

Representing Detained Immigrants in New Jersey

American Friends Service Committee & Legal Services of New Jersey

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Objectives

- (1) Identify agencies/facilities responsible for immigration detention in NJ
- (2) Understand law and policy governing immigration detention
- (3) Learn how to request/advocate for release
- (4) Understand the law governing persecution-based claims for immigration relief
- (5) Learn how to pursue a persecution-based application on behalf of a detained individual

Current State of Legal Representation

- INA § 292
 - In immigration proceedings – right to counsel, but “at no expense to the Government”
- New Jersey representation (*See Seton Hall Report*)
 - 33% of detained immigrants
 - 80% of non-detained immigrants

Legal Representation is Critical

- Non-detained
 - With counsel - 92% obtained relief
 - Without counsel - 31% obtained relief
- Detained
 - With counsel - 49% obtained relief
 - Without counsel - 14% obtained relief



IMMIGRATION DETENTION

Who is detained?

- ICE has the power to detain any immigrant in removal (deportation) proceedings for the duration of their case, e.g.:
 - Individuals who entered the U.S. without inspection
 - Individuals who overstayed a visa
 - Individuals stopped while entering the U.S. at or near a border without a valid visa
 - Non-citizens with immigration status in the U.S. who have certain criminal convictions (e.g., green card holders)

How is someone detained?

- Airport or border point of entry (invalid entry docs)
- Workplace raids (ex. Kearny, NJ warehouses)
- Home raids
- Transfer from criminal custody
- Since 1/2017 – courts, on the street, mistaken identity

Obstacles faced by detained individuals

Case Preparation

- Access to legal counsel
- Access to translation services/materials in native language
- Obtaining evidence/supporting docs for case (during an expedited process)

Obstacles faced by detained individuals

Quality of Life

- Poor conditions and lack of adequate medical treatment, particularly mental health services
- Communicating with family, etc. outside of the facility

Immigration Detention: National Statistics

- ICE: operates immigration detention system
- Many non-ICE entities operate the facilities
 - Private corporations: GEO, CCA (CoreCivic), etc.
 - County jails

Immigration Detention: National Statistics

- Immigrants detained in >200 facilities nationwide
- ICE has capacity to detain >34,000 individuals per day (and planning/constructing new facilities to grow)
- ICE detains approximately 400,000 individuals annually

New Jersey Detention Facilities

Elizabeth Detention Center

- 625 Evans Street, Elizabeth, NJ
- Male/female detainees
- 300 individuals
- Attorney visiting hours from 6 a.m. to 10 p.m.



New Jersey Detention Facilities

Essex County Correctional

- 354 Doremus Ave.,
Newark
- Male detainees only
- Up to 900 individuals
- Attorney visiting hours
from 7 a.m. to 7 p.m.



New Jersey Detention Facilities

Hudson County Correctional

- 35 Hackensack Ave,
Kearny
- Male/female detainees
- Appx 100 NJ detainees
- Attorney visiting hours
from 7 a.m. to 6:30 p.m



Tips for Attorney Visitation

- Bar card not required, but facilities will request one
- Prior approval needed for translators, paralegals, experts (e.g. medical professionals)
- “Count” – limited access to attorneys several times during the day

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INTRO TO IMMIGRATION LAW AND REMOVAL PROCEEDINGS

Immigration Law

- Statute – Immigration and Nationality Act (INA; Title 8 of U.S.C.)
- Regulations (Title 8 of C.F.R.)
- Board of Immigration Appeals (BIA) precedent decisions
- Federal case law
- Policy Guidance from USCIS (formerly INS)

Government Agencies that administer immigration law

- Dept. of Homeland Security
 - U.S. Citizenship and Immigration Service (“USCIS”)
 - U.S. Immigration and Customs Enforcement (“ICE”)
- U.S. Dept. of Justice, Executive Office for Immigration Review
 - Office of the Immigration Judge – EOIR courts
 - Board of Immigration Appeals (BIA)

The Immigration System: Key Decision Makers

- **Deportation Officer**
 - An ICE officer is assigned to each case and makes decisions relating to detention and release
- **Immigration Judge**
 - Will ultimately grant relief in the persons case or issue a deportation order
- **Asylum Officer**
 - Will conduct the credible or reasonable fear interview

Who can be placed into removal proceedings?

- Any non-citizen – even green card holders (LPRs) – who is inadmissible or removable.
- Non-citizens fall into two groups:
 - People **already admitted** to the U.S. (e.g. who are already in the country by means of a lawful entry or who have adjusted their status to legal permanent resident)
 - People who have **not yet sought** or are **seeking admission** to the U.S. (i.e. who are *already here* by means of an *unlawful* entry, or who are trying to enter the country lawfully)

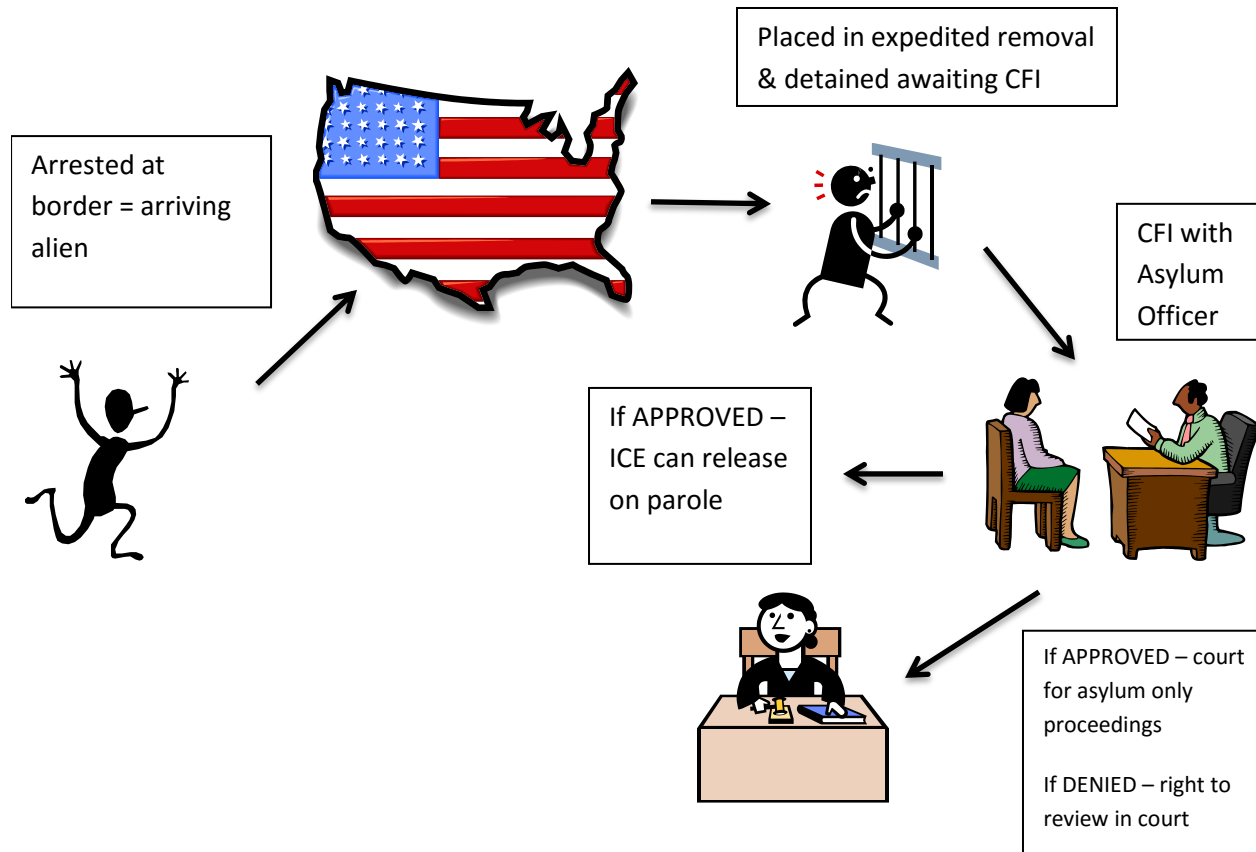
Categories of Removal Proceedings

- Expedited Removal
 - Immigrants apprehended at or near the border
- Reinstatement of Removal
 - Immigrants who re-entered after being deported
- Removal Proceedings (under INA § 240)
 - Immigrants previously admitted subject to ground(s) of removal
 - Immigrants seeking admission subject to ground(s) of inadmissibility
 - Immigrants present without permission or parole

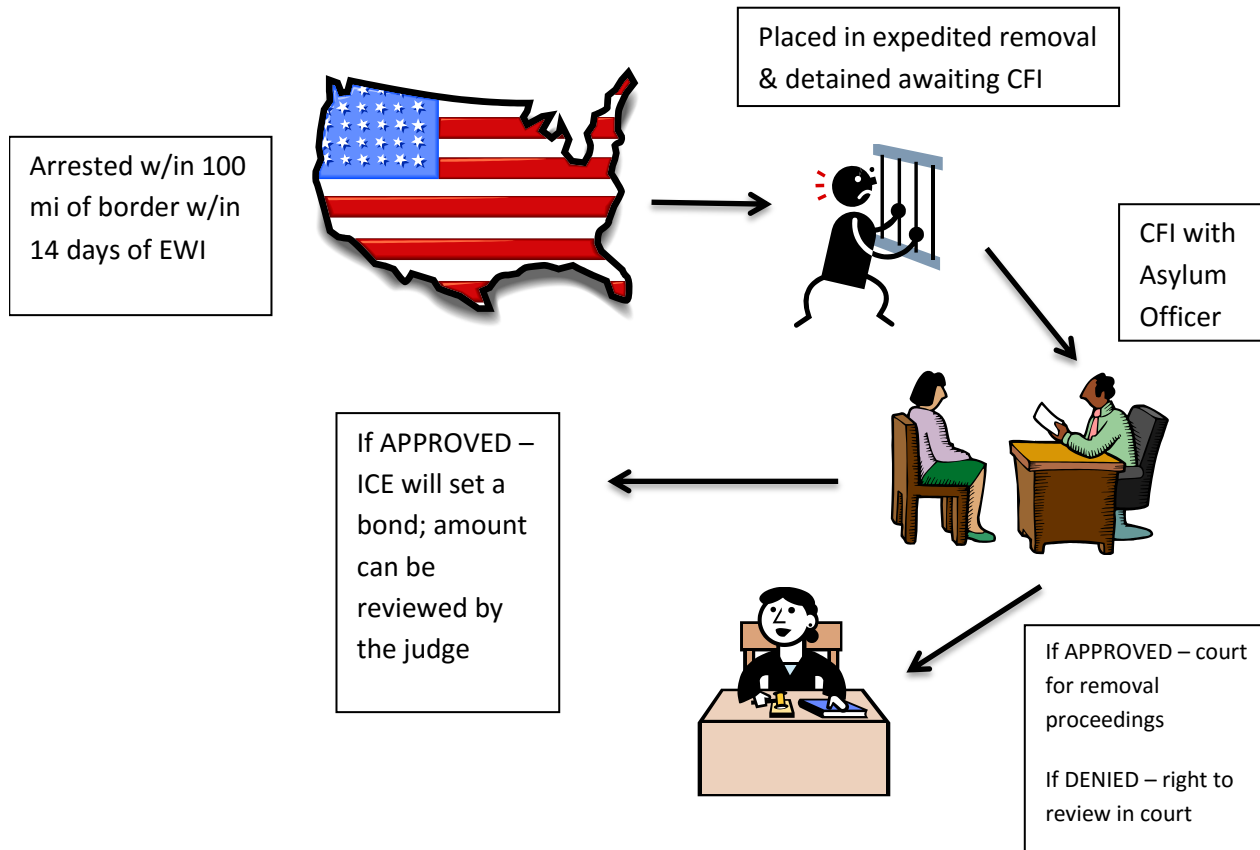
Expedited Removal: Credible Fear Interviews

- Arriving aliens and “certain other aliens” are subject to expedited removal
- Do not have a right to see immigration judge (IJ) UNLESS claim a fear of return and pass a Credible Fear Interview (CFI)
 - Administered by the Asylum Office (a part of USCIS)
 - CFI should be given within 14 days of expressing fear
 - Results are usually given within a few days to a week.
- Case is referred to IJ after positive CFI decision
- Right to IJ review of negative CFI decision

Expedited Removal: Arriving Aliens



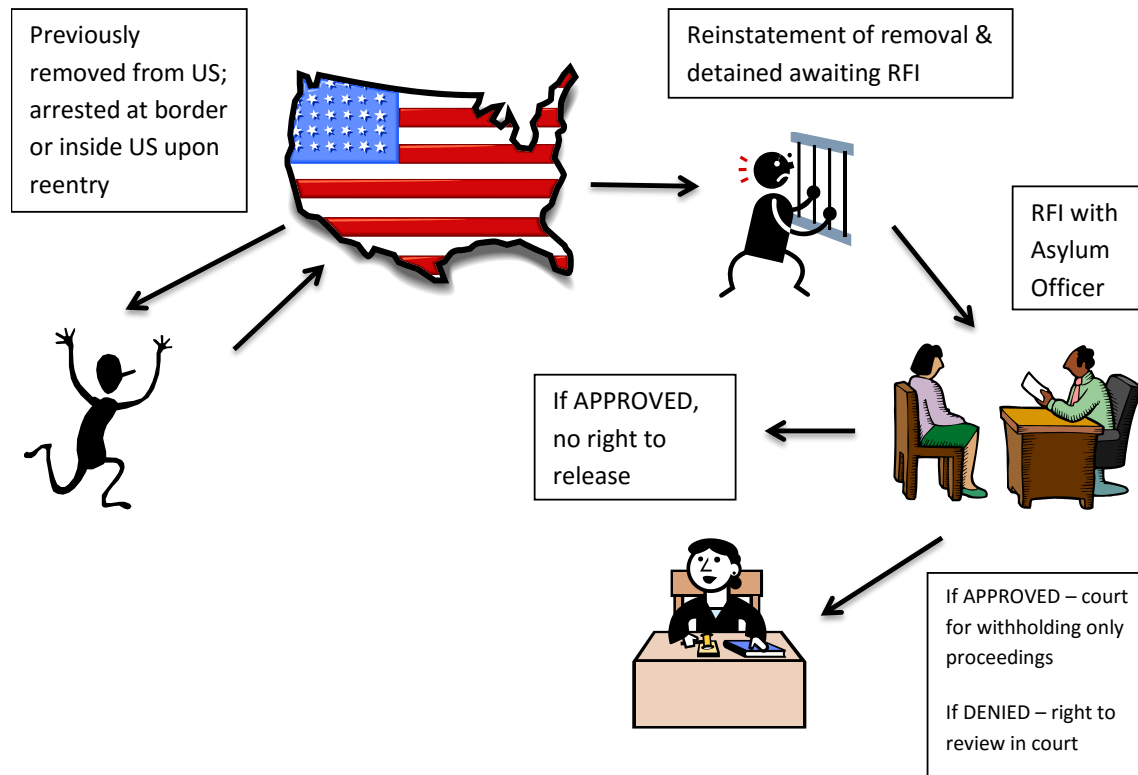
Expedited Removal: Entrants Without Inspection (EWI)



Reinstatement of Removal: Reasonable Fear Interviews

- Reinstatement of Removal: Individuals who re-entered the U.S. after departing under an order of removal will be summarily deported.
- No right to see an Immigration Judge UNLESS claim fear of return and pass a Reasonable Fear Interview (RFI)
 - RFIs usually administered within 3-6 months
- Positive RFI results in referral to IJ.
 - Decision process takes longer than for CFIs
 - Eligible for Withholding of Removal only

Reinstatement of Removal





SEEKING RELEASE FROM DETENTION

Jurisdiction of the Immigration Court over Bond

- **Jurisdiction**

- Currently in DHS custody or within 7 days of release
- Motion by respondent/counsel

- **NO jurisdiction**

- Arriving aliens (even if passed CFI)
- Final order of removal/reinstated removal
- Mandatory detention under INA 236(c) (various criminal offenses)

Expedited Removal: Release from Detention

- After passing a Credible Fear Interview, a detainee may be released on bond or parole:
 - An arriving alien who requested asylum at the port of entry (i.e. airport or bridge) is eligible for parole upon a positive CFI result.
 - An individual who was apprehended within 100 miles of the border and expressed a fear of return is eligible for bond upon a positive CFI result.

Reinstatement of Removal: Release after RFI

- Individuals with a positive RFI decision are not automatically considered for bond or parole
- An attorney may request that ICE release the individual, but such a grant is discretionary
- Most individuals who are pro se will be detained throughout proceedings.

Bond eligibility: Arriving Aliens

- When an arriving alien passes a credible fear interview, ICE will consider parole
 - Parole is discretionary
 - Flight risk
 - Danger to the community
 - ICE will interview the detainee
- Detainee must provide:
 - Proof of identity (i.e., state-issued identification)
 - USC or LPR Sponsor (sponsor is usually required to write a letter to ICE)

Bond Hearings

- ICE makes the initial bond determination
- An individual can ask the judge to review that bond decision in a “custody re-determination hearing”
 - The Judge can change the bond amount or set a bond where ICE declined to set any bond for a bond-eligible detainee
- Can request a redetermination hearing at any time after the client is in ICE custody, including:
 - before an NTA is filed with the Court or
 - before your client has her/his first MC hearing
- Separate from removal proceedings

Bond Hearings: The Standard

- At the bond hearing, the IJ will consider if the person is a flight risk or a danger to the community
- Danger to the Community
 - Past arrests and convictions, rehabilitation
- Flight risk
 - Family and community ties, time in the U.S., work and tax history, eligibility for relief

Bond Hearings: The Standard

- *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006)- The burden of proof is on the respondent to show merits a grant of bond
- Relevant factors:
 - Fixed address in US
 - Length of residence in US
 - Family in US
 - Employment history
 - Record of appearance in court and attempts to escape from authorities
 - Criminal record (number, recency and seriousness of offenses)
 - Manner of entry and history of immigration violations

Bond Hearings: Evidence

- Bond hearings are separate from removal proceedings (8 CFR 1003.19), and the court keeps a separate record
 - All evidence that is relevant for bond should be resubmitted for the bond hearing

Bond Hearings: Evidence

- Potential evidence in support of low bond
 - Letters of support from family, friends, or employers
 - Proof of eligibility for relief
 - Proof of physical presence
 - Certificates of disposition for convictions
 - Bills or records showing fixed address
 - Birth and marriage certificates
 - Education/medical/employment/tax records
 - Proof of rehabilitative programs or probation compliance

Bond Hearings: Tips

- Try to negotiate a bond amount with DHS
- Prepare your client for testimony, particularly relating to their arrest history
 - Some IJs may have you lead the client in a direct, others want to question the client themselves, others direct all questions to the attorney
 - Consider whether client testimony will help your case
- Ask your client's friends and family to come to court
- Be careful about getting into the facts that will impact the removal case
- Determine the maximum bond that can be paid

Outcome of Bond Hearing

- Bond reduced → paid → release of client!
- Appeal
 - In “no bond” or $\geq \$10,000$ initial cases, ICE can file for automatic stay (must be filed w/in 1 day) -- held unconstitutional in *Ashley v. Ridge*, 288 F.Supp.2d 662 (DNJ 2003)
- Subsequent request must be in writing and show how circumstances have materially changed, 8 CFR §1003.19(e)

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ASYLUM, WITHHOLDING OF REMOVAL & CAT

Asylum: statutory definition

- 8 U.S.C. § 1101(a)(42)(A) - Someone who is unwilling/unable to return to (or seek protection from) home country because of:
 - (1) Persecution/well-founded fear of persecution
 - (2) On account of
 - (3) Political opinion, race, religion, nationality, or membership in a particular social group (PSG)

Asylum, Withholding of Removal, CAT

- Asylum:
 - Meets the statutory definition of “refugee” (10%)
 - Subject to immigration judge’s discretion
- Withholding of Removal
 - Same legal standard as asylum; option for people who may be barred from seeking asylum
 - Must show higher probability of persecution (50%)
- Convention Against Torture (CAT)
 - No bars
 - No nexus requirement

Key Statutes

- 8 U.S.C. § 1158 – Asylum applications: Authority, conditions, and exceptions of
- 8 C.F.R. § 208.1, et seq. – Asylum/Withholding Procedural requirements, benefits, etc.
- INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)
- Matter of Mogharrabi, 19 I& N. Dec. 439 (BIA 1987)

Key Caselaw

- INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) – lower burden for asylum (10% likelihood)
- Matter of Mogharrabi, 19 I& N. Dec. 439 (BIA 1987) - “Well-founded fear” four-part test
 - (1) Possession (or imputed possession) of characteristic
 - (2) Awareness (persecutor knows/could learn of characteristic)
 - (3) Capability (persecutor can harm applicant)
 - (4) Inclination (persecutor inclined to harm applicant)

Elements of Asylum Claim

- Persecution/ “Well Founded Fear” of Persecution
- “On account of” (Nexus)
- Protected Ground
 - Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group
- Government is persecutor or cannot/will not control persecutors
 - Knowledge, capability, and inclination

Other Elements

- Persecutor
 - Government, or
 - Individual/group that government cannot/will not control
- Relocation
 - Must not be possible within home country

Sources of Evidence

- Client's story
 - Airport interview (less weight)
 - Credible Fear Interview (CFI)
 - Written declaration and I-589
 - Oral testimony at merits hearing
- Country conditions and other corroborating evidence
- Forensic evidence including documents and medical and/or psychological evaluations

“Persecution”

- Includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom.
 - *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993)
- Does not "encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional".
 - *Chang v INS*, 119 F.3d 1055, 1066 (3d Cir. 1997)

“Well-Founded Fear”

- Persecution must be a “reasonable probability”
- Has objective and subjective components
 - Applicant must have subjective fear
 - Fear must be reasonable or “well founded”
- “Ten percent” probability
 - INS v. Cardoza-Fonseca, 480 U.S. 421 at 431.

Protected Grounds: Race, Religion, Nationality

- Race: broadly defined
- Religion
- Nationality
 - Includes but is not limited to citizenship
 - May include ethnic or linguistic group
 - May coincide with race in some cases

Political Opinion

- Actual
- Imputed
- Non-traditional

Membership in a Particular Social Group (“PSG”)

- Share a common, immutable characteristic
 - Matter of Acosta, 19 I & N Dec. 211, 233 (BIA 1985)
- Characteristic (Can be imputed)
 - Applicant cannot change, or
 - Should not be required to change because it is fundamental to their individual identities or consciences – e.g. sexual orientation

Past persecution

- Creates legal presumption of future persecution
 - 8 C.F.R. § 208.13
- DHS can rebut by a preponderance of the evidence showing changed circumstances
- Humanitarian asylum – past persecution so severe that grant is warranted, even if chance of future persecution is low (Matter of Chen, 20 I& N. Dec. 16 (BIA 1989); Sheriff v. AG, 587 F.3d 584 (3d Cir. 2009))

Reasonable internal relocation

- DHS may try to show by preponderance of the evidence that applicant could avoid future persecution by relocating to another part of the applicant's country of nationality, but only if reasonable to expect the applicant to do so.
 - Factors: possibility of other serious; ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.
 - Presumed unreasonable if persecutor is government or government sponsored

REAL ID

- Higher burdens on asylum, withholding, and CAT applications filed after May 11, 2005
- Burden of proof: must show that one of the five grounds was or will be at least “one central reason” for persecuting the applicant (as opposed to “in part”)

REAL ID

- Corroboration:
 - May grant on testimony alone if it "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."
 - However, may require other evidence to corroborate otherwise credible testimony "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

REAL ID

- Credibility:
 - Demeanor, candor or responsiveness
 - Inherent plausibility and internal consistency of testimony
 - Consistency between all written or oral statements, whenever made and whether or not under oath
 - Consistency of such statements with evidentiary record
 - Any inaccuracies or falsehoods contained in the statements, whether or not material to the asylum claim

Bars to Asylum

- Persecutors of others
- Firm resettlement
- Previously filed for asylum and denied
- Conviction for aggravated felony
- Conviction for particularly serious crime
- Danger to security of U.S.
- Serious non-political crime
- Safe third country
- Failure to file within 1 year of arrival in U.S.

One-year filing deadline

- MUST file application within one year of most recent arrival to the United States
 - INA § 208(a)(2)(B); 8 C.F.R. § 208.4 (a)
- Limited Exceptions
 - Changed circumstances including country conditions
 - Exceptional circumstances (e.g. illness, incapacity)
 - See INA § 208(a)(2)(D); 8 C.F.R. §208.4(a)

Withholding of Removal

- Mandatory form of relief from persecution
 - See 8 U.S.C. § 1231(b)(3)
- Must show clear probability of persecution by government or group the government cannot/will not control on account of protected ground
- “Fifty percent” probability
 - See *INS v. Stevic*, 467 U.S. 407 (1984)

Convention Against Torture

- Article 3 of the CAT states:
 - "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."
 - See Art. 3(1), S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

Convention Against Torture

- Prohibits return of person to another country where substantial grounds exist for believing that s/he would be in danger of being subjected to torture if returned
 - See Matter of Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002)
- More likely than not that will be tortured if returned

Definition of Torture

- For an act to constitute torture under Article 1 of CAT, it must be:
 - (1) an act causing severe physical or mental pain or suffering;
 - (2) intentionally inflicted;
 - (3) for a proscribed purpose;
 - (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and
 - (5) not arising from lawful sanctions
- See Matter of J-E-, 23 I&N Dec. 291, 297 (BIA 2002)

CAT – Burden of Proof

- In considering whether an alien has satisfied his burden of proof, the BIA stated that: all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:
 - (1) evidence of past torture inflicted upon the applicant;
 - (2) evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
 - (3) evidence of gross, flagrant, or mass violations of human rights within the country of removal, where applicable; and
 - (4) other relevant information regarding conditions in the country of removal.
- See Matter of J-E-, I&N Dec. at 303 (citing 8 C.F.R. §208.16(c)(3)).

CAT – other standards

- Government acquiescence
 - “Willful blindness” on part of government satisfies this requirement. *Silva-Rengifo v. AG*, 473 F.3d 58, 63 (3d Cir. 2007)
- Specific intent:
 - CAT standard “requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result...Knowledge that pain and suffering will be the certain outcome of conduct..is not enough for a finding of specific intent. *Pierre v. Attorney General*, 528 F.3d 180 (3d Cir. 2008)

Benefits

- Asylum:
 - Become an LPR and later naturalize
 - Petition for family members
 - Eligible for public benefits
 - Can travel, but not to country from which fled
- Withholding of Removal/ CAT
 - Work permit
 - Cannot adjust status or naturalize
 - Cannot petition family members
 - Cannot leave the United States

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FILING THE APPLICATION: STEPS AND PROCEDURES

Removal Proceedings: A Typical Case Timeline

- Notice to Appear (NTA)
 - At the time that the person is detained, they should receive an NTA, the charging document for an immigration case
 - The NTA will include the legal basis on which ICE is attempting to deport the person

U.S. Department of Homeland Security Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID : [REDACTED] File No: [REDACTED]
Event No: [REDACTED]

In the Matter of: [REDACTED]

Respondent: [REDACTED] currently residing at:

FEDERAL CORRECTIONAL INSTITUTION PO BOX 18 , FT DIX NEW JERSEY 08840 (609) 723-1100
(Name, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.
☒ 2. You are an alien present in the United States who has not been admitted or paroled.
☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of [REDACTED] and a citizen of [REDACTED];
3. You arrived in the United States at Miami, Florida, on [REDACTED];
4. You were not then admitted or paroled after inspection by an Immigration Officer;
5. You were, on [REDACTED] convicted in the United States District Court at the Southern District of [REDACTED] for the offense of Conspiracy to Possess With Intent to Distribute Cocaine, in violation of 21 U.S.C 846, and you were sentenced to a term of imprisonment of [REDACTED] months pursuant to said conviction.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the provision(s) of law:
See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.33(b)(2) ☐ 8CFR 235.3(b)(5)(v)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

FTX Board Street Room 1110 Newark, NJ 07102

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set at a time to be set to show why you should be removed from the United States based on the charge(s) set forth above.

PETER PUNICK SUPERVISORY DEPORTATION OFFICER
(Signature and Title of Issuing Officer)

Date: FEB 21 2008 (City and State)

See reverse for important information Form I-862 (Rev. 08/10/07)

Removal Proceedings: A Typical Case Timeline

- Master Calendar Hearing
 - Shortly after being detained, a person will receive a date for their first Master Calendar
 - Master Calendars are generally short 10-15 minute hearings for the submission of applications and scheduling
 - In total, a person could have one master calendar or several. The judge will continue to schedule master calendar hearings (usually about 2 weeks apart) until all preliminary matters are resolved and all applications are submitted
 - After receiving the applications, the judge will set a “call-up” date for the submission of all evidence and a final individual hearing date

Master Calendar Hearings

- Enter appearance (EOIR-28)
- Admit or deny charges
- Challenge or concede removability
- Decline to designate country for removal
- Indicate relief sought (i.e. asylum, withholding and CAT)
- Request interpreter (if needed)
- File application (usually at second MC hearing)

Submitting the Asylum Application

- Submit copy of application to court with copy served on Office of Chief Counsel, DHS/ICE; also send copy to USCIS for receipt
- Submit supporting documentation and witness list when required by IJ
 - Generally, all evidence to be filed no less than 10 days prior to Individual Hearing on merits of claim
 - May have separate deadline, particularly for original documents (DHS's chance to authenticate)
 - IJ may require client affidavit to be submitted with application

Removal Proceedings: A Typical Case Timeline continued

- Individual Hearing
 - Usually scheduled 1-3 months after the last Master Calendar hearing
 - Individual will give testimony and will have the opportunity to present witnesses and give arguments
 - Usually at least an hour in duration
 - Judge will consider all applications for relief
 - Will typically issue an oral decision at the at the of hearing
- Appeal
 - Individual has 30 days to appeal a decision to the Board of Immigration Appeals, and the appeal process will typically take 3-4 months

Individual Hearing

- Pre-trial:
 - Original documents
 - Motions for telephonic testimony
- At trial
 - Exhibits marked into evidence
 - Opening (not typical)
 - Direct and cross examinations of client and witnesses
 - Closing
 - Decision same day or new date set
 - Final order, if government waives appeal

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