ASYLUM LAW basics

Legal Definition:

- REFUGEE: 8 USC 1101(a), INA 101(a) (42)

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

on account of race, religion, nationality, membership in a particular social group, or political opinion

*If you meet the definition of a refugee, you may qualify for asylum or withholding of removal.*

Benefits of Asylum over withholding:

- Asylees can apply for lawful permanent residency after one year
- Immediate relatives in the U.S. also become asylees when principal applicant does
- Asylees can file petitions to bring immediate relatives living outside U.S. here to the U.S.
  Those immediate relatives enter with derivative asylee status and can then apply for lawful permanent residency.

Why Withholding instead of Asylum?

There are several reasons why a person may qualify for withholding only:

- Withholding is a mandatory form of protection
- Reasons that would bar you from obtaining asylum, such as the one-year filing deadline, firm resettlement in another country, or certain criminal convictions, do not apply to withholding.
- Same is true with Convention Against Torture (CAT) relief

Applying for Asylum:

**Affirmative Asylum Application**

- Apply for asylum by filing an application on Form I-589
- Filed with USCIS (under DHS)
- If in status when application adjudicated and found ineligible, application denied. (Appeal to AAO)
- If out of status when adjudicated, application referred to court and an NTA is issued
- No withholding or CAT relief at this stage

**Defensive Asylum Application**

- In removal proceedings in Immigration Court (EOIR under DOJ)
- Claiming Asylum at US Border or Port of Entry --*expedited removal process*---> if pass this stage, then asylum/withholding/CAT is a defense to removal
Expedited Removal Process:

Under immigration law, all "aliens" who arrive at a Port of Entry or without valid entry documents must be detained and placed into expedited removal proceedings.

- Those who express a fear of persecution or torture receive a credible fear interview.
  - Those found to have credible fear are referred to Immigration Court for Asylum/Withholding/CAT proceedings
- Those who have been previously removed and who express a fear of persecution or torture receive a reasonable fear interview.
  - Those found to have reasonable fear are referred to Immigration Court for “withholding-only” proceedings. (Can also apply for CAT.)

Legal Standards of Proof

CREDIBLE AND REASONABLE FEAR INTERVIEWS:

Credible fear = lower standard than for reasonable fear interview = significant possibility individual could establish eligibility for asylum, withholding, or CAT

Reasonable Fear = higher standard than for credible fear= reasonable possibility individual will be persecuted or tortured

MERITS CASE:

To establish eligibility for asylum: must prove a well-founded fear of persecution on account of protected ground(s)

- More generous than withholding
- Reasonable person standard
- Essentially a 10% chance
- Rebuttable presumption if can establish past persecution

To establish eligibility for withholding: must prove life or freedom would be threatened on account of protected ground(s)

- Clear probability standard = more likely than not = 51% chance
- Still get the rebuttable presumption if can show past persecution
ASYLUM—WHERE TO FIND THE LAW

International sources

1951 UN Convention Relating to the Status of Refugees (the “Refugee Convention”)
1967 UN Protocol Relating to the Status of Refugees (the “Refugee Protocol”)
UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (“CAT”)
UNHCR Handbook on Procedures and Criteria for Determining Refugee Status
UNHCR Executive Committee Conclusions
UNHCR Guidelines
[This is NOT an exhaustive list]

Federal Statutes

INA § 101(a)(42)—Refugee definition
INA § 208—Asylum (eligibility and procedures)
INA § 235—Expeditied removal
INA § 241(b)(3)—Withholding of removal
INA § 212(d)(5)—Parole

Federal Regulations

Please note: to account for the division of authority over immigration matters between the Department of Justice (DOJ) and the Department of Homeland Security (DHS), the immigration regulations at 8 CFR Chapter 1 (the old INS regs) have been duplicated into a new 8 CFR Chapter V, creating a parallel set of regulations for the Executive Office for Immigration Review (part of DOJ). Section numbers for the EOIR regs = section numbers for the DHS regs + 1000. Example: 8 CFR § 208 (asylum eligibility & procedures) on the DHS side appears in the EOIR regs as 8 CFR § 1208.

8 CFR § 208/1208—Asylum and withholding eligibility and procedures
8 CFR § 235/1235—Expeditied removal
8 CFR § 208.16, 17, 18—CAT relief
8 CFR § 212.5/1212.5—Parole
8 CFR § 1003—EOIR regulations (= immigration courts + BIA)

Case law

U.S. Supreme Court decisions
Attorney General Decisions
BIA precedential decisions
U.S. Court of Appeals decisions
U.S. District Court decisions

The Immigration Court Practice Manual, as well as BIA decisions, handy links to the regs, and an array of other useful materials, are available on the EOIR website:
http://www.justice.gov/eoir/