicant, or the applicant's attorney will have a chance at the end of the interview to make a statement, and to present any additional evidence.

If the applicant is unable to make his or her appointed time for the asylum interview, he or she must file in advance a Request to Reschedule Asylum Interview. The request must be made in writing. Failure to attend the interview may result in the case being referred to Immigration Court.

However, an applicant can provide a written explanation for his or her failure to attend the interview within fifteen days of missing the interview. If the explanation is reasonable, the Asylum Office Director has the discretion to reschedule the interview. If there are exceptional circumstances, then the interview must be rescheduled.

## **Benefits of Asylum**

### **Work Authorization**

A person who has been granted asylum may also receive authorization to work in the United States. However, a person who applies for asylum cannot work while the application is still being considered by the Government. A person who has received a recommended approval or a conditional approval can receive work authorization.

### **Travel**

An asylee may travel both inside the United States and abroad. However, to travel overseas, the asylee must obtain a refugee travel document. An asylee should not travel to his or her home country. If an asylee does go back to his or her home country, the U.S. Government may find that the asylee no longer fears returning to his or her home country and not permit re-entry into the United States.

An applicant for asylum must request permission to travel abroad, called Advanced Parole,

from the U.S. Government. If the applicant travels abroad without receiving Advanced Parole, the Government may conclude that the applicant has abandoned the Application for Asylum.

### **Permanent Residency and Citizenship**

When an asylee has been physically present in the United States for one year after the date on which asylum was granted, that person may apply for permanent residency. To apply, the person files an Application to Register Permanent Residence or Adjust Status, also known as Form I-485, with the Nebraska Service Center. A separate application should be filed for the asylee, and for each qualifying family member. Once a permanent resident, the person may apply for citizenship after the required period of time.

### **Refugees**

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A refugee is a person who has fled his or her home country because of persecution or a well-founded fear of persecution. The persecution must be based on race, religion, nationality, political opinion, or membership in a particular social group.

A refugee who is present in the United States may apply for asylum, as outlined above. If the refugee is not present in the United States, the refugee may apply for the United States refugee program.

The United States will only resettle a limited number of refugees from overseas. Generally speaking, it is preferred that a refugee remain in the country of first asylum. However, when the United Nations High Commissioner for Refugees (UNHCR) determines that it is appropriate for a refugee to be resettled in a third country, the UNHCR may refer the refugee to the United States.

Generally, a refugee is only eligible to be resettled in the United States if: (1) he or she is referred to the United States by the UNHCR; or (2) a U.S. Embassy refers the refugee for resettlement in the United States. However, from time to time, the United States Government will determine that certain groups from certain countries are eligible for the refugee program.

While the law defines a refugee as a person who has fled his or her home country, the United States will process refugee program applications from people who have not yet fled their home country in a few places. These places include Cuba, Vietnam, and some of the countries of the former Soviet Union.

A refugee must still be admissible under U.S. law to qualify for the refugee program. This means that refugees with certain communicable diseases, who are drug addicts, or who have committed certain crimes will not be admitted to the United States. Also, a person who has renounced U.S. citizenship for tax purposes is ineligible to return to the United States under the refugee program.

A refugee may be accompanied by a spouse, and any unmarried children under the age of 21, provided they are also admissible under U.S. law. If the refugee's spouse or unmarried children under the age of 21 do not accompany the refugee, the refugee may file a petition on their behalf to be resettled in the United States, called a Form I-730.

## **Restriction on Removal**

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Restriction on removal is a portion of the law that is similar to asylum. Under the law, the Attorney General may not remove an alien if the Attorney General believes that the person's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. This is a higher standard than that of an asylum case.

Like asylum, a person cannot benefit from restriction on removal if that person: (1) has persecuted others; (2) has been convicted of certain crimes; (3) has committed a serious, non-political crime before coming to the United States; or (4) is a danger to U.S. security.

To qualify for restriction on removal, however, a person must be in removal proceedings. This creates a great deal of risk. If a request for restriction on removal is denied, the person faces potential removal from the United States. It may be possible for a person to place himself or herself in removal proceedings specifically to pursue restriction on removal. However, with the risk involved, the person must seriously consider the consequences of failure before doing so.

A person who has received restriction on removal, and has not been granted asylum, cannot apply for permanent residency. Nor may a person who has received restriction on removal bring family members into the United States.

## **Temporary Protected Status**

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Another program similar to asylum is Temporary Protected Status, or TPS. Under the TPS program, the Secretary of the Department of Homeland Security determines whether conditions exist in certain countries that make it dangerous for nationals of that country to return. This is called a TPS designation. When the Secretary designates a country for TPS, nationals of that country are allowed to stay in the United States, and may be given permission to work.

### **Designating a Country for TPS**

Before designating a country for TPS, the Secretary of Homeland Security will consult with other government agencies to see if one of three conditions exist in that country:

- There is an armed conflict in the country which threatens the personal safety of any nationals who return.
- The country has requested TPS designation because of an environmental disaster.

The disaster must result in a substantial, temporary disruption of the living conditions within that country causing the country to be unable to handle the return of its nationals.

- Extraordinary conditions exist in the country, which are temporary, that prevent that country's nationals from returning in safety. The Secretary, however, may determine that permitting the nationals from that country to stay in the United States is contrary to the national interests of the United States, and thus choose not to make the designation.

### **Length of the TPS Designation**

When the Secretary designates a country for TPS, that initial designation will last for at least six months, and can last for as long as of eighteen months. Before the TPS designation expires, the Secretary must review the conditions in the country to see if there is reason to continue the TPS designation. If the conditions that led to the TPS designation continue, the Secretary may extend the TPS designation for six, twelve or eighteen months. If the conditions that led to TPS designation no longer exist, the Secretary will terminate the TPS designation.

### **Notice of TPS Designation**

When the Department of Homeland Security makes a TPS designation for a country, it will publish that designation in a notice in the Federal Register. The Federal Register is a daily periodical that publishes notices from the U.S. Government. The Federal Register can be found in any public library, or online. The designation will also be available in a press release from USCIS, or on the USCIS website, [www.uscis.gov](http://www.uscis.gov).

The Federal Register notice will state the effective date of the TPS designation and the time period that a person has to register for TPS protection. The Federal Register notice will also specify the date on which a person applying for TPS protection must have continuously resided in the United States.

### **Persons Who Can Apply for TPS**

A person can apply for TPS if he or she meets the following requirements:

- The person is a national of a country with a TPS designation.
- The person applies during the registration period.
- The person has been continuously present in the United States since the TPS designation was made.
- The person has lived in the United States since the date specified by the Department of Homeland Security in the Federal Register notice.
- The person is otherwise admissible to the United States under U.S. law.

In many instances, a person applies for TPS protection when the U.S. Government has begun removal proceedings.

### **Application Process**

To apply for TPS protection, a person must fill-out the Application for Temporary Protected Status, which is Form I-821. The person submits this form to USCIS, along with a fee, and copies of documents that prove the person's identity, nationality and place of residence. For persons who are fourteen years old or older, there will also be a fee for biometric services. If the person applying for TPS protection wants to be able to work in the United States, he or she must also submit a Form I-765, with another fee.

If the TPS designation of the country is extended, then all persons receiving TPS protection must re-register. Failure to re-register will result in TPS protection being withdrawn. To re-register, a person submits another Form I-821, and another Form I-765 for work authorization. There will not be an additional fee for the Form I-821. However, there will be an additional fee for the Form I-765.

### **Travel**

A person with TPS protection may travel inside the United States. However, to continue TPS protection, the person must be continuously physically present in the United States. The person may not travel abroad without first applying for advance parole. If a person travels abroad without receiving an advance parole, TPS protection will be withdrawn. Once TPS protection is withdrawn from a person, the U.S. Government may begin removal proceedings, or re-start removal proceedings.

### **TPS Protection is Temporary**

As the name of the program suggests, TPS protection is temporary. Unlike asylum, TPS protection does not lead to permanent residency or citizenship. When the TPS designation for the country ends, or when TPS protection for a person is withdrawn, the person returns to whatever immigration status he or she had before the TPS designation, unless the person has been granted a visa or some other immigration status in the meantime.

This means that if a person does not have a visa, once the TPS designation expires, that person will be required to leave the United States. A person with TPS protection may apply for a visa while the protection is in place. However, if the visa has not been granted before the TPS designation ends, that person cannot remain in the United States to wait for the visa to be granted. If a person has applied for a visa based on a family relation, this could mean that the person will be required to wait for some time, possibly years, before a visa becomes available. That person must

return to his home country, and cannot remain in the United States, until the visa becomes available.

### **Is an Attorney Necessary?**

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Asylum law is extremely complicated. An asylum application involves gathering a great deal of evidence, and putting it together in such a way so as to convince a U.S. official that the applicant deserves the protection of U.S. law. A person who wishes to apply for asylum would be well-advised to discuss his or her case with a legal professional knowledgeable of U.S. asylum law.

Restriction on removal is likewise complicated, and involves certain risks. Like anyone involved in removal proceedings, a person who is seeking restriction on removal would benefit from consulting a knowledgeable legal professional.

The application for TPS protection may appear simple. However, TPS protection is only temporary. A person permitted to stay in the United States under the TPS program will eventually face the need to return to his or her home country once the TPS designation expires, unless that person has been granted some other status under U.S. immigration law. A person who is protected by the TPS program, therefore, should consult with a knowledgeable legal professional to explore what options are available under U.S. law before the TPS designation expires.

## About the Author

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William J. Kovatch, Jr. worked as a staff attorney with the U.S. Government for almost eight years, concentrating on international law related issues. Bill has litigated complex cases before U.S. courts, NAFTA panels, and the World Trade Organization. Prior to his government work, Bill served as a judicial clerk with the District of Columbia Court of Appeals.

Bill earned his law degree from Temple University in 1998, and then his Master of Law degree, with a concentration in Transnational Law, in 2000. He holds a Master of Arts degree in Comparative Politics from the American University, and a Bachelor's degree from the University of Miami.

