



Vindicating the Rights of **Asylum Seekers** at the Border and Beyond

A Guide to Representing Asylum Seekers in Expedited
Removal and Reinstatement of Removal Proceedings



This guide is intended to assist lawyers and advocates and is not a substitute for independent legal advice in a client's case. The cases cited herein do not constitute an exhaustive search of relevant case law in all jurisdictions.

Note: *This guide was finalized in early June 2018, just before Attorney General Jeff Sessions' decision in Matter of A-B, 27 I. & N. Dec 316 (A.G. 2018), which overruled Matter of A-R-C-G-, 26 I. & N. Dec. 338 (BIA 2014). Case law mentioned throughout this report will be impacted by this decision and advocates should take care to review the latest developments in case law.*

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Introduction

This guide is intended to support pro bono attorneys, law students, paralegals and other advocates working to prevent the deportation of families who recently crossed the U.S.-Mexico border seeking asylum. The Asylum Seeker Advocacy Project (ASAP) at the Urban Justice Center prepared this guide and the accompanying templates after assisting hundreds of asylum seekers placed in expedited removal and reinstatement of removal proceedings.

The guide does not address the issue of criminal prosecution of adults entering the United States at the border seeking asylum.¹ This guide is limited to the civil immigration proceedings for recent arrivals at the border known as expedited removal and reinstatement of removal.

¹ Department of Justice Office of Public Affairs, Justice Department Announces First Criminal Illegal Entry Prosecutions of Suspected Caravan Members (May 1, 2018), <https://www.justice.gov/opa/pr/justice-department-announces-first-criminal-illegal-entry-prosecutions-suspected-caravan>.

Background

Beginning in the summer of 2014, the United States experienced an unprecedented humanitarian crisis stemming from an increased number of individuals—especially children and families—fleeing violence, murder, and other persecution, mainly from three Central American countries. Deteriorating security conditions, pervasive violence, and gang-fueled killings in El Salvador, Guatemala, and Honduras—known as the Northern Triangle—caused families to leave, leading them to seek asylum in neighboring countries.

Between 2008 and 2015, the United Nations High Commissioner for Refugees (UNHCR) documented a thirteen-fold increase in requests for asylum from Central American nationals. Central American families traveled through Mexico and arrived at the southern border of the United States, many of them voluntarily turning themselves in to border agents with the intent of applying for asylum or other forms of immigration relief, such as withholding of removal or relief under the Convention against Torture.

Upon arrival at the U.S.-Mexico border, families are placed in expedited removal or reinstatement of removal proceedings, which will be explained at length below. In brief, these families are subject to deportation unless they can demonstrate there is some likelihood that they are eligible for asylum or withholding of removal.

Prior to 2014, the Obama Administration had greatly limited the detention of mothers and children seeking asylum, shutting down the T. Don Hutto Residential Center, a former state prison in Austin, Texas, where women and children seeking asylum were held behind razor wire fences.² But in 2014, the Obama Administration re-launched a Bush-era initiative to systematically detain families³ seeking asylum in the United States—including infants and nursing mothers—in border detention facilities. While this is not the first time families seeking asylum have been detained by U.S. officials upon crossing the border, it has become the largest detention en masse of families since Japanese internment in the 1940s, resulting in the incarceration of tens of thousands of families. The government's treatment of these families is referred to as "family detention" and it persists under the Trump Administration.

As a result of these policies, women and children seeking asylum are detained in prison-like facilities, where they wait to have preliminary interviews with an Asylum Officer. The

2 U.S. Immigration and Customs Enforcement, 2009 Immigration Detention Reforms (last updated Dec. 12, 2011), <https://www.ice.gov/factsheets/2009detention-reform>; Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES (Aug. 5, 2009), <https://www.nytimes.com/2009/08/06/us/politics/06detain.html>.

3 The Department of Homeland Security has defined "families" or "family units" as mothers with children. Fathers or adult males traveling with family are considered adult males for purposes of detention. As a result, even before new policies regarding family separation, fathers have been separated from the other members of their family and detained in detention centers for single male adults upon arriving at the border.

government does not provide an attorney at this interview. Those who do not pass this preliminary interview are subject to swift and immediate deportation to the country from which they fled. Because the detention facilities are primarily located in rural areas hours away from the nearest cities, families have trouble connecting with private or *pro bono* immigration attorneys.

In 2015, several nonprofits and coalitions responded to the need for counsel to assist detained families in preparing for their asylum interviews and understanding the complicated immigration process before them. At the same time, the Asylum Seeker Advocacy Project (ASAP) began a volunteer program to provide remote legal assistance to asylum-seeking families detained at one of three family detention facilities. We worked with nonprofits on the ground to represent detained families who had lost their preliminary interview and needed a second opportunity to disclose the traumatic events that led them to flee their country.

ASAP volunteers prepared hundreds of emergency filings to reverse negative results of preliminary interviews for asylum-seeking families between 2015 and 2016. Since then, ASAP has continued to advocate for and assist attorneys representing families in expedited removal proceedings. This guide is an accumulation of the knowledge we gained throughout this process.

While the guide is informed by our experience in the family detention context, the information in it is relevant to any asylum seeker in expedited removal or reinstatement of removal proceedings. We hope this guide will be used by advocates and attorneys working with asylum seekers at the border and beyond.

CHAPTER 1

Legal and Procedural Overview

Expedited Removal and Reinstatement of Removal

Ordinarily, when immigrants are facing deportation, they are placed in removal proceedings pursuant to Section 240 of the Immigration and Nationality Act (INA), or “Section 240” proceedings. In Section 240 proceedings, immigrants appear before an immigration judge (IJ), who must provide them a fair and neutral opportunity to present their case, and they have the right to bring an attorney to represent them. If the IJ denies them relief, they can appeal to the Board of Immigration Appeals (BIA) and then to a federal court of appeals.⁴

Unfortunately, many asylum seekers do not receive these basic procedural protections because they are subject to “expedited removal” proceedings or “reinstatement of removal” instead of a Section 240 proceeding.

Expedited removal applies to:

- People⁵ without valid entry documents attempting to enter the United States through ports of entry.⁶
- People who are apprehended within 100 air miles of any U.S. international land border who have not been admitted or paroled and are not able to establish to the satisfaction of an immigration official that they have been in the United States continuously for 14 days.⁷

4 INA § 240.

5 Unaccompanied children are not subject to expedited removal. However, children who are accompanied by their parents are subject to expedited removal.

6 INA §§ 235, 240; Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

7 The Trump administration has indicated that it intends to expand the use of expedited removal, potentially to reach all people apprehended anywhere in the United States who cannot establish that they have been in the United States for two years. See Memorandum from John Kelly, Sec’y, U.S. DEP’T OF HOMELAND SEC., Implementing the President’s Border Security and Immigration Enforcement Improvements Policies 6 (Feb. 20, 2017) [hereinafter Kelly Border Security Memorandum], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

Reinstatement of removal applies to:

- People who were previously ordered removed and re-enter the United States without authorization, with some exceptions.⁸

Expedited removal and reinstatement of removal allow immigration enforcement officials to issue (or reinstate) removal orders and immediately deport people unless they indicate fear of returning to their home country.⁹ Immigrants in expedited removal or reinstatement of removal proceedings may be summarily deported without a hearing before an IJ or any appeal.¹⁰

This guide is intended for advocates working with asylum seekers in both expedited removal and reinstatement of removal proceedings. It notes where procedures and legal standards differ between these two kinds of proceedings. The guide does not cover ordinary Section 240 immigration proceedings or affirmative asylum proceedings.

	Expedited Removal	Reinstatement of Removal
When does it apply?	Asylum seeker came to port of entry or was apprehended within 100 miles and 14 days of border crossing (no previous removal order)	Asylum seeker was previously ordered removed and re-entered
Legal Standard?	Credible fear (significant possibility)	Reasonable fear (reasonable possibility, a higher burden of proof)
Procedural Differences	Right to attorney in Credible Fear Interview (CFI)	Limited right to attorney in Reasonable Fear Interview (RFI)
Type of Relief	Asylum, withholding, or Convention Against Torture (CAT)	Only withholding or CAT (fewer immigration benefits)

⁸ INA § 241(a)(5); 8 C.F.R. §§ 208.31, 241.8.

⁹ INA §§ 235, 240; 8 C.F.R. §§ 208.31, 241.8; see also Memorandum from John Kelly, Sec’y, U.S. DEP’T OF HOMELAND SEC., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf; Kelly Border Security Memorandum, *supra* note 7.

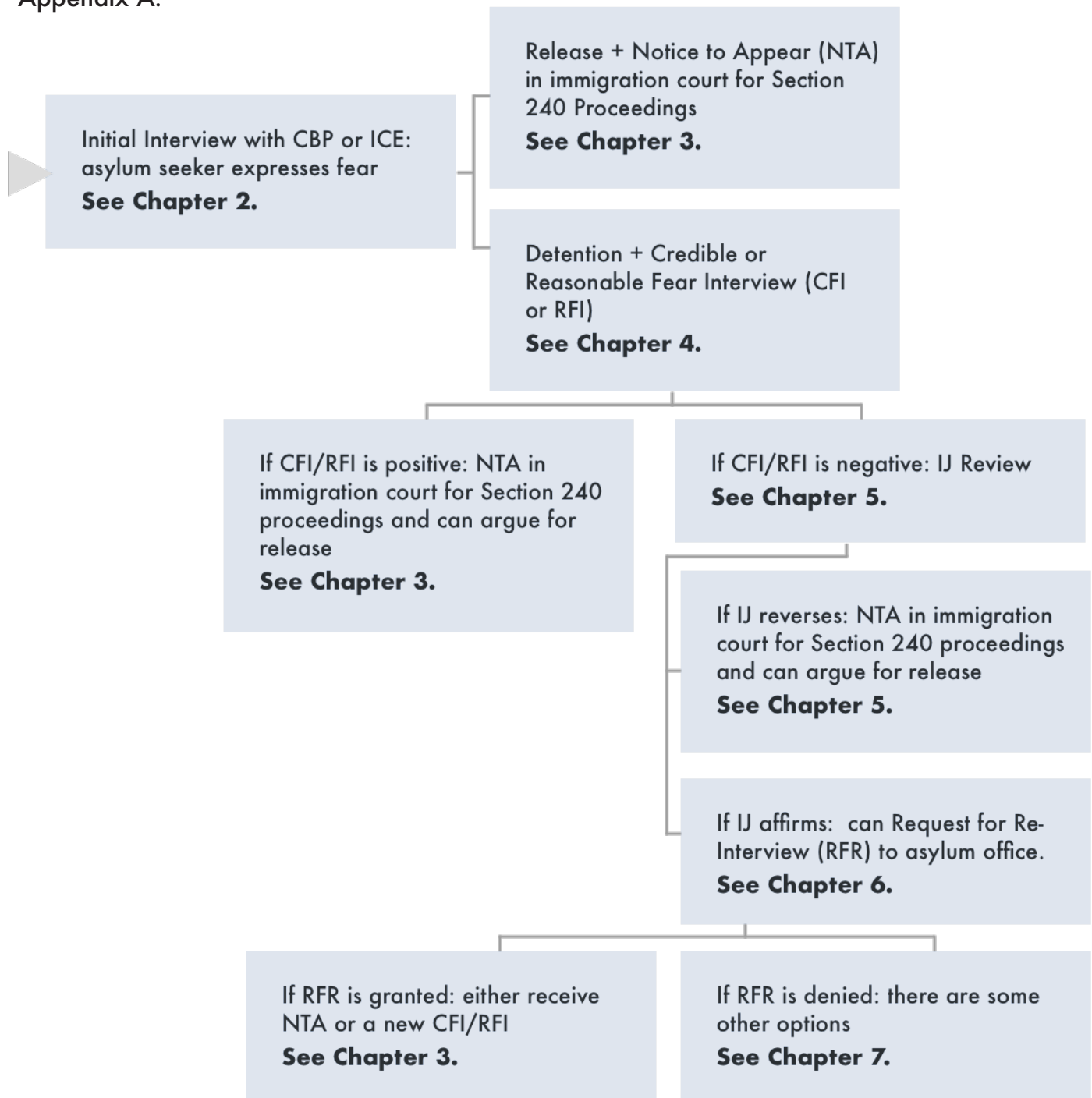
¹⁰ INA §§ 235, 241(a)(5).

For more information on expedited removal and reinstatement of removal in general, see:

- Trina Realmuto, *Reinstatement of Removal*, National Immigration Project of the National Lawyers Guild and American Immigration Council (April 2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstate-removal.pdf
- *A Primer on Expedited Removal*, American Immigration Council (February 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf
- *A Guide to Obtaining Release from Immigration Detention*, Catholic Legal Immigration Network, Inc. (CLINIC) (May 2018), <https://cliniclegal.org/resources/bond-guide>

Process for Asylum Seekers in Expedited Removal or Reinstatement

Below is a basic outline and description of the process for asylum seekers in expedited removal and reinstatement of removal proceedings. More detailed information can be found in the chapters that follow. For a chart of relevant government entities and a list of acronyms, see Appendix A.



When an individual arrives at the border or encounters immigration enforcement after crossing the border, they will have an **initial interview** with an immigration official, usually from Customs and Border Protection (CBP). If the asylum seeker expresses a fear of returning to their country at that initial interview, they are legally entitled to further process. If not, they can be deported immediately. See Chapter 2.

At the discretion of the immigration official, the asylum seeker who has expressed fear could simply be released and issued a document called a **Notice to Appear (NTA)** in immigration court. They would then have a chance to argue the merits of their case in ordinary Section 240 removal proceedings. See Chapter 3. Under the Trump Administration, asylum seekers who entered the United States without inspection have been separated from their children and prosecuted for the federal misdemeanor of improper entry, regardless of any expression of fear, and even arriving asylum seekers who present at ports of entry have been separated from their children.¹¹

Or, the asylum seeker who has expressed fear could be detained and referred to an Asylum Officer (AO) for a longer interview. If an asylum seeker is in expedited removal, they will be referred for a **Credible Fear Interview (CFI)**. For an asylum seeker in reinstatement of removal (who has a prior order of removal), the Department of Homeland Security (DHS) will reinstate the prior order of removal¹² but must also refer the case for a **Reasonable Fear Interview (RFI)**. See Chapter 4.

If the AO makes a **positive determination** at the interview, deciding that the asylum seeker has a credible or reasonable fear of returning to their home country, the asylum seeker will receive a Notice to Appear (NTA) in immigration court and will be able to argue for release from detention. See Chapter 3.

But if the AO makes a **negative determination**, the asylum seeker is vulnerable to deportation. This guide covers several ways to challenge a negative credible or reasonable fear decision: review by an IJ (see Chapter 5), request for re-interview or reconsideration to

11 E.g., Lomi Kriel, *Trump Moves to End 'Catch and Release', Prosecuting Parents and Removing Children Who Cross Border*, HOUSTON CHRONICLE (Nov. 25, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php>; Women's Refugee Comm'n et al., *The Separation of Family Members Apprehended by or Found Inadmissible While In U.S. Customs and Border Protection (CBP) Custody at the U.S.-Mexico Border* (Dec. 11, 2017), <https://www.womensrefugeecommission.org/images/zdocs/Family-Separation-Complaint-FINAL-PUBLIC-12-11-17.pdf>; see also *supra* note 1.

12 Note: When and whether to challenge ICE's reinstatement of a prior order is beyond the scope of this guide, but advocates should be aware that a reinstatement order may not be legal or appropriate and can be challenged in some circumstances. See Trina Realmuto, National Immigration Project of the National Lawyers Guild and American Immigration Council, *Reinstatement of Removal* (Apr. 29, 2013) at 3, https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstate-removal.pdf.

the asylum office (see Chapter 6), and other strategies (see Chapter 7).

Credible and Reasonable Fear Standards

In expedited removal, the AO will conduct a CFI to determine whether the asylum seeker has “credible fear” of persecution or torture. In reinstatement of removal, the AO will conduct a RFI to determine when the asylum seeker has “reasonable fear” of persecution or torture.

The following legal standards govern.

Credible Fear

At the CFI, the AO will assess whether the asylum seeker has a “credible fear” of returning to their home country.¹³ Credible fear means a “significant possibility” of ultimately prevailing on claims for asylum, withholding of removal, or relief under the Convention Against Torture (CAT).¹⁴ To obtain asylum, applicants technically must establish that there is as little as a 10 percent chance that they will be persecuted on account of a protected ground (though the reality on the ground is that a higher standard is often applied).¹⁵ But to demonstrate credible fear, applicants need only show “a significant possibility” that they could establish at least that 10 percent chance.¹⁶

When the credible fear regulations were implemented, the government described the credible fear standard as “a low threshold of proof of potential entitlement to asylum” and stated that the purpose of the credible fear process was to ensure access to a full hearing for all individuals who qualify under the standard.¹⁷ However, the Department of Homeland Security (DHS)’s 2017 updates to Asylum Division Officer Training Lesson Plans have heightened the bar for asylum seekers to obtain a possible credible fear determination.¹⁸

¹³ 8 C.F.R. § 208.30(d).

¹⁴ INA § 235(b)(1)(B)(v); 8 C.F.R. § 1003.42(d).

¹⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987).

¹⁶ Recent guidance from the Trump Administration suggests the “significant possibility standard” may be changed to a more difficult “substantial and realistic possibility of succeeding” standard. U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., RELEASE OF UPDATED ASYLUM DIVISION OFFICER TRAINING COURSE (ADOTC) LESSON PLANS, CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS, AND REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS (FEB. 13, 2017), https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit.

¹⁷ 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997).

¹⁸ Tahirih Justice Center, *Summary of February 13, 2017 Asylum Division Lesson Plan Implementing Executive Orders* (Mar. 6, 2017), <https://www.tahirih.org/wp-content/uploads/2017/03/Tahirih-Summary-of-CFI-RFI-Changes-3.6.17.pdf>; see also U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 16.

Reasonable Fear

At the RFI, the AO will assess whether the asylum seeker has a “reasonable fear” of returning to their home country. Reasonable fear means a “reasonable possibility” that the individual would be persecuted “on account of” a protected ground or a “reasonable possibility that they would be tortured in the country of removal.”¹⁹ DHS does not consider individuals with prior removal orders to be eligible for asylum. Instead, individuals with prior removal orders are limited to applying for withholding of removal or CAT relief.²⁰ The reasonable fear standard is higher than that for credible fear.²¹

Burden of Proof

The applicant bears the burden of proof in establishing a credible or reasonable fear of persecution or torture. The applicant’s testimony alone is sufficient to meet this burden, as long as that testimony is “credible, . . . persuasive, and refers to specific facts.”²² Because this is a “non-adversarial” interview, the AO has a responsibility to elicit all information relevant to the legal determination and fully develop the record to support a legally sufficient determination

Credibility

At the CFI or RFI, the AO will also evaluate the asylum seeker’s credibility.²³ The AO’s credibility determination may be final and will be based on the “totality of the circumstances” including the asylum seeker’s ability to use details in their descriptions and their demeanor. The credibility determination may also be based on inconsistencies between an asylum seeker’s CFI/RFI and their initial interview at the border.²⁴ Under February 2017 guidance, the asylum seeker may be asked to produce corroborating evidence, and they must also establish

19 8 C.F.R. § 1208.31(c), (g); see also *INS v. Stevic*, 467 U.S. 407, 424 (1984) (stating reasonable possibility means 51 percent).

20 The question of whether an individual whose prior removal order has been reinstated should be barred from applying for asylum in the United States is not settled law. Compare *Perez-Guzman v. Sessions*, 835 F.3d 1066 (9th Cir. 2016), cert. denied, 138 S. Ct. 737 (2018), with *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489 (5th Cir. 2015). See also Hillary Gaston Walsh, *Forever Barred: Reinstated Removal Orders and the Right to Seek Asylum*, 66 CATH. U. L. REV. 613 (2017) (arguing reinstatement of prior removal orders should not bar individuals from access to asylum and describing a split among courts on this issue).

21 Compare 8 C.F.R. § 208.30(e)(2) (stating the standard for credible fear), with 8 C.F.R. § 208.31(c) (stating the standard for reasonable fear).

22 INA § 208(b)(1)(B)(ii).

23 U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 16, at 18-23.

24 See, e.g., *Qing Hua Lin v. Holder*, 736 F.3d 343, 352-53 (4th Cir. 2015); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178-81 (2d Cir. 2004).

their identity by a preponderance of the evidence.²⁵

Advocates should be aware that Post-Traumatic Stress Disorder (PTSD) may lead to nondisclosures and inconsistencies by asylum seekers who are interviewed soon after entering the United States. The Center for Gender and Refugee Studies (CGRS) has resources regarding the effects of PTSD, including an expert affidavit written by Stuart Lustig, MD, as well as other valuable resources.²⁶

Applicable Case Law

In the expedited removal and reinstatement of removal context, advocates can use the most favorable case law from any federal circuit court, not just the circuit where the asylum seeker is located. Advocates can also use authority from the BIA.²⁷

Asylum, Withholding, and CAT Basics

To advocate for asylum seekers in expedited removal and reinstatement of removal, it is important to understand and articulate the underlying claims for (1) asylum, (2) withholding, and (3) CAT relief, even though the full claims for relief will not be made until the asylum seeker is in regular Section 240 proceedings.

As a reminder, asylum seekers with prior removal orders are not eligible to apply for asylum; they are only eligible for withholding of removal under INA Section 241(b)(3) or CAT relief.²⁸ Compared with asylum, the standards for establishing the elements of entitlement to CAT or withholding are higher, and these two forms of relief provide more limited immigration benefits.²⁹

25 U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 16, at 17-23; see also Letter from Eleanor Acer, Senior Director of Refugee Protection, Human Rights First, to Lori Scialabba, Acting Director, USCIS (Mar. 10, 2017), <http://www.humanrightsfirst.org/sites/default/files/credible-fear-lesson-plan-letter.pdf>.

26 For more information on CGRS, and to request assistance, visit their website: <http://cgrs.uchastings.edu/assistance>.

27 REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE, U.S. CITIZENSHIP AND IMMIGRATION SERVS., ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR (Feb. 28, 2014), <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf> (“[W]here there is: a. disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue; or, b. the claim otherwise raises an unresolved issue of law; and, c. there is no DHS or Asylum Division policy or guidance on the issue, then generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.”).

28 See INA § 241(a)(5); 8 C.F.R. § 208.2(c). *But* see Trina Realmuto, *Reinstatement of Removal*, National Immigration Project of the National Lawyers Guild and American Immigration Council 22 (Apr. 29, 2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstate-removal.pdf.

29 For example, withholding of removal simply prevents the government from removing an immigrant to a country where their

A. Asylum

As discussed in more detail below, an applicant for asylum must establish the following:³⁰

1. a well-founded fear
2. of persecution
3. perpetrated by the government or an entity the government cannot or will not control
4. on account of
5. one of five protected grounds.

1. The well-founded fear may be based on an asylum seeker's past individual experience or a pattern of persecution of similarly situated individuals.³¹ A fear is not considered well-founded if the asylum seeker could avoid persecution by **internally relocating**.³² If the persecutor is a government actor, the AO must presume that internal relocation would not be reasonable.³³

2. Persecution is defined as "a threat to life or freedom or infliction of suffering or harm upon those who differ in a way regarded as offensive,"³⁴ which is more than mere harassment.³⁵ Certain events that occur to children, particularly when the family is also harmed, can constitute persecution even where similar conduct inflicted upon an adult would not.³⁶ The AO must consider persecution "in the aggregate."³⁷ Once an asylum seeker demonstrates past

life or freedom would be threatened, but they can be removed to a third country. 8 C.F.R. § 208.16. A recipient of withholding cannot leave the U.S., cannot automatically apply for a green card, and does not receive derivative benefits for family members but may provide work authorization. An immigrant seeking withholding must show that it is more likely than not they will be persecuted. *Id.* CAT involves similarly limited benefits and involves a higher standard. 8 C.F.R. § 208.17.

30 INA § 101(a)(42)(A).

31 8 C.F.R. § 1208.13(b)(2)(C)(iii).

32 8 C.F.R. § 1208.13(b)(1)(i)(B).

33 8 C.F.R. § 208.13(b)(3)(ii).

34 *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

35 See, e.g., *Baba v. Holder*, 569 F.3d 79, 85 (2d Cir. 2009) ("[T]o constitute persecution in the asylum context, 'the conduct must rise above mere harassment.'" (quoting *Tian-Yong Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004))).

36 See, e.g., *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006); *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007); *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994).

37 *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998).

persecution, they are entitled to a presumption of a well-founded fear of future persecution.³⁸

Persecution can include, for example:

- serious physical harm³⁹
- rape or sexual assault⁴⁰
- forced abortion⁴¹
- harm to family members and close associates⁴²
- threats⁴³
- severe economic harm⁴⁴
- extortion⁴⁵
- emotional or psychological harm⁴⁶

3. Persecution must be committed by a government actor or an actor the government is unable or unwilling to control.

4. The applicant for asylum must fear persecution “on account of” one of five protected

38 8 C.F.R. § 1208.13(b)(1).

39 *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (two detentions without formal charges for a combined total of 25 days in a dark crowded cell, where applicant was shackled in cuffs preventing him from straightening his legs and forcing him to urinate on his clothes, constitute persecution); *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995) (detention and physical torture); *Tarubac v. INS*, 182 F.3d 1114, 1118 (9th Cir. 1999) (being kidnapped, beaten, held without food, and threatened is persecution); *Matter of V-T-S*, 21 I. & N. Dec. 792, 801 (BIA 1997) (kidnapping is persecution).

40 See, e.g., *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9th Cir. 2000); *Angoucheva v. INS*, 106 F.3d 781, 793 (7th Cir. 1997); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996).

41 See, e.g., *Lidan Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004).

42 See, e.g., *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119 (9th Cir. 2004); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Chouchkov v. INS*, 220 F.3d 1077 (9th Cir. 2000); *Matter of A-K-*, 24 I. & N. Dec. 275, 278 (BIA 2007).

43 See, e.g., *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011); *Chavarria v. Gonzales*, 446 F.3d 508, 518 (3d Cir. 2006); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Ruano v. Ashcroft*, 301 F.3d 1155, 1160-61 (9th Cir. 2002).

44 See, e.g., *Matter of T-Z-*, 24 I. & N. Dec. 163, 173-74 (BIA 2007).

45 See, e.g., *Silvia Ayala v. Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2016); *Oliva v. Lynch*, 807 F.3d 53, 59-60 (4th Cir. 2015).

46 See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004); *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007).

grounds. That means that one of the protected grounds must be “at least one central reason” for the persecution⁴⁷—there must be a **nexus** between the persecution and the protected ground.

5. The **five protected grounds** are:

- race⁴⁸
- religion⁴⁹
- nationality
- political opinion⁵⁰
- membership in a particular social group (PSG)

Many Central Americans seek asylum based on **membership in a PSG**. Under BIA case law, a particular social group must be (1) comprised of members who share an immutable characteristic, (2) defined with “particularity,” and (3) “socially distinct.”⁵¹

Examples of possible PSGs common for Central American asylum seekers include:

- women who are unable to leave their relationships⁵²
- former gang members⁵³
- witnesses and informants against gangs⁵⁴

47 8 U.S.C. § 1158(b)(1)(B)(i); see also *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208 (BIA 2007).

48 See, e.g., *Shoafera v. INS*, 228 F.3d 1070, 1076 (9th Cir. 2000) (Amhara ethnicity); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 n.5 (9th Cir. 1999) (membership in Quiche indigenous group).

49 *Matter of S-A-*, 22 I. & N. Dec. 1328, 1336 (BIA 2000).

50 See, e.g., *Martinez-Buendia v. Holder*, 616 F.3d 711, 717 (7th Cir. 2010) (imputed anti-gang political opinion); *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (feminist beliefs as political opinion); *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992); *Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir. 2007); *Dhakal v. Holder*, 544 F. App'x 35, 37 (2d Cir. 2013).

51 See *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014).

52 *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014). *Matter of A-R-C-G-* has recently been overruled by *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). Advocates should take care to review the most up-to-date case law. A good resource for gender-based claims is the Center for Gender and Refugee Studies (CGRS): <https://cgrs.uchastings.edu/assistance>.

53 See *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). But see *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013).

54 See, e.g., *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1084 (9th Cir. 2013).

- individuals who resist gang recruitment⁵⁵
- individuals targeted because of family membership⁵⁶
- single women heads of household or business owners⁵⁷
- indigenous women⁵⁸

Please note: Case law regarding the PSGs mentioned above and throughout the report will be impacted by Attorney General Sessions' June 11, 2018 decision in *Matter of A-B-*, which overruled *Matter of A-R-C-G-*.⁵⁹ Advocates should take care to review the latest case law.

B. Withholding of Removal under INA Section 241(b)(3)

Withholding of removal under INA Section 241(b)(3) requires showing that it is more likely than not that the applicant's life or freedom will be threatened on account of one of the five protected grounds in the asylum/refugee definition (above).⁶⁰ Applicants for withholding of removal may argue they need only establish that a protected characteristic was "a reason" and not "one central reason" motivating their persecution.⁶¹

55 See, e.g., *Dhakal v. Holder*, 544 F. App'x 35, 37 (2d Cir. 2013). Unfortunately, experience suggests that this PSG alone is rarely successful.

56 See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011).

57 See e.g., *Cordoba v. Holder*, 726 F.3d 1106, 1111 (9th Cir. 2013); *Tapiero de Orejuela v. Gonzalez*, 423 F.3d 666, 672 (7th Cir. 2005). The particular social group of Central American single female heads of household has been recognized by USCIS as "new and novel" and an evolving area of law. USCIS, *Guidance on New and Novel PSGs* (April 15, 2015), available at http://www.fairus.org/sites/default/files/2017-08/Update_on_New_and_Novel_PSGS.pdf. And "in determining whether the alien has a credible fear...the Asylum Officer shall consider whether the alien's case presents novel or unique issues." 8 C.F.R. § 208.30(e)(4). Though some circuits have held that purported particular social groups relating to present business ownership does not satisfy the immutability prong, see *Moreira v. Holder*, 537 F. App'x 739, 740 (9th Cir. 2013), it is recognized that "former" membership in a variety of groups meets the immutability standard, as beyond the capacity of an applicant to change. See, e.g. *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009); *Koudriachova v. Gonzales*, 490 F.3d 255, 262-63 (2d Cir. 2007); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000); *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988), superseded by statute on other grounds.

58 See, e.g., *Ordonez-Quino v. Holder*, 760 F.3d 80, 93 (1st Cir. 2014).

59 *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), overruling *Matter of A-R-C-G-*, 26 I. & N. Dec. 338 (BIA 2014).

60 See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

61 See *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) (remanding the case to the BIA in light of the finding that because Congress amended the asylum statute to include the REAL ID Act's "one central reason" nexus standard, but did not include similar language to the withholding of removal statute, Congress did not intend for the "one central reason" standard to apply to withholding of removal claims).

C. Convention Against Torture (CAT) Relief

Withholding or deferral of removal under CAT requires showing that it is more likely than not the applicant will face physical or mental torture at the hands of the government or that the government will acquiesce in tortuous acts by a non-state actor.⁶²

For comprehensive information on asylum and Section 240 removal proceedings, we recommend consulting these excellent resources:

- Dree K. Collopy, *AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* (7th Ed. 2015)
- National Immigrant Justice Center, *Basic Procedural Manual for Asylum Representation Affirmatively and In Removal Proceedings* (May 2016), http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual_05%202016_final.pdf
- Michelle N. Mendez, *Asylum, Withholding of Removal, and Protection Under the Convention Against Torture*, in *REPRESENTING CLIENTS IN IMMIGRATION COURT* (AILA 4th ed. 2016)
- The Center for Gender & Refugee Studies (CGRS), which provides technical assistance and mentorship, including providing a variety of publications on Gender Asylum, Children's Asylum, Gang Asylum, and Gender-Based Violence claims. To request technical assistance, visit <http://cgrs.uchastings.edu/assistance>
- Innovation Law Lab, *Center of Excellence Tactical Training Materials*, <https://innovationlawlab.org/center-of-excellence-training/>.

2017 Executive Orders and Memoranda Affecting Asylum Seekers in Expedited Removal or Reinstatement of Removal

In early 2017, the Trump Administration released several executive orders and memoranda relevant for asylum seekers. These may change with the issuance of new orders or memoranda or because of litigation.

First, a February 2017 "border security" memorandum from then-Secretary of Homeland

⁶² *Ahmed v. Mukasey*, 300 F. App'x 324, 328 (5th Cir. 2008); see also 8 C.F.R. § 1208.18(a)(4).

Security John Kelly implemented numerous changes and forecasted others.⁶³ Under the memorandum, DHS is required to detain all immigrants in expedited removal proceedings, and may be permitted to remove certain individuals to Mexico during expedited removal proceedings. The Kelly memorandum also provides for construction of a wall between the United States and Mexico, an increase in the number of AOs assigned to adjudicate expedited removal and reinstatement of removal interviews, and limits the availability of parole for asylum seekers and other non-citizens. The memorandum proposed, but did not implement, an expansion of expedited removal proceedings to all undocumented immigrants, except for unaccompanied children and asylum seekers, anywhere in the United States who cannot establish to the satisfaction of an immigration officer that they have been present in the country for longer than two years. Finally, the memorandum provides that unaccompanied minors may be placed in regular removal proceedings if reunited with their parents after crossing the border, and that parents may be prosecuted if they paid “coyotes” to assist their children across the border.

Second, February 2017 guidance to AOs appears designed to raise the showing required to establish a credible fear.⁶⁴ Among other changes, the guidance removed language from previous guidance about resolving ambiguities in favor of asylum seekers, deleted references to the “significant possibility” standard and language emphasizing the threshold nature of the CFI and RFI process, and appeared to require asylum seekers in CFIs and RFIs to provide greater detail and corroboration to establish credibility.⁶⁵

More recently, the Trump Administration has been separating asylum seekers from their children, and, for asylum seekers who entered the United States without inspection, has been prosecuting them for the federal misdemeanor of improper entry regardless of any expression of fear.⁶⁶

This area of law and policy is changing rapidly. Advocates should continue to monitor for future policy shifts and litigation⁶⁷ that may impact the rights of asylum seekers.

⁶³ Kelly Border Security Memorandum, *supra* note 7.

⁶⁴ U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 16.

⁶⁵ See *supra* note 18.

⁶⁶ E.g., Lomi Kriel, *Trump Moves to End ‘Catch and Release’, Prosecuting Parents and Removing Children Who Cross Border*, HOUSTON CHRONICLE (Nov. 25, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php>; Women’s Refugee Comm’n et al., *The Separation of Family Members Apprehended by or Found Inadmissible While In U.S. Customs and Border Protection (CBP) Custody at the U.S.-Mexico Border* (Dec. 11, 2017), <https://www.womensrefugeecommission.org/images/zdocs/Family-Separation-Complaint-FINAL-PUBLIC-12-11-17.pdf>; see also *supra* note 1.

⁶⁷ For example, the American Civil Liberties Union (ACLU) has filed a class action lawsuit challenging family separation, which was pending at the time of publication: *Ms. L v. ICE*, 18-cv00428 (S.D. CA).

CHAPTER 2

Initial Interview with Customs and Border Protection (CBP)

When an asylum seeker arrives in the United States and encounters immigration enforcement, they will be questioned by an official from Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE). Local police officers in certain states and cities may also conduct the interview if they encounter an asylum seeker without documentation.⁶⁸

This questioning occurs:

- When the asylum seeker arrives at a port of entry such as a border crossing or an airport
- When the asylum seeker is encountered by immigration officials within 100 miles of the border without documents and within 14 days of arriving.⁶⁹

Note: This is the process as it is defined in the regulations. Advocates have learned that CBP and ICE are now questioning anyone at any time all over the country, not only asylum seekers who are arriving at the border.

The initial interview may include questions such as:

- Of what country are you a citizen?
- Where were your parents born?
- Do you have documentation allowing you to be present in the United States?
- Are you afraid to return to your country?

This is only a preliminary interview. If an asylum seeker indicates that they are afraid to return to their country, they are entitled either to a credible or reasonable fear interview with an AO

⁶⁸ INA § 287(g).

⁶⁹ While by statute, expedited removal applies to asylum seekers who have not been continuously in the United States for two years, a regulation has limited that to those asylum seekers encountered within 100 miles of the border and who have not been in the United States continuously for fourteen days. INA § 235(b)(1)(A)(iii); 67 Fed. Reg. 68,923-24 (Nov. 13, 2002). However, in the memorandum discussed above, Secretary Kelly indicated that he intends to expand expedited removal, likely to its statutory limits of anywhere in the U.S. and two years. Kelly Border Security Memorandum, *supra* note 7.

or to a Notice to Appear (NTA) in immigration court (see Chapter 3).⁷⁰ Unfortunately, this does not always happen: human rights organizations have documented flaws and abuses in the preliminary screenings conducted by CBP, which may result in deportation of immigrants with valid claims for asylum and other forms of relief.⁷¹

70 INA § 235(b)(1)(A)(ii).

71 Human Rights Watch, “You Don’t Have Rights Here”: US Border Screening and Returns of Central Americans to Risk of Serious Harm (October 16, 2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>. Moreover, recent guidance from the Trump Administration suggests that inconsistencies, even ones fabricated by government officials, between this initial interview and the credible fear process can lead to an adverse credibility determination. See U.S. Comm’n on International Religious Freedom, *Study on Asylum Seekers In Expedited Removal: Evaluation of Credible Fear Referral in Expedited Removal At Ports of Entry in the United States* 13-18 (Feb. 2005), http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolIII.pdf (explaining that Customs and Border Protection [CBP] officers have been observed recording false responses on Forms I-867). The website *HoldCBPAccountable.org*, a joint project of the American Civil Liberties Union, the American Immigration Council, the National Immigration Project of the National Lawyers Guild, and the Northwest Immigrant Rights Project, contains a wealth of information documenting litigation action taken across the country in an ongoing effort to establish accountability and transparency with CBP. It is an excellent resource for practitioners seeking documented examples of CBP misconduct, including falsifying forms that are required for the expedited removal/fear interview process.

CHAPTER 3

Notice to Appear (NTA)

A Notice to Appear (NTA) is a charging document issued by the Department of Homeland Security (DHS) that initiates removal proceedings in immigration court under Section 240 of the Immigration and Nationality Act (INA). If an asylum seeker indicates in the initial interview that they are afraid to return to their country, they could either (1) be detained and interviewed by an Asylum Officer (AO) (see Chapter 4), or (2) receive a document called an NTA.⁷² Whether to issue an NTA is a discretionary determination made by DHS⁷³.

Asylum seekers who received **NTAs at the border** in the past were sometimes released into the United States and expected to appear at immigration court in the area where they lived (in regular Section 240 removal proceedings). However, recent executive guidance indicates that once detention capacity is increased, all asylum seekers will be detained after expressing fear, rather than being released with an NTA.⁷⁴

If a detained asylum seeker is interviewed by an AO and receives an **NTA as a result of a positive credible or reasonable fear determination**, they are then placed in regular Section 240 removal proceedings, and may be eligible for release from detention. Although arguing for release from detention is beyond the scope of this guide, an advocate whose client receives an NTA after a positive credible fear interview (CFI) or reasonable fear interview (RFI) should consider seeking release.⁷⁵

“Regular” (i.e. non-expedited) removal proceedings are often referred to as “Section 240 proceedings” because they are provided for in Section 240 of the INA. This is in contrast to “expedited removal proceedings” which are sometimes also referred to as “Section 235” proceedings for the same reason. In “regular” Section 240 proceedings, the first immigration court hearing will almost always be a “master calendar” hearing primarily to identify what relief the respondent intends to apply for and to discuss scheduling the full trial on the merits of the case.

⁷² Beginning in 2017, some arriving parents have instead been separated from their children and prosecuted for improper entry. See *supra* notes 1 & 11 and accompanying text.

⁷³ 8 C.F.R. § 1235.3(b)(ii).

⁷⁴ Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017); Kelly Border Security Memorandum, *supra* note 7.

⁷⁵ For more information on seeking release from detention, see Catholic Legal Immigration Network, Inc. (CLINIC), *A Guide to Obtaining Release from Immigration Detention* (May 2018), <https://cliniclegal.org/resources/bond-guide>; ASISTA, “How to Get Your Client Out from Detention After an ICE Enforcement Action,” http://www.asistahelp.org/documents/resources/1_51905531016E4.pdf (2012).

Regardless of the timing or location of their first immigration court hearing, or whether they are still in expedited removal or reinstatement of removal and have not been issued an NTA, asylum seekers must file an asylum application (called a form I-589) **within one year of arriving** in the United States.⁷⁶ Therefore, in all cases, the asylum seeker should **consult with an attorney as early as possible**, even when their first court appearance is months or even a year or more away. Lists of legal organizations that provide services to asylum seekers in different regions are available online.⁷⁷

76 INA § 208(a)(2)(B). A recent class action, *Mendez-Rojas v. Johnson*, 16-cv-01024 (W.D. WA) may affect some asylum seekers' ability to file their I-589 after the one-year filing deadline.

77 For one such list, see the National Immigration Legal Services Directory, <https://www.immigrationadvocates.org/nonprofit/legaldirectory/>; see also EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE (Sept. 14, 2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf.

CHAPTER 4

Credible or Reasonable Fear Interview (CFI/RFI)

A detained asylum seeker in expedited removal or reinstatement of removal who expresses fear of return will be interviewed by an Asylum Officer (AO) about this fear. These interviews usually last between 1-2 hours but are not limited in length by any statute or regulation.

Two Types of Fear Interviews

First, those asylum seekers arriving at the border who have not been previously ordered removed are in expedited removal and will receive a credible fear interview (CFI).⁷⁸ Second, asylum seekers who were previously removed or who executed a prior removal order by departing the United States are in reinstatement of removal proceedings and will receive a reasonable fear interview (RFI).⁷⁹ The interviews are procedurally similar and the major substantive questions asked in both will generally be the same. The difference is that in the RFI, the asylum seeker must meet a higher standard, and will likely have to answer questions about their previous entry to the United States and what has happened to them since their last departure.⁸⁰

Children traveling with a parent who was previously removed from the United States are not subject to reinstatement of their parent's removal, and thus should receive a CFI. If a child is not provided with a separate interview, an AO must review the parent's interview, taking into account the lower credible fear standard for the child.

The Interview Itself

At a CFI, the asylum seeker is allowed to bring an attorney or non-lawyer into the room to assist in eliciting testimony.⁸¹ The regulations limit the role of the legal advocate or any non-

78 8 C.F.R. § 208.30.

79 8 C.F.R. § 208.31. CBP or ICE may, in its discretion, place individuals with prior deportation orders in credible fear proceedings.

80 See *supra* Introduction, Credible and Reasonable Fear Standards.

81 8 C.F.R. § 208.30(d)(4).

lawyer to that of a consultant.⁸² The regulations allow the consultant to present a statement at the end of the interview, but condition this opportunity upon the AO's approval.

At an RFI, the regulations only allow an attorney or Board of Immigration Appeals (BIA) accredited representative to accompany the asylum seeker to the interview.⁸³ The regulations governing RFIs do not grant permission to the advocate to present a statement, but do require the AO to review the summary of testimony with the asylum seeker and provide them an opportunity to correct any errors.

AOs differ in their preferences, but generally advocates are allowed to interrupt to clarify a misunderstanding and are given an opportunity at the conclusion of the interview to ask further questions, elicit further testimony or clear up any misunderstandings.⁸⁴ The advocate and asylum seeker should arrive early to the area of the detention center where the interviews take place and consult with the AO to determine the permitted scope of advocacy. Importantly, the advocate should take as close to verbatim contemporaneous notes as possible so as to contest any dispute in what appears in the officer's notes.

Preparing for the Interview

Whether or not the advocate will attend or represent an asylum seeker by phone during the interview, the asylum seeker should meet with or speak to the advocate before the interview to prepare. Details and suggestions on preparation are included in the checklist below.

82 *Id.* To qualify as a consultant, you are not required to submit a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, but the regulations do not prohibit you from doing so. Nevertheless, it may be helpful to have a G-28 on file in case subsequent advocacy, like a request for reconsideration (RFR), is necessary. See Chapter 6.

83 8 C.F.R. § 208.31(c).

84 Advocates should clarify the AO's preferences at the start of the interview if possible. Also, asylum seekers who have the opportunity to consult with and retain counsel prior to a fear interview should be careful to fully clarify the scope of the attorney's planned participation (e.g. will the attorney be present for the CFI in person, telephonically, or just to prepare the applicant ahead of time, will the attorney file any documents, etc.).

CFI/RFI Preparation Checklist

(See also Appendix C for interview tips and sample questions)

☐ **Introduce yourself and the goal of the meeting**

- ☐ Explain your role and the process. Remember that you are a stranger and are going to ask the asylum seeker personal questions, so it is important to build credibility and trust through clarity upfront.
- ☐ Let the asylum seeker know that you are here to answer their questions, and that they may interrupt you or request a break if they would like.
- ☐ Explain the purpose of the CFI/RFI and the standards that the AO will use.
- ☐ Assure the asylum seeker that anything they share with you will remain confidential, and check to see that they understand that this means you will not share what they tell you with family in the United States, family in their country of origin, the government in their country of origin, or anyone else—unless the asylum seeker consents or offers testimony from one of these sources to help their case.
- ☐ Explain why you will be asking difficult questions and why it is important to talk about prior persecution or harm in all its forms in order to pass the interview—including abuse, rape, extortion, threats, etc. This does not mean you doubt or disbelieve the asylum seeker.

☐ **Review any records and documents that the asylum seeker has**

- ☐ Note that the asylum seeker does not need to bring any documents to the CFI/RFI, but bringing documents to review with an attorney can help an attorney to understand their case. It may also make sense to bring corroborating documents to the actual CFI/RFI. If an asylum seeker intends to bring documents to the interview, make copies beforehand so as to not lose the original documents.
- ☐ Review the Form 1-867: Record of Sworn Statement and translate this document to the asylum seeker, explaining that if there are errors or omissions on this document that the asylum seeker will likely be asked to explain why such errors exist.

☐ **Ask questions to understand their case**

- ☐ Begin with general questions about why they left their home country and why they are afraid to return.

- ☐ Ask more specific questions and follow up. See Appendix C (Client Interview Tips and Sample Questions).
 - ☐ Summarize what you understand the claim to be.
- ☐ Ask about other family members**
- ☐ Ask whether they were separated from a spouse or children at the border. Even if they are currently separated, they may be able to link their claims together if one claim provides the basis for other family members' claims.⁸⁵
 - ☐ Determine whether it is appropriate for you to interview any older children to help older children prepare for the interview; and if the children are teenagers, whether the parent is comfortable with you interviewing the children independently. It is not uncommon for children to have experienced sexual abuse or other violence that is relevant to the asylum claim but is not known to the parent.
- ☐ Explain how the CFI/RFI will work**
- ☐ The interview could last a few hours.
 - ☐ There will be an interpreter, most likely by telephone.
 - ☐ If the asylum seeker is detained with their children, they have the right to testify outside of their children's presence. The children have the right to do the same and to state their own individualized claims for relief separate and apart from their parents if they so choose.
 - ☐ The AO may want to speak with children as well, and in most cases is required to ask at least some questions of minors who are able to testify to any meaningful degree. United States Citizenship and Immigration Services (USCIS) generally allows a trusted adult to be present in such an interview.⁸⁶
- ☐ Share the following strategies with the asylum seeker so that they may pass their CFI/RFI**

⁸⁵ See REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE, U.S. CITIZENSHIP AND IMMIGRATION SERVS., GUIDANCE ON IMMEDIATE FAMILY MEMBERS IN CREDIBLE FEAR (June 27, 2014), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2014/MEMO_Guidance_on_Immediate_Family_Members_in_Credible_Fear.pdf.

⁸⁶ U.S. CITIZENSHIP AND IMMIGRATION SERVS., Asylum Officer Basic Training Course: Guidelines for Children's Asylum Claims (Mar. 21, 2009), https://cliniclegal.org/sites/default/files/AOBTC_Lesson_29_Guidelines_for_Childrens_Asylum_Claims_0.pdf.

- Speak slowly and pause often to give the interpreter time to interpret.
- Use complete sentences and phrases (as opposed to “yes” and “no”).
- Make eye contact with the AO.
- It is okay to cry and show strong emotion. If you need a minute to compose yourself, you can ask the AO for a break.
- Provide specific details—try to recreate the scene in the AO’s mind.
- Try to tell the story chronologically (explain the first time you were persecuted, then the worst incident of persecution, and then the most recent incident of persecution). It is important to share the full story.
- Be prepared to respond to the AO questions of “why” the persecution happened or “why” you are going to be harmed in the future.
- You can ask the AO to repeat or clarify a question if you don’t understand, including if you don’t understand the interpreter. If you don’t know the answer to a question, say that you don’t know. If you think the AO or the interpreter misunderstood or is missing something (including an error on your immigration forms), tell them. If you are having difficulty understanding the interpreter (perhaps due to regional differences and dialects), alert the AO.
- **Do not answer a question you do not understand!** (Note: Many asylum seekers—especially those who did not benefit from any pre-interview preparation—will later state that they did not know the scope and purpose of the interview, did not understand the questions, or did not understand the interpreter. If an asylum seeker testifies under oath that they understood the interpreter but later claims they did not, there is often very little that be done about the issue at that point.) Do not be afraid to answer “no” to questions about whether you understood something.
- The last question the AO usually asks is: “Is there anything else you would like to say?” That is a chance to say anything you forgot or want to add that is relevant to your fear of returning to your home country. (It is not a time to talk about any reasons for migration *unrelated* to past persecution/torture or a fear of persecution/torture.)

□ **Explain next steps**

- State whether or not you or another advocate will be attending the CFI/RFI.
- Explain what will happen if they “pass” the CFI/RFI (receive a Notice to Appear [NTA])

and possibly be eligible for release, see Chapter 3) and if they do not pass the CFI/RFI (at the interview, they can ask for review of the decision by an immigration judge [IJ], see Chapter 5).

☐ **Practice a few interview questions**

- ☐ Ask the asylum seeker to respond as they will respond to the AO during the real interview. For example, ask them why they left their country and what they think will happen if they return. Saying “I left my country because gang members threatened to kill me because of my relationship to my husband who left their gang” is a much more useful answer for the AO (and the asylum seeker) than “I left because I was scared of crime.” Helping asylum seekers get used to speaking in complete but succinct responses to the specific questions they are asked greatly facilitates the process of the actual interview when it occurs. Creating a timeline of events together is also often helpful.
- ☐ Include as one of the practice questions at least one example where the asylum seeker should respond that they do not understand the question. Emphasize that they can ask the AO to clarify anything they do not understand.

☐ **Review the theory of the case**

- ☐ Remember that the AO will be listening to how and why the asylum seeker and their family were harmed and what they fear to determine whether the harm rises to the level of persecution and whether it is on account of one of the protected grounds. See Chapter 1.
- ☐ Focus on reviewing facts that convey the feared harm and link the harm to the protected grounds. Also consider discussing what testimony is not relevant (including any mixed motives for migration unrelated to harm or fear of persecution).
- ☐ Remember that the record the AO develops in this hearing will follow an asylum seeker through their immigration proceedings. Any later testimony will likely be compared to this record.

☐ **Ask if the asylum seeker has any questions**

An asylum seeker who receives a negative determination after their credible or reasonable fear interview (CFI or RFI) has a right to a review by an immigration judge (IJ). The review must take place within **seven days** of a supervisory Asylum Officer (AO)’s approval of a negative credible fear determination or 10 days of the service on the Executive Office for

Immigration Review (EOIR)'s approval of a negative reasonable fear determination.⁸⁷ In practice, though, the regulations regarding timing of reviews may not be followed due to the extremely high caseload in all immigration courts.

⁸⁷ INA § 235(b)(1)(B)(iii)(III); 8 C.F.R. § 208.31(g).

CHAPTER 5

Immigration Judge (IJ) Review

The IJ review is a **short hearing** (typically about 30 minutes, though it may be shorter or longer) in which the IJ will question the asylum seeker about their fear, evaluate their credibility, and consider relevant country condition documentation.⁸⁸ The hearing will likely take place in a “courtroom” in the detention center. The IJ and interpreter will likely appear via videoconference. An attorney can accompany the asylum seeker as a consultant, but cannot represent them at the hearing, and therefore the attorney cannot take testimony, call witnesses, or make opening and closing statements.⁸⁹ Generally speaking, Department of Homeland Security (DHS) attorneys waive their appearance at an IJ review.

At the IJ review of a negative CFI—also called a **Negative Credible Fear Review (NCFR)**—the IJ must make a *de novo*, or brand new, determination of whether there is a significant possibility that the individual could establish eligibility for asylum, withholding, or relief under the Convention Against Torture (CAT).⁹⁰

For review of a negative RFI—also called a **Negative Reasonable Fear Review (NRFR)**—the IJ must make a determination of whether there is a reasonable possibility of future persecution or torture.⁹¹

The immigration court can consider **written statements**,⁹² although some IJs do not allow written briefing. The checklist below assumes that attorneys can file a written statement, but even if that is not the case, it is still important to work with the asylum seeker to understand what went wrong during the interview, develop their claims, and prepare them to testify in response to the IJ’s questioning.

There may be an **opportunity for the attorney to speak** during the IJ review and question the asylum seeker. However, some IJs will not let attorneys speak.⁹³

88 See 8 C.F.R. § 1003.42.

89 EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 115-116 (Aug. 2009), https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf.

90 8 C.F.R. § 1003.42(d).

91 8 C.F.R. § 208.31(g).

92 8 C.F.R. § 1003.42(c).

93 EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 89 at 115. The relevant statute is silent on the issue of whether an applicant can be represented. See INA § 235(b)(1)(B)(iii)(III) (“[R]eview shall include an opportunity for the alien to be heard and questioned by the immigration judge.”).

IJ Review Checklist

Note: IJ reviews happen very quickly and many IJs will not continue these hearings under any circumstances, so you should start preparing immediately once you learn of a negative interview result.

- ☐ **Review the CFI/RFI transcript and other documents.** Make notes of where you think there were problems with the interview, such as when the AO missed an area of follow-up questioning, the asylum seeker appears to have been upset or crying, or the asylum seeker or AO misunderstood one another. Also note relevant evidence beyond the text of the transcript such as the start and end times of the interview, whether the interpreter was changed, whether the asylum seeker understood the interpreter, etc.
- ☐ **Interview the asylum seeker and prepare a declaration**
 - ☐ Ask the asylum seeker follow up questions beyond what is in the CFI/RFI transcript, and explore inconsistencies between their story and the transcript. Be sure to ask whether there was anything that was not mentioned during the interview that the asylum seeker now thinks is important and why it was left out of the initial interview. See Appendix C (Client Interview Tips and Sample Questions).
 - ☐ Write the declaration in the asylum seeker's voice, then review the declaration line-by-line with the asylum seeker for accuracy.
 - ☐ The declaration should directly address any discrepancy between what the asylum seeker is now telling you and what was said at the interview (e.g. "At my credible fear interview, the officer asked me whether the police could protect me, but I could hear my son crying in the other room and I had already been interviewed for two hours so I just said 'yes' without really considering the question. In fact, they can't protect me because...").
 - ☐ Evaluate whether it is important to interview any of the children independently to solicit additional facts. It is not uncommon for a parent to be unaware of what has occurred to their children. Many children have been subjected to sexual abuse and other harm that is not known and/or fully understood by their parent. The basis of the claim may sometimes lie in the harm inflicted on a child.

☐ **Identify country conditions resources and gather evidence**

- ☐ Consider including a small number of targeted country conditions exhibits, such as official reports or newspaper articles corroborating an incident in the asylum seeker's testimony. You can apply to the Center for Gender and Refugee Studies (CGRS) for access to great resources: <http://cgrs.uchastings.edu/assistance>.
- ☐ You do not need evidence beyond the asylum seeker's own testimony, but if you have access to supplemental declarations, documentation, or a mental health evaluation, consider including them.

☐ **Draft the IJ Review brief**

- ☐ Open with the most important, compelling facts—sometimes the IJ is given the file just before the hearing and will not have time to review it thoroughly.
- ☐ Explain why the asylum seeker has a credible or reasonable fear.
- ☐ Explain why the AO reached the wrong decision, for example due to procedural problems, miscommunication, or obstacles in testifying due to the asylum seeker's mental health and/or trauma.
- ☐ You can use the most favorable case law from the Board of Immigration Appeals (BIA) or any federal circuit court, not just the circuit where the asylum seeker is located.⁹⁴
- ☐ See Appendix E (Sample IJ Review Brief).

☐ **Compile the Immigration Court filing**

- ☐ EOIR-28 Form, Notice of Entry of Appearance as Attorney⁹⁵
 - Signed by attorney.
 - Must include EOIR # of attorney.
 - Submit separate forms for the parent and each minor child.
 - Note that practices surrounding EOIR-28s may be changing, so check with other advocates who argue in your court or detention facility to confirm whether you need to submit this form.

⁹⁴ REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE, *supra* note 27 at 16.

⁹⁵ For a copy of the form, see <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf>.

- **Index of Exhibits**
 - Include a short description of each exhibit and page numbers.
- **Memorandum of Law in Support of Positive Finding of Credible Fear**
 - Signed by attorney.
 - Double check accuracy of names, and A#s, including of children.
 - Resolve any inconsistencies between the asylum seeker's declaration and the CFI/RFI.
 - Cite to the exhibits.
- **Paginated exhibits, including:**
 - Asylum seeker's declaration.
 - Either draft the declaration in English and then read it back in Spanish to the declarant, or draft the declaration in Spanish and then have it translated into English.
 - Signed by asylum seeker.
 - With certificate of translation signed by the translator. (See Appendix D).
 - Any supplemental declarations or other evidence, if applicable.
 - Targeted country conditions information. It is not necessary to include general references like State Department Human Rights Reports, but it is advisable to include information that is specifically targeted to the circumstances of your case (such as a translated newspaper article about a similarly-situated person's fate) where possible.
 - The IJ will already have the asylum seeker's file, so it is not necessary to include the credible fear transcript and decision or other government-issued documents.

□ **Submit the filing**

- Hand-filing in person at the window of the immigration court the day before the hearing is usually the most reliable way to submit IJ review materials.⁹⁶ Be sure to check the local rules of the immigration court.⁹⁷
- Advocates who handle a number of IJ reviews have informed us that they do not serve or

⁹⁶ Each immigration court functions differently. For that reason, we urge you to double check the hour at which each local immigration court will accept stop accepting filings.

⁹⁷ To find a specific immigration court, see <https://www.justice.gov/eoir/eoir-immigration-court-listing>.

send a copy of the filing to the Department of Homeland Security (DHS). Again, check the practice at the specific immigration court.

☐ **Appear at the Immigration Court hearing**

- ☐ Appear as a consultant for the asylum seeker at the immigration court hearing. Come prepared with all of your documents.

☐ **Possible outcomes and next steps**

- ☐ If the IJ vacates the CFI/RFI, the asylum seeker will receive a Notice to Appear (NTA). See Chapter 3.
- ☐ If the IJ affirms the CFI/RFI, the asylum seeker is at immediate risk of deportation. There is no opportunity to appeal an affirmed negative CFI or RFI to the BIA and no opportunity to appeal an affirmed negative CFI to a federal court, although asylum seekers may be able to appeal an affirmed negative FRI to a federal appeals court through a petition for review.⁹⁸ Generally, the best strategy after an IJ affirms a negative credible fear decision is to submit a request for re-interview or reconsideration (RFR) to the asylum office that rendered the initial fear determination. See Chapter 6.

⁹⁸ INA § 242(a)(2)(A); 8 C.F.R. § 1208.30(g)(2)(iv); *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017).

CHAPTER 6

Request for Re-Interview or Reconsideration (RFR)

Unfortunately, asylum seekers cannot appeal an immigration judge (IJ) decision affirming a negative credible fear interview (CFI) to the Board of Immigration Appeals (BIA) or a federal court of appeals.⁹⁹ But the regulations provide that United States Citizenship and Immigration Services (USCIS) “may reconsider a negative credible fear finding that has been concurred upon by an immigration judge.”¹⁰⁰

Based on that regulation and accompanying policy guidance, advocates may submit requests for re-interview or reconsideration (RFRs) to USCIS asylum offices having jurisdiction over the site of the interview. If the office assigned to the case determines that the asylum seeker “has made a reasonable claim that compelling new information concerning the case exists,” it can exercise its discretionary authority to grant a new interview or reverse the Asylum Officer (AO)’s negative finding.¹⁰¹

Because of the possibility of imminent deportation, such requests should be filed **as soon as possible** for detained asylum seekers and prior to any upcoming Immigration and Customs Enforcement (ICE) check-in for any non-detained asylum seeker.

With little formal guidance from USCIS, advocacy groups have analyzed outcomes for asylum seekers filing RFRs in offices around the country to identify additional criteria that these officers are using to evaluate RFRs.

First, we believe it is important to identify the “**new information**” that the asylum seeker could present in a second interview with the AO that would support their claim for asylum, withholding, and relief under the Convention Against Torture (CAT). This “new” information can include:

⁹⁹ INA § 242(a)(2)(A); 8 C.F.R. § 1208.30(g)(2)(iv). Asylum seekers may be able to file a petition for review of an affirmed negative Reasonable Fear Interview (RFI) in the relevant federal appeals court. See *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017).

¹⁰⁰ 8 C.F.R. § 1208.30(g)(2)(iv)(A).

¹⁰¹ Michael A. Benson, Exec. Assoc. Comm’r for Field Operations, Immigration & Naturalization Serv., Expedited Removal: Additional Policy Guidance (Dec. 30, 1997), reprinted in 75 Interpreter Releases (West) 255, 270 (Feb. 23, 1998). USCIS treats reviews of RFRs as distinct from the formal reopening and reconsideration procedures. See USCIS, Joseph D. Cuddihy, Guidance for Adjudicating Requests for Review of Denied I-590 Refugee Applications 2 n.2 (May 3, 2005) [hereinafter RFR Guidance Memo].

- changed circumstances;
- newly discovered information by the asylum seeker (i.e., information from a family member, colleague, relative, or friend had that is material to the asylum seeker's case but that they did not know during the interview);
- newly disclosed information (i.e. evidence that the asylum seeker knew at the time of the interview but did not present to the AO); or
- evidence of extraordinary circumstances (i.e., egregious errors by the AO, evidence of Post-Traumatic Stress Disorder (PTSD) or other trauma-induced symptoms that affected the asylum seeker's ability to communicate with the AO).

Second, experience suggests that it matters to the asylum office **why the information is new**. If you are relying on newly disclosed evidence to support the RFR, the RFR should not only describe this evidence and its relevance, but should also explain why the asylum seeker did not or could not present it at their initial interview.

- Egregious errors by the AO may help to explain the asylum seeker's inability to develop their claims at their first interview. According to USCIS guidance, the reviewing officer must first determine whether any errors were made in adjudicating the case in the first instance. Then, the officer determines whether the error was "significant," meaning "it is more likely than not to have affected the result."¹⁰²
- If an asylum seeker has developed PTSD as a result of experiencing trauma, or suffers from anxiety or depression, symptoms of these conditions may have made it more difficult for them to disclose information to an AO. In such a case, a psychological evaluation can help to explain these extraordinary circumstances and support their request for reconsideration of their case. Consider asking for their permission to seek out this kind of an evaluation from a professional. See also Chapter 7.

In general, an RFR should not merely disagree with or criticize the AO or IJ. In fact, it is advisable to specifically avoid denigrating the conduct of individual AOs except where especially flagrant, because it is their own colleagues who will be reviewing your request. A concise, matter-of-fact statement of what the AO allegedly failed to do is generally much more persuasive than flowery rhetorical allegations that the AO "flagrantly and abjectly failed in his solemn duty" to elicit sufficient testimony.

¹⁰² RFR Guidance Memo, *supra* note 101 at 3.

RFR Checklist

- ☐ **Review the CFI/RFI transcript and other documents**
- ☐ **Interview the asylum seeker**
 - ☐ Develop the underlying claim.
 - Look for new information about past persecution (such as threats, sexual violence, harassment, and harm to family members).
 - Look for new information on the motivation of the persecutor (“nexus”).
 - Look for new information on ability to remain or return, including information about events that have occurred since the asylum seeker fled.
 - See Appendix C (Client Interview Tips and Sample Questions).
 - ☐ Identify problems and errors during the CFI/RFI.
 - ☐ Explain inconsistencies between the narrative and the CFI/RFI transcript.
 - ☐ If it would be useful to obtain a supplemental declaration from another person, for example a family member who witnessed the events, ask the asylum seeker for permission to speak with that person and for that person’s contact information.
- ☐ **Prepare a declaration**
 - ☐ Write the declaration in the asylum seeker’s voice, based on your interview notes.
 - ☐ Remember that the declaration you file will be part of the asylum seeker’s immigration record—try to avoid using dates that are too specific, to prevent inconsistencies in the future.
 - ☐ Review the declaration line-by-line with the asylum seeker for accuracy.
 - ☐ The declaration should directly address any discrepancy between what the asylum seeker is now telling you and what was said at the interview (e.g., “At my credible fear interview, the officer asked me whether I knew anyone in the police or the government. I answered ‘no’ because I was focused on the fact that I had just been attacked six weeks before my interview, and I forgot that my husband had been a soldier before we got married.”).

- In some situations, it will be extremely helpful to develop a declaration from a child, especially when the child is a teenager and was not previously given the ability to comfortably share information with the AO.
- See Appendix D (Sample Declaration).

□ **Identify country conditions resources and gather evidence**

- Include a small number of targeted exhibits about country conditions, such as official reports, newspaper articles, or even general expert declarations. Advocates can apply for assistance from the Center for Gender and Refugee Studies (CGRS), which has great resources: <http://cgrs.uchastings.edu/assistance>.
- Seek out any new evidence that the asylum seeker was not able to present earlier, including testimony from family members or individuals who are aware of past harms, who can speak to the likelihood of future harm, or who can establish the elements of the particular social group and the nexus between the harm and membership in this group. Such new evidence helps explain why the circumstances merit a new interview. While there is no requirement to have evidence beyond the asylum seeker's own testimony, any other concrete evidence corroborating an asylum seeker's testimony is very helpful.
- If you suspect that the asylum seeker has mental health issues such as PTSD, or cognitive difficulties, consider consulting a mental health professional and obtaining an evaluation. Begin this process early; detention facilities may require advance clearance and notice before approving access to mental health professional for a telephonic or in-person evaluation.

□ **Draft the RFR**

- Make it compelling, and start with the strongest facts.
- Explain why the asylum seeker has a credible or reasonable fear, with a focus on new facts. Include alternative grounds for asylum, if applicable, and include a CAT claim.
- Explain errors in the interview process including:
 - Problems with translation.
 - Difficulty understanding the AO, for example because of education level or speaking an indigenous language.
 - Discomfort with the gender of the AO (stronger if the AO failed to ask if the asylum

seeker was comfortable or disregarded a comment indicating discomfort).

- Discomfort of child describing physical or sexual harm in front of siblings or with mother.
- Discomfort with discussing sexual/physical violence by intimate partner or spouse.
- Interview was too long and resulted in exhaustion to the asylum seeker, or too short and failed to cover all relevant areas of factual development.
 - A CFI or RFI usually lasts between 1-2 hours but is not limited in length by any statute or regulation. A busy interview schedule does not excuse an AO's failure to faithfully execute their duty to fully develop the record. Always note the duration of the interview and the approximate number of substantive questions asked to determine whether important testimony may have been omitted due to an inadequately brief interview.
- Misconduct by the AO in questioning.
 - AO did not ask asylum seeker if they wished to have a consultant present, disregarded a request to have a consultant present, or dissuaded an asylum seeker from seeking assistance from a consultant by emphasizing that it would delay their interview and prolong their detention.
 - AO interrupted or otherwise prevented the asylum seeker from telling their full story.
 - AO failed to ask important follow-up questions.
 - AO's comments or actions made the asylum seeker feel nervous, uncomfortable, and/or intimidated.
 - AO failed to follow the relevant AO training guidelines for particular kinds of claims.
 - Consult AO training materials to identify ways in which the AO failed to comply with the agency's own guidelines.¹⁰³ See *Guidelines for Children's Asylum Claims*;¹⁰⁴ *Guidelines for Gender-Related Claims*.¹⁰⁵
- Legal Errors by AO.

103 Select lesson plans from the Refugee, Asylum, and International Operations Directorate Trainings publicly available. For example, see <http://www.aila.org/File/DownloadEmbeddedFile/71705>.

104 Asylum Division, U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 86.

105 Refugee, Asylum, International Operations Directorate, U.S. CITIZENSHIP AND IMMIGRATION SERVS., RAIO Combined Training Course: Gender-Related Claims (Oct. 16, 2012), available at <http://www.ilw.com/immigrationdaily/news/20170714%20Training%20Course.pdf>

- If the AO determined the asylum seeker was not credible,¹⁰⁶ identify why this determination was erroneous.¹⁰⁷
- If the AO misunderstood the law (for example, if the officer did not identify a nexus that could be inferred from the answers),¹⁰⁸ explain why they should have found a credible/reasonable fear even based on the information provided in the interview.
- Failure to accommodate the asylum seeker's particular health needs.
 - Health problems interfered with ability to do the interview.
 - Asylum seeker was deprived of medication in a way that interfered with their ability to participate in the interview.
 - Asylum seeker was on medication that interfered with their ability to participate in the interview.
 - AO failed to question asylum seeker with trauma-related condition in a trauma-sensitive manner. See Chapter 7.
- In the family detention context, the child's presence during sensitive sections of testimony, problems with child care, problems with the child's health, or inability of child to articulate the nature or extent of harm or fear of harm.
- ☐ Resolve any inconsistencies between the CFI/RFI and the declaration. (Note: The materials submitted to the IJ for the IJ review and the transcript of that hearing will *not* be part of the record before the asylum office.)
- ☐ In providing legal support for your argument, you can use the most favorable case law from the BIA or any federal circuit court, not just the circuit where the asylum seeker is located.¹⁰⁹
- ☐ See Appendix F (Sample RFR).

¹⁰⁶ The AO indicates this credibility finding in the CFI/RFI decision.

¹⁰⁷ For a discussion of credibility determination standards, see U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 16, at 18-23.

¹⁰⁸ See *id.* at 24-25.

¹⁰⁹ See *id.* at 16.

☐ **Compile the RFR and supporting evidence**

- ☐ **G-28 Form, Notice of Entry of Appearance of Attorney¹¹⁰**
 - Signed by client.¹¹¹
 - Signed by attorney.
- ☐ **Index of Exhibits**
 - Include a short description of what each exhibit is and the page number.
- ☐ **RFR Letter**
 - Signed by attorney.
 - Double check accuracy of names, and A#s, including of children.
 - Resolve any inconsistencies between the asylum seeker's declaration and the CFI/RFI.
 - Include citations to the exhibits, as necessary.
 - The asylum office will already have the asylum seeker's file, so it is usually not necessary to include the credible fear transcript and decision or other government-issued documents.
- ☐ **Paginated Exhibits, including:**
 - Asylum seeker's declaration.
 - Signed by asylum seeker.
 - Translated into English.
 - With certificate of translation signed by translator (anyone willing to attest to their fluency in English and the asylum seeker's language).
 - Any supplemental declarations or other evidence, if applicable.
 - Psychological evaluation, if applicable.
 - Supporting country conditions information.

¹¹⁰ For a copy of the form, see <https://www.uscis.gov/sites/default/files/files/form/g-28.pdf>.

¹¹¹ In the past, advocates have been able to write "DETAINED" on the client signature line if unable to see a client to obtain a signature. This should not be assumed to be sufficient, but a suggestion for those who are not able to get to their client in time to get a signature to file a time-sensitive request for re-interview.

- It is not necessary to submit documents that the reviewing officer is already likely very familiar with, such as State Department Human Rights Reports or copies of USCIS training materials. Such materials can be cited without also including a copy as an exhibit.

☐ **Submit the RFR by email to the local asylum office as soon as possible¹¹²**

- ☐ Locate the correct asylum office.¹¹³
- ☐ Identify the correct email addresses—asylum offices have specific e-mail addresses they use for RFRs.
- ☐ Attach the RFR and supporting evidence to the email as a PDF.
- ☐ In the body of your email, ask for confirmation of receipt.

If you do not receive confirmation of receipt within several business hours, you may need to follow up depending on the imminence of removal. ICE has sometimes informally stayed removal while the asylum office considers a first RFR, but that is not a guarantee.

☐ **Possible outcomes and next steps**

- ☐ The asylum office could grant the RFR by scheduling a second interview for the asylum seeker—called a “follow-up information-gathering session,” which usually is shorter than the first CFI/RFI and focuses on specific areas of inquiry highlighted by the RFR but not fully explored during the initial interview. See Chapter 4.
- ☐ The asylum office could also grant the RFR by simply issuing a Notice to Appear (NTA) to the asylum seeker, meaning that the asylum seeker is now in Section 240 proceedings and may present their full case on its merits before an IJ. See Chapter 3.
- ☐ If the asylum office denies the RFR (they will not give reasons for the denial), the asylum seeker is at imminent risk of deportation. There is no right to appeal a denied RFR. See Chapter 7 for ideas about alternative strategies to prevent deportation after a first RFR is denied.
- ☐ In some cases, the timing of RFR denials (e.g., late on a Friday afternoon) makes it impossible to take any additional steps to fight a case prior to an asylum seekers removal.

¹¹² Ask the applicant whether they traveled with a passport. If so, ICE will already have the necessary travel documents to deport them as soon as the IJ affirms. If the applicant is from Mexico, you should submit the RFR on the same day as the affirmance. ICE deports Mexican nationals very quickly, especially if they are detained anywhere near the border.

¹¹³ For an asylum office locator, see https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=ZSY.

Advocates preparing RFRs should also review with asylum seekers their safety plan if they are removed, how they can stay in touch with their attorney, and, if necessary, advise them to reach out to the United Nations High Commissioner for Refugees (UNHCR) officials at the airport to which they are removed.

CHAPTER 7

Other Strategies to Prevent Deportation

If the immigration judge (IJ) affirms the negative credible/reasonable fear interview (CFI/RFI), and the asylum office denies the request for re-interview or reconsideration (RFR), the asylum seeker is at imminent risk of deportation. Possible further strategies are described briefly below. This is not meant to be a comprehensive list, and effective strategies change over time.

Second RFR

If a first RFR is denied, consider submitting a second RFR. The framework for a second RFR is the same as for a first RFR—United States Citizenship and Immigration Services (USCIS) has discretion to issue a Notice to Appear (NTA) or to extend an opportunity for a follow-up information gathering session, and may do so when presented with new evidence and a compelling reason why the asylum seeker was unable to provide this new evidence during the initial interview and/or in the initial RFR. Typically, asylum seekers who file an initial RFR *pro se* have been allowed to submit a subsequent RFR with the assistance of counsel. Below are other kinds of second RFRs that have been successful in the past.

RFR with Newly Discovered Information

One basis for a second RFR is the discovery of new information since the initial interview or first RFR. It can be helpful to, with permission, speak with family members or other contacts from the asylum seeker's home country who might have additional information for a supplemental declaration that could corroborate the claims or demonstrate the ongoing danger since the asylum seeker fled.

RFR Based on Diagnosis of Trauma-Related Conditions

New information can also come from a psychological evaluation from a mental health professional. Mental health professionals, such as social workers or psychologists, may be willing to provide this evaluation *pro bono* and may be able to do so via Skype. Possible places to find *pro bono* evaluators include university departments, community mental health programs, and organizations such as Physicians for Human Rights.¹¹⁴ A psychological

¹¹⁴ For more information, visit: www.physiciansforhumanrights.org and <http://cgrrs.uchastings.edu/assistance>.

evaluation, attached as an exhibit to the RFR, can add credibility to the asylum seeker's testimony about past threats and persecution, and explain why the asylum seeker was unable to fully communicate due to trauma-related conditions.

An advocate can also invoke the asylum seeker's right to reasonable accommodation under the Rehabilitation Act, which requires government agencies such as the Department of Homeland Security (DHS) to provide reasonable accommodations to people with disabilities, including trauma-related disabilities.¹¹⁵

RFR on Behalf of Accompanied Child

If the adult asylum seeker is accompanied by a minor child, and the child experienced threats or persecution themselves (for example, due to sexual assault or resisting gang recruitment), an advocate can submit an RFR for the child rather than the parent.

If the child was initially interviewed, look for failure to ask age-appropriate questions and failure to develop a rapport with the child, as well as whether the child was questioned with the parent present. Check for compliance with USCIS's own Guidelines for Children's Asylum Claims.¹¹⁶

A child accompanying a parent is eligible to receive a positive fear finding as a derivative of their parent, provided that the parent and child entered concurrently and are in expedited removal proceedings—but there is no statutory or regulatory right of parents to be eligible for derivative status based on their children.¹¹⁷ However, USCIS policy provides that when a parent is found not to have a credible fear, but the child is found to have credible fear, both receive NTAs—the parent's NTA is sometimes called a "family unity" or "courtesy" NTA.

Risk of Multiple RFRs

Be aware of the systemic risk that submitting multiple poorly-drafted and legally tenuous RFRs

115 29 U.S.C. § 794(a); 42 U.S.C. § 12102(1); 6 C.F.R. §§ 15.1-15.70; 28 C.F.R. § 35.130; see also *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (holding that the Rehabilitation Act applies to removal proceedings and requires reasonable modifications for disabled respondents); Oliver T. Wolf, *Stress and Memory in Humans: Twelve Years of Progress?*, 1293 BRAIN RES. 142, 142 (2009) (finding that stress "temporarily blocks memory retrieval," especially where emotionally arousing memories are present); Letter to Jeh Johnson, Sec'y, Dep't of Homeland Sec. and Loretta Lynch, Att'y Gen., U.S. Dep't of Justice (Jan. 4, 2016), https://www.law.yale.edu/system/files/area/clinic/document/letter_to_dhs_and_doj_-_2015_01_04.pdf;

116 For a link to the Guidelines, see Asylum Division, U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 86. USCIS removed this guidance from its website so keep an eye out for potential changes.

117 8 C.F.R. § 208.21(a); *Matter of A-K*, 24 I. & N. Dec. 275 (BIA 2007).

could discourage adjudicators from seriously considering RFRs in the future, and thereby dilute the impact of RFRs filed in cases where asylum seekers' lives are in serious and imminent danger.

Application for Administrative Stay of Removal

Another possible strategy to prevent deportation is to apply to Immigration and Customs Enforcement (ICE) for an administrative stay of deportation or removal. To do so, complete ICE form I-246, and submit it along with a cover letter, form G-28 (entry of attorney appearance), and, if applicable, form I-912 (noting financial hardship). Unfortunately, advocates have not often had success with this strategy for detained families, and the limited success reported has been in the context of breastfeeding mothers or asylum seekers experiencing serious medical issues.

Parole Request

Parole requests are requests to ICE to release a family from detention due to critical medical conditions or other reasons.¹¹⁸ Under newly issued guidance, parole can only be authorized sparingly by the Customs and Border Protection (CBP) or ICE deputy director except in the case of exigency such as a medical emergency.¹¹⁹ The parole request ideally should include documentation such as medical records, declarations, and information from a sponsor in the United States.

Petition for Review of a Negative Reasonable Fear Review

Asylum seekers may be able to file a petition for review of an affirmed negative RFI (not CFI) to the relevant federal court of appeals.¹²⁰

118 INA § 212(d)(5); 8 C.F.R. § 235.3(b)(ii)(2)(iii) (parole of individuals in expedited removal may be permitted in accordance with INA § 212(d)(5) when the Attorney General "determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.").

119 Kelly Border Security Memorandum, *supra* note 7.

120 See *Ayala v. Sessions*, 855 F. 3d 1012 (9th Cir. 2017).

APPENDICES

Appendix A: Common Acronyms

AO: Asylum Officer or Asylum Office

BIA: Board of Immigration Appeals

CAT: Convention Against Torture

CBP: Customs and Border Protection (within DHS)

CFI: Credible Fear Interview

DHS: Department of Homeland Security

DOJ: Department of Justice

EOIR: Executive Office for Immigration Review (within DOJ)

ERO: Enforcement and Removal Operations (within ICE)

ICE: Immigration and Customs Enforcement (within DHS)

IJ: Immigration Judge

NTA: Notice to Appear

NCFR: Negative Credible Fear Review (coded as “ICFR” on EOIR dockets)

NRFR: Negative Reasonable Fear Review (coded as “IRFR” on EOIR dockets)

OCRCL: Office of Civil Rights and Civil Liberties

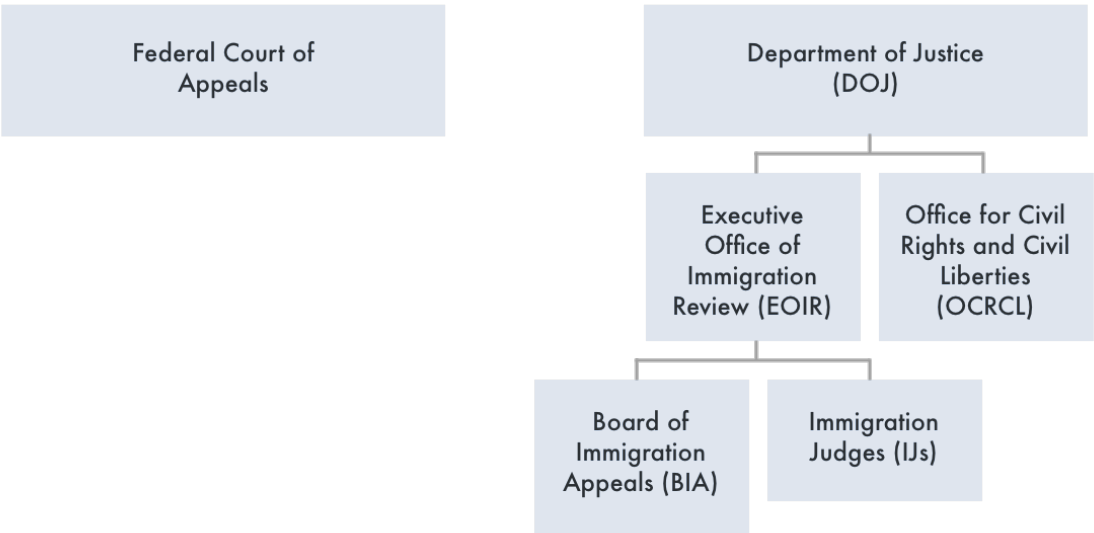
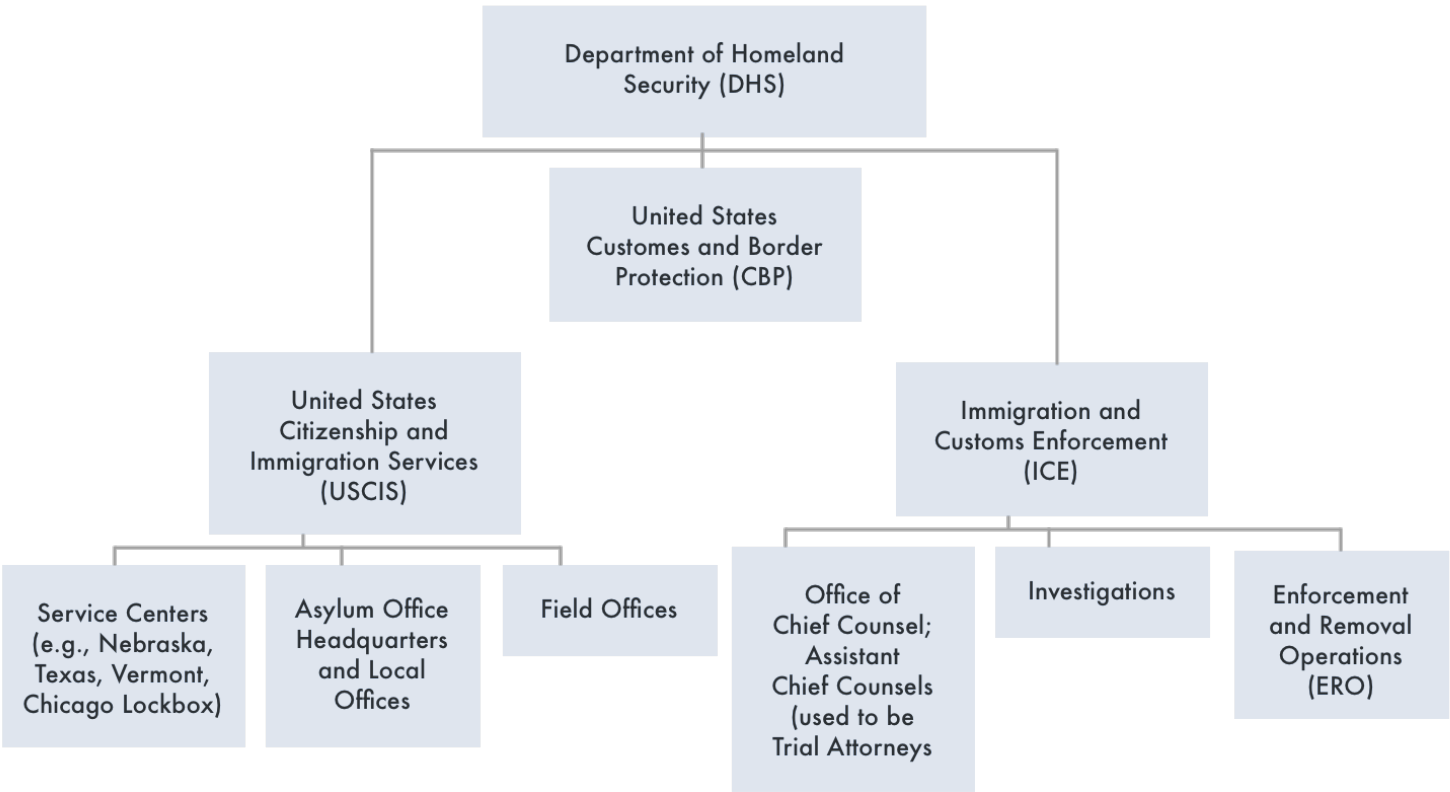
RFI: Reasonable Fear Interview

RFR: Request for Re-Interview or Reconsideration

USCIS: U.S. Citizenship and Immigration Services (within DHS)

Appendix B: Government Entities

The charts below show relevant executive branch agencies within both the Department of Homeland Security (DHS) and the Department of Justice (DOJ). Federal appeals courts also have the authority to review decisions of the Board of Immigration Appeals (BIA).



Appendix C: Client Interview Tips and Sample Questions

This appendix is meant to assist advocates in interviewing asylum seekers to prepare for an immigration judge (IJ) review or request for re-interview or reconsideration (RFR).

Interview Tips

Understanding Your Client

- Identify indigenous language speakers.
- Know historical and cultural context of violence in the region.
- Figure out the client's number one priority and most pressing needs.

Before the Interview

- Review the credible or reasonable fear interview (CFI/RFI) transcript and other documents if you have them, and make a skeleton draft of a declaration before interviewing the client.
- Look up locations where events took place to identify relevant cities, towns or cantons/villages and distances between them.

Strategies for Client Interview

- Begin by building rapport. Explain your role, the purpose of the interview, and the questions you will be asking. Assure the client that information will be confidential, and will not be shared without their consent. Some strategies to help make the client comfortable can include discussing a neutral topic before delving into your client's story and sharing a piece of your own private life or similarities from your own background. Make sure your client understands that they are in control of the meeting, and invite them to ask questions or to interrupt you whenever they would like.
- Contextualize your questions in wanting to help an American adjudicator understand their story.
- Explain the goals of each conversation to the client at the outset, including proving that they were targeted and would be in danger if returned.
- Ask direct questions: have a list of questions that correspond with identifying possible particular social groups or claims.

- Do not expect the client to always offer all of their reason(s) for leaving or forms of persecution they suffered.
- Remember what may seem “normal” to your client (e.g., domestic violence) may still be considered persecution under the law, so ask follow-up questions to find out what is important or relevant.
- Tell the client you need to discuss events in chronological order.
- Make sure you can situate events as they are being mentioned in order. If your client expresses anxiety when you ask for specific dates, try to situate events by:
 - (A) First, second, third time
 - (B) Time of year, especially child’s school year (January – October) or holidays
 - (C) Before or after important life events, like deaths or birth of children
- It’s okay to pause the asylum seeker’s story in order to clarify the sequence of events or something that doesn’t make sense.
- A common technique (and one sometimes used by Asylum Officers (AOs) themselves in actual interviews) to help clients organize the information is to encourage clients to think of their problems in terms of “first, worst, last.” For each issue (e.g. domestic abuse, gang violence, etc.) have the client tell you what the first time they experienced that type of problem was, what the worst example of it was, and what the most recent example was.

Flagging Other Issues

- Identify signs of trauma and consider seeking a psychological evaluation.
- Identify signs of trafficking, domestic abuse, and other vulnerabilities.
- Decide whether to ask to interview children. Generally, in the family detention context, children who are old enough to potentially have their own claim for relief should always be interviewed, and should be questioned at least once outside the presence of the parent. Prudent attorneys must be wary of potential conflicts of interest where a child has an independent claim for relief that they do not want their parent to know about.
- Decide with your client whether and how to reach out to family and friends in Central America or the United States who could write letters or declarations. If your client is reluctant to let you contact their family members, explore why.
- Conduct your own credibility assessment. If you don’t believe the new claims your client

is making since their original negative determination, the adjudicator won't either. Ask follow up questions, for example, "I can see how the Officer/Judge might have a hard time believing that. Can you help me understand (e.g. why this was never mentioned before) so we can make sure your full story is considered this time around?"

- Pay attention to indicia that the client is still not being forthcoming. It is very common for trauma victims not to disclose their past harm until they have met with someone many times or come to trust the person they are speaking with. Because time is a luxury usually not available during this process, it may be necessary to question the client about their reluctance to share. Consider a technique like "ma'am, I get the impression that there's something more that happened to you that you aren't telling me about. That's okay and I understand why you might not want to tell me everything you've been through. Would you prefer speaking to a female volunteer/could we return to this topic later/would you like to take a short break?"

Sample Questions

This is not meant to be an exhaustive list of questions, or a transcript. Rather, it is an outline of some of the relevant issues you will want to address in preparing the case.

Basic Information

- ☐ What is your full name?
- ☐ Where were you born?
- ☐ What is your birth date?
- ☐ What is your race or ethnic group? (e.g., Latina, Hispanic, indigenous, white, or black)
- ☐ What is your religion?
- ☐ What languages do you speak?
- ☐ When did you enter the United States?
- ☐ Was this your first entry?
- ☐ If not, when was your first entry?
- ☐ Do you have any medical conditions?
- ☐ Are you married, single, divorced, widowed, and/or living with someone?
- ☐ Do you have any children?

- ☐ Are they with you?
- ☐ What are their names?
- ☐ How old are they?
- ☐ Where were they born?

Asylum Claim

- ☐ Begin by asking the more open-ended and general questions about why they left their home country, and why they are afraid to return.
- ☐ Follow up on anything the asylum seeker has told you so far, or anything you read in their documents, including the CFI/RFI transcript.
- ☐ What was the last event that led you to leave the country?
 - When did it occur and what led you to leave then?
- ☐ Ask about any harms, threats, extortions, or harassment that the asylum seeker, their family, friends, or neighbors experienced. It is often important to know the specific language of any threats made, even (or especially) when they are graphic and include offensive language.
- ☐ Try to identify why the asylum seeker was harmed and/or fears harm.
 - Who was it that threatened/harmed you and how do you know who it was?
 - Did the person(s) who harmed you/others say anything about why they were targeting you/others?
 - Did that person imply anything?
 - Can you guess what the reason/motive was?
 - Why did the person(s) think it was okay to treat you in this way?
 - Did they do the same thing to anyone else?
 - Have you heard of anybody in a similar position (e.g. single mother, small business owner, woman with a husband in US, woman in a relationship with an abuser) who was harmed, harassed, extorted, or threatened?

- Ask if any family members or romantic partners ever abused the asylum seeker.
 - › Did they ever hit, push, or threaten you?
 - › Did any romantic partner ever force you to have sex when you did not want to or said ?
 - › Did you feel like you could refuse to have sex with your partner? (Some people might not identify daily physical and psychological harms as abuse, so try to ask follow up questions that rule these out. This might be a time to remind again that anything they tell you is confidential and that you are here to help tell their story for their case but that you recognize you are asking very sensitive questions.)
- Did you ever report the threats or harm to the police?
 - › If yes, what was the police's response?
 - › If no, why not? Would the police have helped you if you had reported it? How do you know?
- Did you ever witness a crime?
 - › If so, did you report it to the police?
 - › Why or why not?
 - › What happened?
- Ask questions about why the asylum seeker could not relocate internally. (Explain that you need information to show the IJ or AO why they could not have moved within the country to escape harm.)
 - › Did you try to move to another part of the country?
 - If yes, what happened when you moved?
 - If no, why not? Is it dangerous to do so?
 - › Would it be possible for a person like you to simply pick up and move to another part of the country?
 - If not, why not?
 - › Do you have family anywhere else in the country?
 - If yes, why did you not go to live with family?
 - › Do you believe you could be found and harmed even if you moved?

- Have you heard of anybody who was harmed after moving?
- Have you heard anything from anyone who still lives in your country of origin since you left? (Note: Explain that this information could be helpful in demonstrating that the individual or group the client fled wants to harm them for leaving, or to show that the conditions for those in a similar situation continue to be dangerous.)
- What do you believe will happen to you if you are forced to return to your country?

If this interview is after a negative credible fear determination and you have the CFI/RFI transcript, note any inconsistencies between the CFI/RFI transcript and what the client is telling you. **Resolve these inconsistencies.** Pay attention to facts such as dates, place names, and the relationships of people. Reassure the client that you believe their story, but that you need to help explain any conflicting information.

Problems in CFI/RFI

Note: If you are taking a declaration for an RFR, be aware that asylum seekers understandably confuse the CFI/RFI and the IJ review, so it's important to clarify.

- How were you feeling on the day of the interview?
 - Were you or your children sick?
 - Were you or any of your children experiencing health problems in the detention center prior to the interview?
- Who exactly was in the room during the interview?
 - If a child or children were present, did you have to take care of the children?
 - If the child was not present, were you thinking about your child at all during the interview?
 - If a child or children were present, did the AO ask you questions that you were not comfortable answering with your child in the room? Did the AO make it clear that you could be interviewed without your child in the room?
- Were you confused during the interview? Nervous? Intimidated?
 - If you have the transcript, ask about specific places where it seemed from the transcript they might have been confused.
- Did you understand the AO and the interpreter during the interview?
 - Do you speak any languages besides Spanish (like indigenous languages or dialects that would have made it difficult to understand)?

- › Were you able to hear the interpreter clearly?
- › Did the interpreter change at all during the interview?
- › Did you understand why the AO was asking you questions about your fears?
- › Did you feel comfortable asking the AO to explain their questions?
- › What is your education level?
- How did the AO and interpreter respond to you?
 - › Were you interrupted by the AO or the interpreter during the interview?
 - › Did either of them cut you off? If so, how?
 - › Did they allow you to ask questions?
 - › Ask about non-verbal responses that would not be in the transcript.
- Did you feel comfortable telling your story during the interview?
 - › Did you feel like you could trust the AO? If not, why not?
 - › Was the AO a man or a woman? If a man, did you feel comfortable telling him your story? If not, why not?
 - › Was this the first time you had spoken with a government official?
- How long was the interview? Did you feel any differently at the end than at the beginning?
- Were you able to tell your whole story to the AO?
 - › If not, why not?
 - › Was there anything you felt like you couldn't share that you would like to share now?
- If you learned something about the client's story that they did not share in the asylum interview, explore that.
 - › Why didn't you tell the AO about X?
 - › Have you ever talked to anyone about X before?
 - › Do people in your home country talk about X?
 - › Is talking about X painful?
 - › How do you feel when you talk about X (e.g. would you start crying)?
- Have you had any off-the-record or informal follow-up interviews? With whom?

Appendix D: Sample Declaration

To view and download an example declaration, visit ASAP's website at asylumadvocacy.org/resource/expedited-removal.

Appendix E: Sample IJ Review Brief (Annotated)

To view and download an example annotated brief for an Immigration Judge (IJ) review, visit ASAP's website at asylumadvocacy.org/resource/expedited-removal.

Appendix F: Sample RFR (Annotated)

To view and download an example annotated request for re-interview or reconsideration (RFR), visit ASAP's website at asylumadvocacy.org/resource/expedited-removal.

