

PROTECTION- BASED RELIEF

**Justice Americorps Training
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Karla is a woman from Guatemala and Fernando is her teenage son. Karla's husband abused her for much of their relationship until she fled to the United States in 2012. Her son Fernando came to the United States on his own in 2014 to escape persecution from gangs and to reunite with his mother. Both Karla and Fernando entered the United States without inspection and both were apprehended at the border and placed into removal proceedings.

United States of America

Mexico

Guatemala

Honduras

Nicaragua

Costa Rica

Panama

Colombia

Ecuador

Ven.

Guyana

French Guiana

Suriname

Weste

Guine

CEAN

ASYLUM: DEFINITION

- An individual is eligible for asylum if she meets the definition of a refugee. Immigration & Nationality Act (INA) § 208(b)(1)(A).
- A refugee is “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A)
 - Definition based on international law: UN Protocol Relating to the Status of Refugees, Art I(2)
- Statutory and regulatory standards: INA § 208; 8 CFR § 208

ASYLUM: ELEMENTS

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
5. a protected ground:
 - Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group

These elements are SEPARATE!

WELL-FOUNDED FEAR

- **Burden of Proof: reasonable possibility**
“one in ten” chance of persecution (*INS v. Cardoza-Fonseca*, 480 U.S. 421 at 431)

Established two ways:

1. Past persecution = legal presumption of future persecution. 8 CFR § 208.13.
 - DHS can only rebut with proof of changed circumstances or reasonableness of safe internal relocation.
2. Fear of future persecution

Argue both whenever possible!

FUTURE FEAR CLAIMS

- **Objective and subjective components**
 - Subjective: genuine fear of all asylum elements
 - Objective: fear (of all elements) must be reasonable, i.e., “well-founded”
- **Must show applicant will be individually targeted,**
 - Exception: “pattern or practice” claim. 8 CFR § 208.13.
 - Extremely difficult
 - Don’t assert as primary claim

PERSECUTION

- Three types *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011)
 1. **Significant** physical force against a person's body,
 2. the infliction of comparable physical harm without direct application of force . . . , or
 3. nonphysical harm of equal gravity.
- Poverty, discrimination, harassment generally not sufficient
- Harm constituting persecution can be less for a child than an adult. See USCIS Guidelines.
- Must be considered cumulatively. *Nzeve v. Holder*, 582 F.3d 678 (7th Cir. 2009).

PERSECUTION

- Veronica is a woman from Mexico. She began living with her husband when she was 15 years old and after they moved in together, he became verbally, physically and sexually abusive. He regularly kicked and hit her and would rape her when she refused to have sex with him.
- Fatima is lesbian from Senegal. After her family learned of her sexual orientation, they regularly beat her, discussed her sexual orientation at family gatherings, and pressured her to marry.

GOVERNMENT ACTOR

- **The persecution suffered or feared must be inflicted by the government**
 - **police, soldiers (interpret broadly)**

OR

- **Entity the government can't/won't control**
 - **Gangs**
 - **Abusive spouses**
 - **Guerilla/rebel/paramilitary groups**

GOVERNMENT ACTOR

Lorena and Edwin are young siblings from El Salvador. In early 2014, a member of the Mara Salvatrucha gang approached Lorena and demanded she be his girlfriend. He threatened to harm Edwin if she refused. Lorena ignored him, but the gang member grew more persistent and Lorena often had to hide in her home to avoid him. At one point, he confronted Lorena and Edwin outside a shopping center and threatened to make Edwin disappear if Lorena refused him again. Lorena and Edwin never reported the gang member to the police because they believed the police could not protect them and that the gang member would harm them if he learned they had gone to the police. Soon after, they fled to the United States.

ON ACCOUNT OF

- **Must establish nexus between the persecution suffered/feared and ...**
- **...at least one of the five protected grounds**
 - **Race**
 - **Religion**
 - **Nationality**
 - **Political Opinion**
 - **Membership in a Particular Social Group**
- **These are two DISTINCT elements that require SEPARATE analyses.**

PROTECTED GROUNDS

1. **Race: Broad meaning (Congolese Tutsis)**
2. **Religion (Christian, Atheist)**
3. **Nationality: Not just citizenship; can include ethnic or linguistic group. May overlap with race.**
4. **Political Opinion: Actual or Imputed (e.g. child of political activist, man who criticizes government's military policy)**
5. **Membership in a Particular Social Group: one of the most common and most complex bases for asylum.**

PSG

- Based on a “common, immutable characteristic” that “members of the group either cannot change, or should not be required to change.” *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)
- **Examples:**
 - Gay Honduran men;
 - Unmarried Malian women;
 - Former government employees,
 - Honduran males who have opposed gang recruitment,
 - Immediate members of the X family

PSG

COMPLICATED CIRCUIT/BIA SPLIT

BIA	Seventh Circuit
<ul style="list-style-type: none">• Can't be overly broad	<ul style="list-style-type: none">• Breadth is irrelevant
<ul style="list-style-type: none">• Must be considered a group by society	<ul style="list-style-type: none">• No social distinction test
<ul style="list-style-type: none">• "Former" status/past experience is not enough	<ul style="list-style-type: none">• "Former" status/past experience can form the basis of a social group, without more
<ul style="list-style-type: none">• Groups can't be overly diverse	<ul style="list-style-type: none">• Diversity not an issue

BURDEN OF PROOF FOR NEXUS

- Protected ground must be “at least one central reason” for the persecution. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007)
- Persecutor can still have mixed motives. *J-B-N- & S-M-*, 24 I&N Dec. at 211.
- Circumstantial evidence can be sufficient to establish the persecutor’s motives. *Martinez-Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010)
- Be sure to separate nexus element from protected ground

PRESUMPTION OF FUTURE FEAR

- **Rebuttable presumption of future persecution if all asylum elements established for past persecution**

- **Govt can only rebut by showing**
 - 1. Internal relocation would make applicant safe AND is reasonable.**
 - **Relocation presumed unreasonable if the govt is the persecutor. 8 C.F.R. § 208.13(b)(3)(i)-(ii).**
 - 2. Changed circumstances so fear no longer exists**

FUTURE FEAR & RELOCATION

- Applicant's burden to establish relocation would not make her safe and is not reasonable
- Unless the government is the persecutor = relocation presumed unreasonable. 8 C.F.R. § 208.13(b)(3)(i)-(ii).

“HUMANITARIAN ASYLUM”

- CANNOT be granted just because case is compelling
- Only available when all past persecution elements are met, but future fear has been rebutted
- **Must demonstrate:**
 - “Compelling reasons” for being unwilling/able to return due to the severity of the past persecution; OR
 - “A reasonable possibility of other serious harm”
 - No nexus required
 - “Other serious harm” = persecution

8 C.F.R. § 208.13(b)(1)(B)(iii); *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012)

WHAT BARS RELIEF?

	Bars Asylum?	Bars Withholding/Withholding under CAT?	Bars Deferral under CAT?
One-Year Filing Deadline - INA § 208(a)(2)(B)	Yes	No	No
Firm Resettlement - INA §208(b)(2)(A)(vi)	Yes	No	No
Persecutor - INA § 208(b)(2)(A)(i)	Yes	Yes	No
Terrorism - INA § 208(b)(2)(A)(v)	Yes	Yes	No
Particularly Serious Crime - INA § 208(b)(2)(A)(ii)	Yes	Yes, but PSC definition for withholding differs from definition for asylum	No
Conviction of an Aggravated Felony as Defined in INA § 101(a)(43)	Yes – is a PSC	Yes, if the aggregate term of imprisonment sentenced was at least five years it is a PSC. <i>But other crimes may also be found to constitute a PSC, notwithstanding the prison sentence.</i>	No
Serious Non-Political Crime Outside the U.S. - INA § 208(b)(2)(A)(iii)	Yes	Yes	No
Danger to the Security of the U.S. - INA § 208(b)(2)(A)(iv)	Yes	Yes	No

ONE-YEAR FILING DEADLINE

- **Govt must RECEIVE application within one year of most recent arrival to be eligible for asylum**
 - **Entry October 5 → Application by October 4**
INA § 208(a)(2)(B); 8 C.F.R. § 208.4 (a)
- **Does not apply to unaccompanied children (but may apply once reunified/turn 18)**
- **Limited Exceptions for everyone else**
 - **Changed circumstances**
 - **Extraordinary circumstances (e.g. mental or physical illness, incapacity, lawful status)**
INA § 208(a)(2)(D); 8 C.F.R. §208.4(a).

PERSECUTOR BAR & TERRORISM BARS

- **Persecutor Bar:** bars someone who has “ordered, incited, assisted, or otherwise participated” in the persecution of someone else on account of a protected ground. INA § 208(b)(2)(A)
 - Duress, intent, and knowledge may be relevant.
Negusie v. Mukasey, 129 S. Ct. 1159 (2009).
- **Terrorism Bar:** bars someone who has in any way supported or been involved in (even under duress) a group that has or has a subgroup which has participated in violent activity against the laws of that country or the United States. INA § 212(a)(3)(B)

CRIMES

- **Convictions AND unconvicted criminal activity (here and abroad) may bar relief**
- **Asylum is discretionary**
- **If your client is arrested, let NIJC know immediately so we can make sure the client's criminal attorney is aware of the immigration consequences of any conviction or plea.**

WITHHOLDING OF REMOVAL

- Automatically apply for withholding when file asylum application
- Alternative remedy; INA § 241(b)(3)(A)
- Same basic, statutory definition as asylum except no subjective prong and no “humanitarian” option
- Heightened burden of proof: “more likely than not” (50%)
- Available if applicant faces certain asylum bars (including 1-year filing deadline bar)
- Non-discretionary, but no pathway to residency and no derivative benefits for spouse, children

CONVENTION AGAINST TORTURE (CAT)

- **8 C.F.R. § 1208.16** - Apply by checking box on asylum application.
- **Two forms of CAT relief (withholding under CAT and deferral under CAT) – BE SURE TO REQUEST BOTH**
- **Different definition**
 - **torture v. persecution; no nexus requirement, govt/govt acquiescence**
- **Burden of proof: More likely than not” (>50%)**
- **Non-discretionary, but no pathway to residency and no derivative benefits**

OTHER ISSUES TO WATCH

- **Certain events in the client's life may make her eligible for other relief**
 - **Marriage**
 - **Victim of a crime**
 - **Your client should not file applications for any other immigration benefits without consulting you first.**
- **Other life changes may compromise eligibility for relief**
 - **Travel**
 - **Marriage (in some cases)**

PARTICULAR SOCIAL GROUP, FORMULATING THE GROUP

- Unlike claims based on the other grounds e.g. race, nationality you have to *craft* the ground in PSG claims
- What characteristics is the persecutor targeting? Why was the applicant targeted or why would the applicant be targeted?
- Craft a PSG that will fulfill each of the tests
(**social distinction and particularity are not required in all circuits*)
- Are the characteristics immutable or fundamental?

Immutable examples:

- childhood
- disability
- HIV+/AIDS
- family ties
- orphan
- past experiences
- gender

Fundamental characteristics:

- sexual orientation or gender identity
- religious belief, deeply held conviction

FORMULATING THE GROUP

- Avoid groups defined *entirely* by the harm, they are circular “battered women” vs. “women in a domestic relationship who are unable to leave”
- There is no size requirement – i.e. no requirement that the number of people in a group is small or low, but the BIA has held that the group cannot be overly broad or diffuse.
- Some circuits reject this approach, e.g. 7th Circuit (*Cece v. Holder*, 733 F.3d 662), 9th Circuit (*Perdomo v. Holder*, 611 F.3d 662)
- Overly broad groups may run into nexus problems – if not targeted for the characteristics that define the group
- A very broadly defined group may confront particularity problems if the *boundaries* are unclear, e.g. democrats

FORMULATING THE GROUP

➤ Social distinction can be shown by:

- Laws directed at group members
- Application of laws, including impunity for violation of laws
- Broad societal attitudes
- Widespread violence against group members
- Persecutor's perspective is relevant, but not enough (*M-E-V-G-*)
- Importance of country conditions experts
- Importance of country conditions documentation – including statistics regarding group members, scholarly literature, popular literature, to show societal attitudes

EXAMPLE: Guatemalan orphan children

FORMULATING THE GROUP

- **Particularity: Does the group have clear boundaries? Is it discrete in the *society in question*? Do the terms defining the group have *clear meaning in the society*?**
 - Be sure the PSG is clearly defined, avoid amorphous groups, e.g. “sports fans”
 - Look to objective measures defining terms - e.g. laws or policies
 - Use expert testimony to show that in the context of the society in question, the group is discrete and who is a member is readily ascertainable
 - Distinguish from cases where PSG was found to be overbroad by focusing on the unifying characteristic(s) of the PSG
 - Remind adjudicator that the size of the group is not determinative (other grounds are large; cite cases recognizing large groups, e.g. *Toboso-Alfonso*, *Matter of H-*)

FORMULATING THE GROUP

- **Children and subgroups of children should be able to meet the tests**
- **Consider age/childhood/youth + other immutable/fundamental such as:**
 - Nationality
 - Race/ethnicity
 - Family
 - Sexual orientation, gender identity
 - Lack of adult supervision or protection
 - Disability or mental illness
 - Witness to organized crime
 - Former gang member
 - Past recruitment by gang and active resistance to gang
 - Street children

HYP0

Antonio is a studious 15 year old who lives in Sonsonate, El Salvador. He has an uncle living in the United States, who visits frequently, and brings him and his brothers presents. On a visit two years ago, his uncle brought him an iPhone, which no one else in his neighborhood owned. Several weeks after he received the iPhone, he began to receive calls from anonymous individuals who identified themselves as being in a gang, and who told him they wanted his phone. They told him to go to the town plaza with the phone and to give it to someone who would meet him there. Antonio was very frightened and told his mother. His mother insisted that they call the police, which they did. The police told Antonio go to the plaza, and that they would be nearby and would arrest the gang members. Antonio did as he was told, and as a result, several gang members were arrested, while others got away. After the arrests, the police suggested to Antonio that he and his family move because they (the police) could not protect them. Shortly after, Antonio received a summons to come to the court as a witness against the gang members; he also began receiving threats that he would pay the consequences for what he had done. He knew of others who had appeared as witnesses against the gangs and were later killed. He stopped going to school, stayed inside the house night and day, and finally his uncle helped him make his way to the United States.

HYP0

Ana Maria is an indigenous Guatemalan who lived in a very remote village in the highlands of Guatemala. She is one of six siblings in the family. From the earliest times she can remember, her father insulted and beat her mother, pulling her by the hair, pushing her against walls, and kicking and punching her when she was pregnant. When Ana Maria reached the age of eight, she began trying to defend her mother, putting herself between her mother and father. This enraged her father, who began to beat her also. On one occasion he punched her in the face, and broke her nose. There were no police stations nearby, and in any case, Ana Maria and her mother knew that it was pointless to go to the police, because they would laugh at the women and tell them that they didn't get involved in "family matters." The abuse continued, and when Ana Maria reached the age of fifteen, her father began pressuring her into a relationship with Osorio, a 25 year-old man he had picked out for her. He said that she was old enough to marry and that he would not feed her forever. Osorio also pressured Ana Maria into the relationship. Osorio was her father's drinking partner.

HYPO CONT'D

Desperate, and feeling that she had no other choices, she went with Osorio, hoping that she would come to feel comfortable with him. Early on in the relationship, Osorio began beating and raping Ana Maria, something which he did regularly. He was also as abusive as her father, forbidding her from leaving the house without his permission – even to see her mother, and beating her whenever he was displeased with anything she did. He used food to control her, sometimes withholding food from her for days. Ana Maria had always believed in speaking up – she had done so in defending her mother – so after several months of this treatment, she told Osorio she would leave if he did not stop. He became so enraged that he pulled out a knife and began chasing her. She ran outside the house to escape him, and just kept running. Ana Maria went to a nearby city and was able to work enough to pay a smuggler to help her arrive in the United States. She knows she has an aunt living in Los Angeles, and will try to contact her.

HYP0

Edgar's parents left him and his siblings in their care of their grandparents and migrated to the United States from Honduras when Edgar was fairly young. Edgar's parents have had TPS for years, but have no way to bring Edgar and his siblings to the U.S. based on their TPS. Edgar's uncle also lives in the home with the grandparents and children. Edgar's grandfather strongly believes he is the master of the house and that children are to obey. He beat Edgar's mother and brother (the uncle) when they were children and he beats Edgar and his siblings whenever he thinks they are behaving badly, and sometimes when he drinks. He slaps and pushes them and tells them they are bad children. One time he beat Edgar's brother with an electrical chord; another time he burned Edgar's sister with a cigarette. Edgar's uncle has always been friendly to Edgar and very affectionate, sometimes hugging Edgar more often than Edgar is comfortable with, or for longer than Edgar wants. When Edgar turns 12 his uncle starts coming into his bed at night and fondling him and eventually rapes Edgar.

HYPO CONT'D

Edgar's uncle frequently has parties at the home with lots of men in attendance. Soon after Edgar's rape, the uncle's friends begin raping Edgar too. Sometimes after raping him they thank Edgar and leave money next to the bed. His sister's boyfriend starts calling Edgar a girl and some kids at school call him a "maricon," a derogatory term for gay. Edgar strongly identifies as a boy, and does not identify and has not expressed any sexual orientation. Edgar becomes suicidal and tries to kill himself. Eventually he flees to the United States.

HYP0

Isai is a 17 year old Salvadoran teenager. He first came to the U.S. when he was 16. At that time he was held in ORR custody and had no family to be released to. He had never been harmed in El Salvador but was generally afraid of the gang violence happening in the country and wanted to work in the U.S. and help his family. After 3 months in custody and being advised by an attorney that his case for relief was pretty weak, Isai decided to take voluntary departure and return to El Salvador. Shortly after his arrival MS-13 gang members approached him and invited him to join the gang. Isai resisted and gang members began to threaten that they would kill him if he did not join. During one encounter gang members punched and kicked him all over his body and held a knife to his throat. Soon after that incident Isai's older cousin Jesus was deported from the U.S.

HYPO CONT'D

Jesus had been a member of Mara 18 before he fled El Salvador. He left the country because he wanted to get out of the gang and knew of no other safe way out, but lost his asylum case because of his former gang membership and was deported back to El Salvador. Isai and Jesus were talking in town one day when MS 13 members drove by in a car shooting at them, naming them both by name, and yelling that they were both “dead men.” Soon thereafter MS 13 members showed up at Isai’s home, but no one opened the door. They stood outside the house yelling that they knew who his cousin was and that first they would kill his cousin and that Isai would be next. At that point Isai decided he had better leave El Salvador.

HYP0

Laura is a 12 year old Honduran girl from San Pedro Sula. She came to the United States when she was 10 to reunify with her parents who had been living and working in Los Angeles since she was three. Laura lived with her paternal grandmother in Honduras. She has a close relationship with her grandmother and never suffered any harm while she was in Honduras, but she knows about other girls who have. Laura has heard gunshots in her town and has seen gang members. She once even saw a dead body in the street, a few blocks from her home. Now that she has reunified with her parents she does not want to leave them again. She is scared to go back to Honduras because “it is dangerous; bad things happen to girls there.”

GANG CLAIMS

➤ Witness defined PSGs

- recognition in 3d and 9th Circuits

➤ Former gang members

- recognition in 7th, 6th, 8th, 4th circuits
- pending before 2d and 9th circuits

➤ Family defined PSGs

- family of prosecution witness against gang, *Crespin-Valladares*, 632 F.3d 117 (4th Cir. 2011)
- family of former gang member, *Aquino v. Holder*, 759 F.3d 332 (4th Cir. 2014)
- family of gang resisters or opponents, former gang members, rival gang member, law enforcement against gang, witness

GANG CLAIMS

- **Gender defined PSGs**
 - no published decisions recognizing in the gang context
 - lots of positive caselaw on gender-defined PSGs
 - girls being forced into relationships or to be sex slaves
 - consider: girls viewed as property of the gang, nationality + girl children, girls without effective parental protection
- **Consider WHICH children gang targets**
 - Neighborhood? Students?
- **Resistance-defined PSGs**
 - past recruitment + refusal
- **Children without effective parental protection**
 - First Circuit has rejected this type of group

CHILD ABUSE

- Status and vulnerability as a child clearly is a reason children are targeted for abuse
- Certain subgroups of children may be especially vulnerable, such as: children with disabilities, orphans, girl children, stepchildren, LGBT children and gender non-conforming children, others
- Consider family as a PSG, family members of x, children of xx, female children of xx
- Children in families, stepchildren
- *Matter of A-R-C-G-*, 26 I.&N. Dec. 388 (BIA 2014) consider children unable to leave the familial relationship

*children of women in domestic relationships they are unable to leave

GENDER

- Intimate partner violence: *Matter of A-R-C-G-*, 26 I.&N. Dec. 388 (BIA 2014), married Guatemalan women unable to leave the relationship is a PSG
- Forced marriage, trafficking, female genital cutting, rape
- Consider the following characteristics
 - nationality
 - Childhood
 - gender (girls)
 - tribe/ethnicity (e.g. Malian girls from the Bambara tribe)
 - indigenous status (e.g. Guatemalan Mayan girls)
 - lacking parental protection
 - living alone
 - martial status (i.e. single, unmarried)

PROVING NEXUS

➤ Direct evidence:

- What was said? What words surrounded the acts of persecution? Look for words indicating the persecutor's belief about the victim's status, characteristics, beliefs.
- Actions that indicate persecutor's belief, examples:
 1. shaving hair of a member of an Indigenous group for whom long hair is cherished and has cultural value,
 2. destroying religious or political materials that belong to the victim,
 3. raping a religious woman at her church,
 4. Rwanda: threatening to throw someone in the river where dead bodies were placed during the genocide of Tutsis

PROVING NEXUS

➤ **Circumstantial evidence:**

- **Show legal and social/cultural/religious norms tolerating violence against similarly situated people, e.g., status of children in society, levels of violence against children or subgroups of children. Status of women in society.**
 - 1. country conditions evidence**
 - 2. expert testimony**
 - 3. evidence of targeting of similarly situated (i.e. other family members)**

PROVING NEXUS, GANG CLAIMS

- The challenge is to show that gangs are motivated by the protected ground (political opinion/social group) rather than just the desire to grow or as retribution.
- Don't overlook recruitment itself – WHO do gangs target and why?
- Direct evidence: Did gangs say anything about being an enemy? Snitch? Government supporter? About family? About religion?
- Circumstantial evidence: A country conditions expert can be especially useful to establish how gangs understand resistance and view resisters, and why they are motivated to suppress resistance, and who they target for recruitment and why.

PROVING NEXUS, GENDER CLAIMS

- Direct evidence of gender as a central motivating factor: a persecutor's words calling a woman a "bitch," "whore," saying she's "just a woman," he is "the man" and he decides
- Circumstantial evidence showing that the state and society accept violence against women. E.g., country conditions showing the prevalence of VAW, failure of state to respond to VAW.
 - *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011): recognizing relevance of societal attitudes and gender norms to establishing nexus.
 - Discriminatory laws, e.g., no recognition of marital rape, allowing for marriage of girls under the age of 18?

HYP0

Viviana is a 14 year old Guatemalan Quiche girl who lives in a small town on the outskirts of Guatemala City. While walking home from school one day two young men, strangers to Viviana grab her, pull her to a back alley and take turns raping her. The men don't say much to her, but warn her not to tell the police and say that police "don't believe 'Indios' anyhow." Viviana is terrified and in a lot of pain. She returns home and reluctantly tells her mother what happened. Her mother decides that she must go live with her adult brother in the United States to be safe. Viviana gets to the U.S. with the help of a coyote. Once in the U.S. she learns she is pregnant. Her mother tells her that it is a good thing she is not in Guatemala because it would be a real embarrassment to the family to have a pregnant, unmarried daughter.

JURISDICTION OF UAC ASYLUM APPLICATIONS - TVPRA

- For the first time, Congress attached significant protections and benefits to “unaccompanied alien children” (UAC)
- Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”) the Asylum Office has initial jurisdiction over an asylum application filed by a UAC who is in Removal Proceedings. *Section 208(b)(3)(C)*
- **Benefits of the Asylum Office**
 - Non-adversarial setting (no cross examination by a DHS attorney)
 - Child-friendly asylum interviews by trained officers
 - If referred to court, case is reviewed de novo

PROCEDURAL ISSUES IN UAC CASES

➤ **UAC defined as child who**

- (1) has no lawful immigration status
- (2) is under 18, and
- (3) has no parent/legal guardian in the U.S. or for whom no parent/guardian in the U.S. is available to provide care and physical custody

➤ **Jurisdiction over asylum claims**

- Asylum Office has **initial jurisdiction** over asylum applications by UACs (AO position is that must be UAC at the time of filing)
- **If child deemed UAC is in removal proceedings (even if child now over 18), file I-589 with Asylum Office and seek admin closure and/or termination from Immigration Judge
- **If child reunifies with at least one parent, the child is still a UAC, as long as the status has not be revoked
- Refer to USCIS Memos dated May 2013 and June 2013 for additional guidance

PROCEDURAL ISSUES IN UAC CASES

Practice Tip

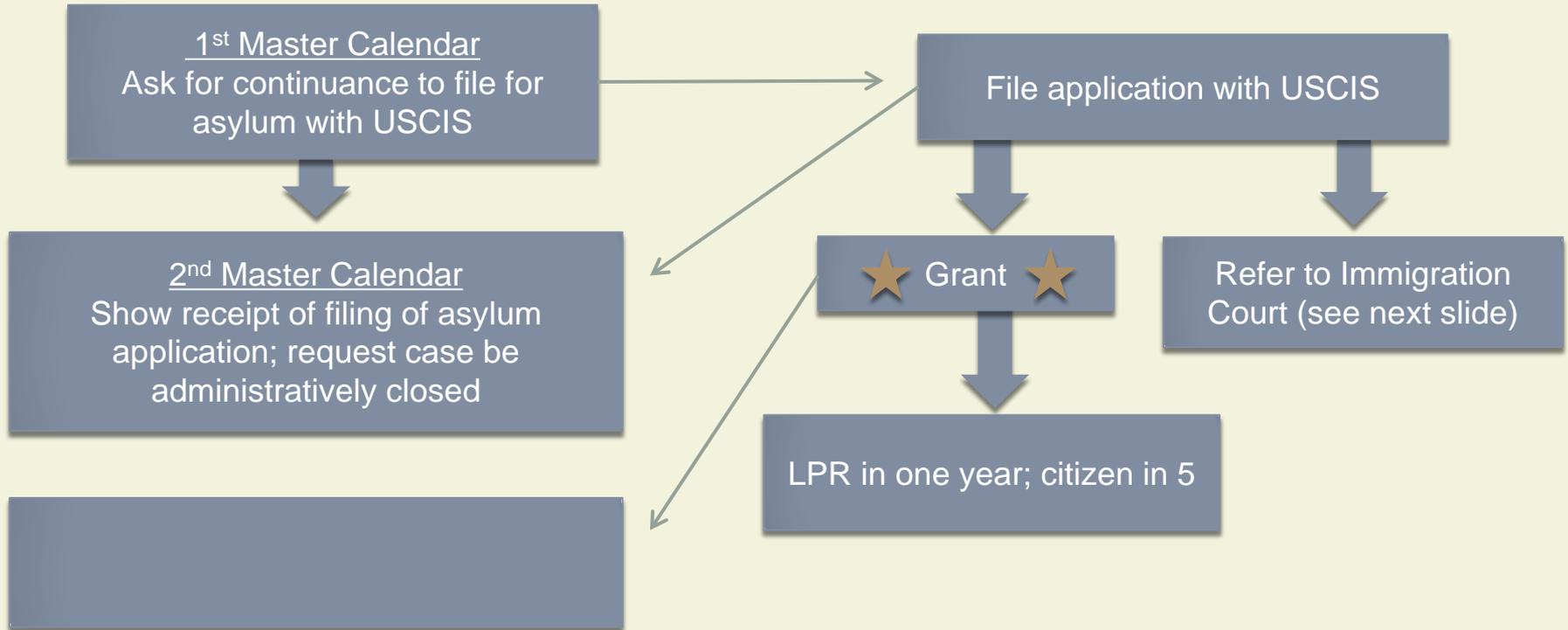
Attach proof of UAC status to the initial filing of I-589 to avoid USCIS rejecting your application

- **Examples of proof of UAC status include:**
 - **Birth Certificate with Translation**
 - **Notice to Appear showing entry date and DOB**
 - **ORR Release Sheet**
 - **Signed UAC instruction sheet**
 - **ORR census showing that child was in an ORR facility**

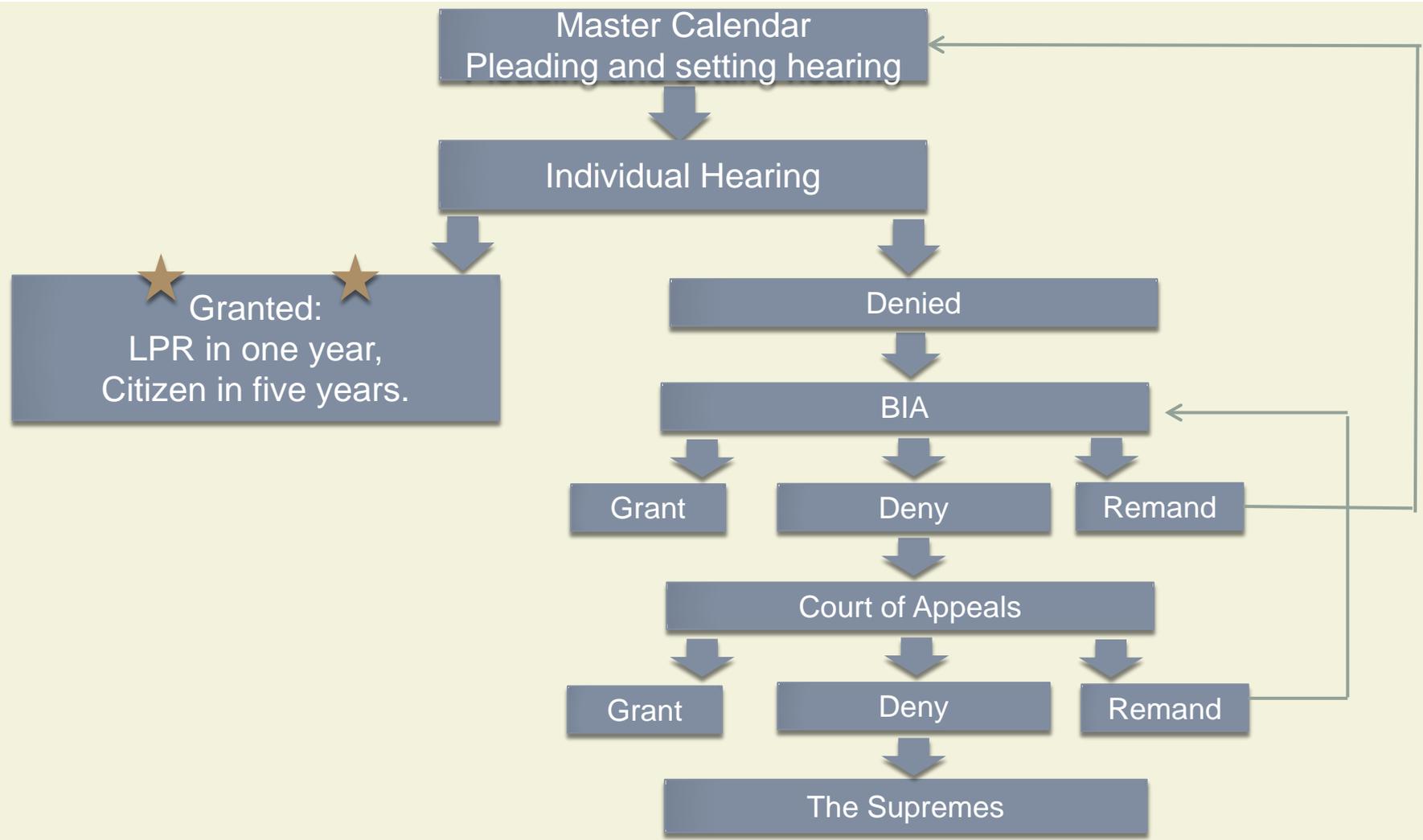
PROCEDURAL POSTURE OF A UAC CASE

Immigration Court

USCIS



PROCEDURAL POSTURE OF A UAC CASE (AFTER REFERRAL TO IMMIGRATION COURT)



THE CONTENTS OF AN APPLICATION

1. I-589:

- Found at www.uscis.gov → Forms → I-589
- Read instructions
- Handout on how to fill out I-589
- I-589 is automatically a request for asylum and withholding
- To apply for CAT, you must check off boxes on pages 1 & 5

2. G-28 (entry of appearance) for USCIS

- Found at www.uscis.gov

3. EOIR-28 (entry of appearance for EOIR (court))

- Found at www.justice.gov

4. Birth certificate with certified translation;

CONTENTS OF AN APPLICATION – DOCUMENTS IN SUPPORT OF THE I-589

5. Copy of passport, identity document, stamp in passport showing arrival into U.S., or I-94 printout
6. Documents showing past persecution:
 - Client's affidavit
 - Medical records
 - Death certificates
 - Police reports
 - Letters from people with firsthand knowledge (notarized if possible)
 - Court documents from home country (i.e. restraining order against abusive family member)
 - Proof of counseling in home country OR in the US
 - Documents from ORR file corroborating client's story
 - Newspaper articles or TV segments (transcribed) covering incident from your client's claim
 - Photos

CONTENTS OF AN APPLICATION – DOCUMENTS IN SUPPORT OF THE I-589 (CONT.)

7. Expert reports

- Medical
- Psychological (for pro bono psychological examinations, check out Physicians for Human Rights or local medical schools)
- Country conditions

8. General country conditions

- Department of State report
- Amnesty International, Human Rights Watch, etc.
- Congressional reports
- Reported newspaper articles
- Journal article/books

9. See example of cover letter and handouts

TIPS – FILLING OUT THE I-589

- Read the I-589 instructions on the USCIS website
- Completeness is key! Answer every question and subsection (if the question does not apply to your client, then respond “N/A”)
- Indicate on the application that you intend to supplement the substantive responses with a detailed statement (if you plan to do so)
- Do not include information if the client is unsure (ex: precise dates vs. month/year, naming a specific gang if client is unsure which gang attacked or threatened him/her)
- Prepare the I-589 as if the most detail-oriented asylum officer will be adjudicating your claim

TIPS – INTERVIEWS AND DRAFTING THE AFFIDAVIT

- **Consistency, Consistency, Consistency**
- **This child has suffered – be gentle**
- **Get the whole story; it will change.**
- **Ask questions in different ways**
- **Be patient**
- **Take cues from your client and be creative**
- **Be aware of cultural differences**
- **Be aware of translation issues**
- **Take care of yourself. Secondary trauma is real**

TIPS – INTERVIEWS AND DRAFTING THE AFFIDAVIT

- Consistency, Consistency, Consistency (this is not a typo!)
- Use client's voice
- Detailed vs. general
- Organize in chronological order (start with timeline and review timeline with client before finalizing)
- Constantly review and verify testimony with previous interviews and applications
- Address and explain inconsistencies/omissions in affidavit
- Be aware of the client's culture and country conditions
- Know the case law before finalizing the affidavit to make sure you have asked all the right questions
- **Develop the facts! This takes time.**
 - **NOTE:** Inability to articulate a “strong” asylum claim does not make the claim frivolous. A frivolous asylum claim is one that “any of its material elements is deliberately fabricated” 8 CFR §§208.20, 1208.20

ORDER OF EVENTS FOR AN AFFIRMATIVE CASE

- **Send I-589 to the Nebraska Service Center (refer to UAC Instruction Sheet for more detail)**
- **Receive a receipt**
- **Receive biometrics**
- **Receive interview notice**
- **File additional documents with local asylum office**
- **Interview**
- **Decision mailed to client**

THE ASYLUM INTERVIEW - PREPARATION

- Let the client know who will be present at the interview and where the interview take place (AO vs. Immigration Court)
- Explain (again) to your client what it means to file an asylum application
- Review their affidavit word-for-word
- “the big story”
- Review all questions/answers on the application
 - An asylum interview is divided into 3 parts:
 1. Biographic Information;
 2. What happened in the past/why forced to leave home country; and
 3. Why your client cannot return to home country.
- This is not a test! Your client’s only job is to tell the truth and explain to the officer why they cannot return
- Explain that they will not receive a decision same day

THE ASYLUM INTERVIEW

- **Attorney comments at end, time permitting**
- **If something goes drastically wrong, intervene!**
 - Ask to call supervisor if necessary
 - The interview is supposed to be non-adversarial, especially with children
- **Must bring interpreter**
- **Interview Agenda:**
 1. Swearing in
 2. Biometrics
 3. Go over I-589
 4. Go over substance of case
 5. Closing arguments

ASYLUM IN COURT

- **File Freedom of Information Act request**
- **Review court file – Ask your mentor for local rules**
- **Master calendar**
 1. File I-589 – original to judge, copy to government (EOIR practice manual)
 2. Plead to Notice to Appear (NTA)
 3. Ask for relief in form of asylum, withholding, CAT and voluntary departure if applicable
 4. Remain mute on country of return, or “respectfully decline to designate”
 5. File G-28 (entry of appearance to USCIS)
 6. File EOIR-28 (entry of appearance for EOIR)
 7. Certificate of Service to OCC
 8. Request court-appointed interpreter in client’s first language
 9. Get trial date
 10. Clarify on the record filing deadlines for documents and witness lists

ASYLUM IN COURT (CONTINUED)

- **File additional documents within 15 days of trial date (according to the EOIR Practice Manual)**
 - **NOTE:** Some IJs set different filing deadlines (ex: 60 days prior to the hearing)
 - Update materials
 - Motions for telephonic testimony
 - Witness list
- **Merits Hearing**
 - Bring own interpreter (friend/family) to monitor court-appointed interpreter
 - Housekeeping issues (exhibits, amendments to I-589, late filings, etc.)
 - Request opening if planning on one
 - Direct, cross, redirect
 - Judge may ask questions
 - Rules of evidence do not apply
 - De Novo review of USCIS decision
 - OCC might use asylum officer's notes to impeach
 - Usually judge will render discussion orally in court
 - Have to make all people who supplied letter available for cross examination
 - Former asylees need to sign waiver to testify
 - 30 days to file Notice of Appeal with BIA if case is denied

WORK PERMISSION

➤ Clock starts ticking...

- On receipt of I-589 filed with USCIS
or
- When I-589 lodged with court
or
- When I-589 filed at Master Calendar

➤ Tick Tick Tick

- File for work permission 150 days after clock starts running
 - Form I-765 (www.uscis.gov)
- USCIS will begin adjudication at day 180
 - Currently taking 90 days or more to adjudicate



➤ Clock will stop

- For any delay caused by applicant