

IMMIGRATION LAW

WEEK SIX

Summary of Immigration Law

The United States Immigration classifications are divided into two major systems, i.e., temporary and permanent residence. The visas which start with one alphabetical letter, e.g., B-2, are temporary visas. The permanent residence visas are employment or relative-based.

The law is divided into two major visa systems:

- 1: Non-immigrant (NIV), which is temporary visa.
- 2: Immigrant Visa (IV), which grants a “Green Card” or Lawful Permanent Residence.

Meeting with the Client

- Initial client contact; setting up appointment/new vs. status calls
- Handling Interview
 - Interview/Intake Sheet/Consultation fee?
 - Review of entry documents, if any; EWI problems
 - “3/10 unlawful presence rule, bar to adjustment”
 - Criminal issues
 - Controlling talkative client: narrowing the issues
 - Exploring all options; visa unavailability problems
 - Setting the fee

Review: Immigration Law

- Individuals entering the United States as visitors for business (B-1) or pleasure (B-2) enter with a temporary nonimmigrant visa.

Visa Waiver Program (VWP) is another visitor classification. The VWP program allows nationals from certain participating countries to enter the United States without applying for a B2 visa at the consulate. This program automatically grants entry at the border or port of entry for ninety days.

Review: Immigration Law

The application for a B-1 and/or B-2 visa is filed with the consulate or embassy in the home country or current place of residence abroad. The process involves an interview with the consular officer, who will analyze the application and interview the individual. If the officer suspects preconceived intent, such as intent to work or marry rather than visit, the application will be denied. Applicant must have ties to home country and adequate funds to carry out purpose of visit.

Review: Immigration Law

▶ **Study Visas**

- ▶ Those planning to be a student in the United States, also need a visa. The first type of visa available to students is the F-1 visa for full-time students at an accredited educational institution. Institutions include colleges, high schools, seminaries, and conservatories.
- ▶ The second type of visa is an F-2 visa, which is for spouses or children of F-1 visa holders.
- ▶ The final option is an F-3 visa for people who live in Canada or Mexico and commute to the United States for their studies.

Review: Immigration Law

- ▶ **Work Visas**

- ▶ Work visas allow people to enter the United States for a temporary period. The visa does not apply to indefinite or permanent work — only U.S. citizens and permanent residents can work in the country permanently. An employer needs to start the visa application process by filing a petition with U.S. Citizenship and Immigration Services (USCIS). If accepted, the foreign national can get a nonimmigrant work visa.

Review: Immigration Law

- ▶ **Work Visas**

- ▶ H-1B and H-1B1 visas are for professional jobs. These jobs must require at least a bachelor's degree. Foreign nationals must have an employer sponsor.
- ▶ H-2A and H-2B visas are for seasonal work that don't have available U.S. citizens as employees. This could include agricultural work.
- ▶ L-1A or L-1B visas are for people transferring from within a multinational company to a U.S. office.
- ▶ O-1 visas are for people with unique talents.
- ▶ P-1A, P1-B, P2, and P-3 visas are for artists and entertainers.
- ▶ Q visas are for people participating in international cultural exchange.
- ▶ C-1, D, and C-1/D visas are for crewmembers of ships or airline employees.

Meeting with the Client

- USCIS Service Centers where applications are processed:
 - Vermont Service Center (VSC)
 - Texas Service Center (TSC)
 - California Service Center (CSC)
 - Nebraska Service Center (NSC)
 - National Benefits Center

Sources of Law

- ▶ International agreements and instruments
 - ▶ 1948 Declaration of Human Rights
 - ▶ 1951 UN Convention on the Status of Refugees
 - ▶ 1967 Protocol on the Status of Refugees, UN Convention Against Torture

Sources of Law

- ▶ Domestic law
 - ▶ Statute – Immigration and Nationality Act or INA, Title 8, U.S. Code
 - ▶ Regulations – 8 C.F.R
 - ▶ Case Law

Overview of Asylum Law

Definition of refugee, see 8 USC section 1101(42); INA Sec. 101(a)(42)(A)

- ▶ The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided,
 - ▶ 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.

Elements to Prove

Essentially, in order to qualify for asylum, a foreign national must show that:

- S/he has experienced persecution in the past or has a fear it will occur in the future;
- The fear is “well-founded”;
- The persecution is “on account of” one of the enumerated grounds, which are the person’s race, nationality, religion, membership in a particular social group, or political opinion; and
- S/he is unable or unwilling to return to his or her country of nationality.

Persecution

- ▶ No statutory definition
- ▶ *Matter of Acosta*, 19 I&N Dec 211 (BIA 1985): threat to life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.

Persecution

Tesfay was a major in the Eritrean army. He was dismissed from his position because he sought to expose corruption in the military. In this case, the treatment of Tesfay, while unjust, would not constitute persecution because losing his job would not rise to the level necessary for it to be considered persecution.

Factors to be Proven for Grant of Asylum Status

- ▶ *Matter of Mogharrabi*, 19 I&N Dec. 211 (BIA 1987)
- ▶ Past persecution or fear of future persecution:
 - ▶ fear is 'well-founded'
 - ▶ persecution is 'on account of' one of the five grounds
 - ▶ unable or unwilling to return to country of nationality

Persecution

- ▶ Substantial economic deprivation constituting threat to individual's life or freedom
- ▶ Rape or sexual assault, FGM
- ▶ Confinement and physical torture
- ▶ Arbitrary interference with private or family life
- ▶ Pattern or practice of persecution of people similarly situated: *Lie v. Ashcroft*, 396 F.3d 389 (3rd Cir. 2005)

Persecution Does Not Include

- ▶ Discrimination
- ▶ Harassment
- ▶ Prosecution
- ▶ Civil war: *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990)

Persecution Does Not Include

- ▶ Harm or suffering inflicted by individuals unless acting as a government or the government is unable or unwilling to control
- ▶ Criminal punishment for violating laws

Persecution

Sharaf is an Iranian national. He is Baha'i, a minority religion in a country where Islam is dominant. Sharaf could not apply for any government jobs nor obtain a business license, all because of his religion. Private employers would not hire him, and as a result, he remained unemployed for long stretches of time. Sharaf's children could not attend the local public school because of their religion and his non-Baha'i neighbors often harassed his family. Because of the difficulty finding employment, the family was very poor and found it almost impossible to earn a living.

Is Sharaf merely a victim of discrimination and harassment or would his situation rise to the level of persecution?

Persecution

During the civil war in Liberia from 1999-2003, many citizens fled their country and now wish to apply for asylum in the United States. You have been asked by your employer to attend a community meeting organized by a local Liberian Church in order to give information about the asylum process and conduct initial screenings of the newly arrived to determine whether any would qualify for asylum because of the harm they may have suffered. Some of the questions you might ask would include: "Are you a member of a particular tribe or ethnic group? If so, which one? What, if anything, happened to you in Liberia? Do you know the identity and political or tribal affiliations of your attacker? Did the attacker say anything that would lead you to believe you were being specifically targeted because of your ethnic background or political beliefs?"

Persecution

Hamid was a prominent and outspoken university professor in Afghanistan in 1986. He publicly denounced the occupation of his country by and his government's alliance with the former Soviet Union. The government targeted Hamid and sought to silence him. He was arrested as a traitor but later released from detention after 18 months in prison, where he was beaten constantly. Hamid then fled to the United States and claimed asylum. While Hamid's case was pending, the Soviets withdrew, and the government that harmed him was overthrown. However, Hamid now claims he cannot return home because control of many regions in his country is in the hands of the Taliban, a group that opposes all things American and the moderate form of Islam Hamid practices. 189He claims if he returns, the Taliban will persecute him for having been to the "land of the infidel" and that they will force him to adhere to fundamentalist practices.

Has Hamid suffered past persecution?

Can he rebut an argument that circumstances in Afghanistan have changed substantially so that it is now safe for him to return?

What additional information would you like to know to inform your decision?

Persecution

Ndume is a preacher from Kivu, in the eastern side of the Democratic Republic of Congo, or DRC, an area that has been under armed conflict for many years. He frequently traveled between rebel and government held areas, advocating for a peaceful solution to the crisis. One Sunday, Ndume was abducted on his way home and taken to a government prison where he was held for two months, during which time he was brutally beaten and given very little to eat and drink. Finally, a guard helped him to escape. Ndume made his way to the United States and claimed asylum. During consideration of his case, government forces searching for him killed his wife and son. Peace talks have convened between the government and rebel forces and it is likely the war will be over soon. However, Ndume remains afraid to return home. He has been diagnosed with post-traumatic stress disorder or PTSD, because of his treatment in detention in the DRC, and, following the news of the killing of his wife and son, he is suffering from survivor's guilt for which he receives counseling. Ndume would be a candidate for humanitarian asylum because it is likely he would suffer psychological harm if he is forced to return to the place where his wife and son were killed. He may suffer additional harm if he could not work to support himself on his return or could not continue to access counseling services.

Well-founded Fear

- ▶ Subjective
 - ▶ Look at applicant's state of mind to determine whether or not fear exists.
 - ▶ Credibility is an important factor here.
- ▶ Objectively reasonable
 - ▶ Would a reasonable person in the same circumstances fear persecution?
 - ▶ Objective evidence of country conditions.

Well-founded Fear

- ▶ Belief or characteristic to be overcome by persecutor; see *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997)
- ▶ Awareness or ability to become aware
- ▶ Ability to overcome
- ▶ Inclination to overcome

Past Persecution

- ▶ Rebuttable presumption of future persecution
- ▶ Government has burden to rebut
- ▶ Standard: preponderance of the evidence
- ▶ Fundamental change in circumstances so that fear no longer exists;
OR
- ▶ Internal relocation is available and reasonable

Discussion Question

Omar, an Egyptian, is on a J-1 visa as a visiting scholar of religion at a prominent U.S. university. While here, he decides to convert from Islam, the majority religion in his country, to Christianity, a minority. Omar is afraid to return to Egypt because he believes Christians are targeted because of their faith and because he will be further singled out as an apostate, or religious convert. He believes the government will not protect him. In order to support his claim, Omar must provide subjective evidence of his fear and objective evidence of the treatment of Christians and apostates in his country as well as evidence of how the government responds to attacks on them.

What types of documents would you suggest Omar gather?

Humanitarian Asylum

- ▶ Where presumption of future persecution rebutted, IJ can exercise discretion and grant asylum anyway if applicant has compelling reason related to severity of past persecution suffered for being unable or unwilling to return.

Evidentiary Standard and Burden of Proof

- ▶ Applicant must prove there is reasonable possibility of suffering persecution; see 8 CFR section 208.13(b)(2) .
- ▶ Well founded fear legally only requires 10% chance of harm or persecution.

On Account Of

► Nexus:

- i. race
- ii. religion
- iii. nationality
- iv. political opinion, imputed or otherwise
- v. membership in a particular social group

Example

Thaba, a black African student activist in South Africa during the 1960s, was arrested many times by the white government regime because he organized street protests against Apartheid. Thaba's family lives in a segregated township outside of Johannesburg. The government will not permit them to live in other areas. In addition, black children cannot attend "white" schools, which are better equipped than the segregated schools in the township. Thaba receives an invitation to come to the United States to speak about his work. After he arrives, he claims asylum. In this instance, Thaba has a strong claim that he faces persecution on account of his race.

Example

Danica, a Serbian, and Petar, a Croat, are married with two children. Their neighbors are Bosnians, Kosovans, and other nationals. Once the war in Yugoslavia began, tensions between the neighbors surfaced. The war required people to support their ethnic group. Danica and Petar are under pressure to separate because of their different nationalities. If they do not, Croats and Serbians alike will treat them as traitors. They have heard of the killing of other mixed nationality families simply because they refused to declare support for one or other nationality. Danica and Petar can raise a claim for asylum because they fear persecution because of their nationalities

Particular Social Group

- ▶ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)
 - ▶ Immutable characteristic or common trait which may be innate, such as sex, color, or kinship ties
 - ▶ or shared past experiences
 - ▶ Fundamental characteristics that cannot or should not be required to change
 - ▶ Evolution of requirements of “social visibility” and “particularity” added in 2005

Social Group: Gender and Nationality

- ▶ Gender and nationality recognized as a social group in cases involving survivors of domestic violence where their government is unwilling and unable to protect them.
- ▶ *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014): The Board of Immigration Appeals (BIA) on August 26, 2014 issued a precedent setting ruling that establishes the circumstances under which victims who suffer domestic violence in their home country will be eligible to receive gender based asylum in the United States. The BIA ruled that “married women in Guatemala who are unable to leave their relationship” are a “cognizable particular social group that forms the basis of a claim for asylum or withholding.”

Social Groups

Additional recognized social groups:

- ▶ Clan membership: *Matter of H-*, 21 I&N Dec. 337 (BIA 1996)
- ▶ Sexual Orientation: *Matter of Tobos-Alfonso*, 20 I&N Dec. 819 (AG 1994)

Discussion Question

Akinbola is a Nigerian national. He has been living in the United States undocumented since 2008. Akinbola has been struggling with his sexual orientation for some time because he recognizes he is only attracted to men. After several visits with a therapist, Akinbola is finally able to come to terms with this. However, he does not know how to share this information with his family. Akinbola knows that if he were to reveal his sexual orientation to them, his family would disown him. In the past, he has heard his father say he would rather arrange the death of any child in order to preserve the family's honor in the community than publicly admit s/he is homosexual. Yet, Akinbola also wants to be true to himself because he knows he will never be attracted to women.

- Is Akinbola a member of a particular social group?
- If so, how would you define it?

Discussion Question

Youssef is from a prominent political family in Cote d'Ivoire. In 2012, a coup d'etat, widely believed to have been financed by his uncle, was foiled. The government has accused Youssef, his entire family, and prominent members of the opposition party of which they are members, of treason. At the time of the coup attempt, Youssef was in the United States on an H1-B, skilled worker visa, and knew nothing about the coup. In fact, he had renounced his membership in the party before coming to the United States. Youssef's employment contract is ending and he is afraid to return home because he believes his association with his family will result in his arrest, torture, and possible death.

Can Youssef claim asylum and remain here instead?

Discussion Question

Denny is an ethnic Chinese citizen of Indonesia. He was raised as an Evangelical Christian. Denny discovered he was attracted to men when he was 15. He joined an informal group of gay activists who shared experiences and attended support groups. Their eventual goal was to work against discrimination and stigmatization of gays in Indonesia. While Denny was coming home from a support meeting with a friend, two members of the army attacked and badly beat him. They yelled at him, "filthy Cina woman." Cina is considered a derogatory racial term for the Chinese in Indonesia. Denny tried to report the incident to both the police and army and neither would accept the complaint. Instead, they told him to be careful. They openly declared that there would be no place in Indonesia for "unnatural" people like him who defied Islam. Denny's family disowned him once they learned of his sexual orientation because they consider homosexuality to be a sin against their religion.

If Denny applies for asylum in the United States, which, if any, of the enumerated grounds would apply to his situation?

Corroboration

- ▶ REAL ID Act governs. See INA §208(b)(1)(B)
- ▶ Corroboration NOT required if testimony is:
 - ▶ Credible
 - ▶ Persuasive
 - ▶ Refers to specific facts sufficient to demonstrate qualification as refugee

Example

Gilberto, a pastor in Angola, was in charge of an orphanage for boys. One day, the army arrived and demanded that all boys 13 and older leave with them to be conscripted. Gilberto refused to release the boys and managed to lock the doors, preventing the army from entering. The army came the next day and arrested Gilberto. They took him to prison, where they beat him so badly that upon release, he had to go to the hospital for treatment. After his recovery, he believed it was not safe for him to remain in Angola because the army would arrest him again. Gilberto made his way to the United States, where he claimed asylum. Because he received treatment at a hospital, it would appear reasonable for the immigration judge to request medical records to corroborate Gilberto's injury and treatment. However, hospitals in many countries do not keep records and so they are unavailable. If research showed this to be the case in Angola, Gilberto can demonstrate it would be unreasonable for him to produce the records.

Corroboration

- ▶ Judge may require corroboration even if deemed credible.
- ▶ Does the applicant have this evidence?
- ▶ Is it reasonable to expect him/her to get it?
- ▶ Weigh credible testimony along with other evidence.

Corroboration

- ▶ Authenticate documents: 8 C.F.R. §§287.6, 1287.6; *Sukwanputra v. Gonzales*, 434 F.3d 627 (3rd Cir. 2006); *Vatyan v. Mukasey*, 508 F.3d 1179 (9th Cir. 2007).
- ▶ Translate into English.
- ▶ Certified copies where possible.
- ▶ Consider forensic testing through ICE.

Value of Expert Testimony

- ▶ Who is the expert?
- ▶ Why is he/she an expert?
- ▶ Academics/Professionals
- ▶ Sources of information?
- ▶ Detailed affidavits
- ▶ What does he/she know about your client's case or people similarly situated?
- ▶ May be useful to address issues of social distinction.
- ▶ Medical experts

Credibility

- ▶ Demeanor
- ▶ Plausible
- ▶ Consistent with other statements made at any time
- ▶ Consistent with country conditions and other evidence
- ▶ Immaterial inaccuracies

Credibility

- ▶ Review court file
- ▶ Prior representations, submissions?
- ▶ Documents to corroborate/repair
- ▶ Know your client's story inside out
- ▶ Expect changes at the hearing
- ▶ Cross-examine vigorously
- ▶ Prepare all witnesses: affidavits