



National Immigrant Justice Center

Know Your Rights

Information on Seeking Asylum in the United States for Detained Immigrants
who are Lesbian, Gay, Bisexual, Transgender or HIV-Positive

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Know Your Rights, Information on Seeking Asylum in the United States for Detained Immigrants who are Lesbian, Gay, Bisexual, Transgender or HIV-Positive, © 2009 Heartland Alliance's National Immigrant Justice Center

INTRODUCTION

You are currently detained by the Department of Homeland Security (DHS), an agency of the United States government. DHS says that you may not have the right to stay in the United States. You should contact an attorney to seek legal counsel. The National Immigrant Justice Center is available to provide legal counsel and provide legal referrals. You can contact the National Immigrant Justice Center at its toll free number: (312) 263-0901.

This document is for people who are afraid to return to their home countries because they are lesbian, gay, bisexual or transgender (LGBT) and/or due to their HIV status. You may have a defense against deportation if you fear you will be harmed or tortured if you are deported to your home country. **This manual is a guide and resource. It is not intended to serve as a substitute for legal counsel. You should attempt to obtain a lawyer.**

There are three types of protection available to people who fear harm in their home countries: (1) Asylum (2) Withholding of Removal and (3) Relief under the Convention Against Torture (CAT). Asylum requires that you show that there is a one in ten chance that you will be persecuted in your home country because of your LBGT or HIV status. Withholding of removal is similar to asylum, but requires that you show there is a more than 50 percent chance you will be persecuted. This defense is available to people who may not qualify for asylum because of criminal convictions, because they did not file for asylum within one year of arriving in the United States or because they have already been ordered removed. CAT relief is available to people who can show they will be tortured by the government in their home countries.

WHAT HAPPENS NEXT?

Credible and Reasonable Fear Interviews

Depending on how you entered the United States and why you were taken into custody, your first step in the asylum process may be a “credible fear interview” or a “reasonable fear interview.” If you have already had hearings before an immigration judge, you will not have either of these interviews and should tell the judge you wish to apply for asylum at your next hearing.

CREDIBLE FEAR INTERVIEW

If you attempted to enter the United States without valid travel documents and were detained at or near a port of entry and you told the immigration officials that you have a fear of returning to your country because of your LGBT identity and/or HIV status, you should be given a “credible fear interview.”

You will be interviewed by an asylum officer. If the officer believes there is a significant possibility that you will be persecuted, you will pass the interview and will be allowed to apply for asylum before an Immigration Judge.

REASONABLE FEAR INTERVIEW

If you have previously been ordered deported and you came back to the United States, or you were ordered deported and never left, DHS will seek to remove you using your old deportation order. If you are afraid of returning to your country because you are LGBT and/or HIV positive, you must request a “reasonable fear interview” in order to seek protection in the United States.

You must also request a “reasonable fear interview” if you have been convicted of a crime that is considered an aggravated felony and you are not a lawful permanent resident of the United States.

You will be interviewed by an asylum officer. If the officer believes there is a reasonable possibility that you will be persecuted or tortured, you will pass the interview and will be allowed to apply for withholding of removal and/or relief under the Convention Against Torture before an immigration judge.

At your interview ...

If you fear you will be harmed in your country because you are LGBT, or because you are HIV positive, you should tell the asylum officer in your credible or reasonable fear interview. You may consult with a lawyer before the interview, and your lawyer may attend the interview with you.

At your interview, the asylum officer will ask you to describe:

- Any experiences of persecution, torture or other harm that you experienced in the past
- Why you fear you will be persecuted or tortured in the future
- Whom you fear
- Whether you have had any other experiences (in any country, including the United States) that may place you at risk of persecution or torture.

It is extremely important that you tell the truth. Any statement you make at the credible or reasonable fear interview may be reviewed by the judge who ultimately decides your case.

After your interview, the asylum officer will decide whether you passed. If you are found not to have a credible or reasonable fear of persecution, you can appeal the decision to an immigration judge. If the immigration judge agrees with the asylum officer, there are no more appeals and you will be removed from the United States. If you pass, you will be permitted to apply for asylum, withholding of removal and/or relief under the Convention Against Torture.

PAROLE

If you have been stopped by the DHS at a port of entry (for example, the border or airport), are seeking asylum and have passed your credible fear interview, you can request “parole” from the DHS. When you request parole you are asking the immigration authorities to release you from custody while your asylum proceedings are pending. To request parole, you will need to submit a letter in writing to the immigration authorities who are currently detaining you. In your letter, you must show that you:

- Have documents confirming your identity, such as your passport or identity card;
- Have a “sponsor” such as a relative or friend in the U.S. who knows you well, can provide you food and housing if you are released, and can commit to helping you appear at future immigration obligations;
- Are committed to appearing at future immigration obligations; and
- Do not pose a threat to the community (for example, you do not have a criminal record within or outside the U.S.).

Your request for parole will be considered more favorably if you are able to obtain an “affidavit” or letter from your sponsor. In their letter, your sponsor should state that they know you well, can offer you food and a place to stay, and will help make sure that you appear at all future immigration obligations.

BOND RE-DETERMINATION HEARING

If you were *not* detained at a port of entry, are seeking asylum and have passed your credible fear interview, you may ask a judge to order your release under bond while your asylum proceedings are pending. You may be eligible for a bond if you: (1) physically entered the country but were apprehended by the DHS in the interior of the country (you are not an “arriving alien”); (2) are in removal proceedings, but do not yet have a final order of removal; and (3) have not been convicted of certain crimes. You should consult with an attorney to assess whether you are eligible for bond. Note that generally, if you are in removal proceedings following a *reasonable fear interview*, you will *not* be eligible for bond.

WHAT IS A BOND?

A bond is an amount of money paid to the DHS to guarantee that you will appear in court for all of your hearings and obey the order of the immigration judge. If you attend all of your hearings, and obey the judge’s order, then the money will be returned to the person who paid the bond at the end of the proceedings (regardless of whether you win or lose). If you do not appear in court, the money is not returned and you may be ordered removed or deported by the immigration judge.

If you are eligible for bond, the immigration judge has the power to set a bond, and to raise or lower the amount set by the DHS. The immigration judge will look at two main factors in deciding whether to set a bond or change the bond amount set by the DHS:

- 1. Whether you will be a danger to the community; and**
- 2. Whether you will be a flight risk if you are released.**

To decide whether you will be a **danger to the community** if you are released from DHS custody, the immigration judge will consider:

- The nature and seriousness of your criminal record; and
- Any efforts toward reforming or rehabilitating yourself.

To decide whether you will be a **flight risk**, the immigration judge will look to see if you:

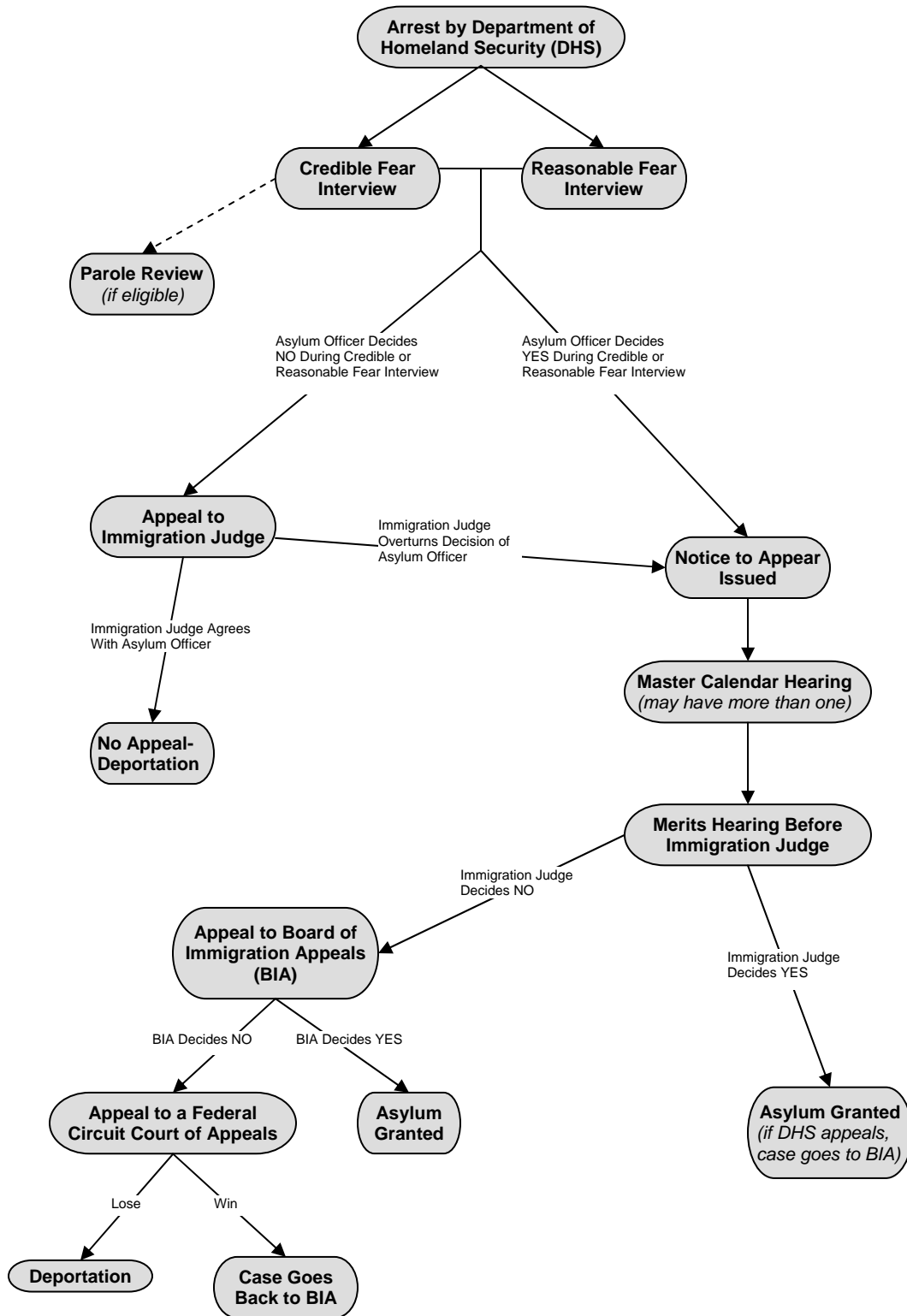
- Have any ties to family in the U.S.;
- Have any ties to the community where you want to live;
- Previously worked in the U.S. and have a job if you are released;
- Own any property in the U.S.; and
- Have any defense to your removal or deportation (for example, an asylum claim based on your LGBT status).

The law states that the minimum bond amount is \$1,500. You, your family or friends will have to pay 100% of the bond amount to the DHS. The money will be returned to the person who pays the bond if you obey the judge’s orders.

The DHS trial attorney may object to a bond in your case or may disagree with the amount you request. The final amount of the bond will be determined by the judge after considering all of the factors you and the DHS attorney present in court. You are encouraged to ask the immigration judge to set or lower the bond to the minimum amount that you can pay.

Steps in the Asylum Process

For Detained Asylum Seekers



SEXUAL ORIENTATION AND HIV STATUS AS A BASIS FOR ASYLUM

In 1990, the Board of Immigration Appeals, the administrative body that hears appeals of immigration court decisions, found that being gay could be the basis for winning asylum in the United States. Being gay or lesbian alone, however, is not enough to win asylum. In addition to being gay or lesbian, you must show that:

- You were persecuted in the past because of your sexual orientation;
- You have a well-founded fear of persecution in your home country because of your sexual identity; or
- Your life or freedom will be threatened because of your homosexuality.

If you identify as transgender or if you feel that your biological sex does not match your gender identity, you also may be eligible for asylum.

If you are HIV-positive or have AIDS, you may be eligible to apply for protection in the United States if you can prove that you will suffer persecution or torture as a result of your HIV status.

A successful asylum claim on the basis of sexual orientation or HIV status must have *all* of these elements:

1. You have a well-founded fear that you will be persecuted if you return to your home country, or you suffered persecution there in the past because you are lesbian, gay, bisexual, transgender and/or HIV-positive.
2. The threat or persecution comes from a governmental official (for example, a police officer), or someone the government is unwilling or unable to control.
3. The persecution you suffered in the past or that you fear will happen in the future is due to your identity as a lesbian, gay, bisexual or transgender or due to your HIV status.

DEFINING PERSECUTION

What is persecution?

- **Persecution may be physical, emotional or psychological.** Some of the most recognized forms of physical persecution include beatings, torture, kidnapping and confinement, but other forms of abuse may constitute persecution and entitle you to protection.
- **Rape and sexual assault of a gay person on account of his or her sexual or gender identity is persecution.** In the case of *Hernandez-Montiel*, the court found that there was persecution when a “gay man with a female sexual identity” was detained, strip searched, sexually assaulted, and raped by police officers on more than one occasion and sexually assaulted and attacked by a group of men.¹
- **Forced institutionalization, electroshock treatments and drug injections may also constitute persecution.** Harmful medical or psychological “treatments” to “cure” your sexual orientation or gender identity, even if your persecutor believed such treatments would be good for you, may be persecution.²
- **In some instances severe forms of discrimination will amount to persecution.** For example, if you are denied or lost a job or if you are unable to travel safely within your country because of your LGBT identity, these forms of discrimination may be considered persecution.

What is not persecution?

- **Lack of access to adequate medical treatment generally is not considered persecution.** If you are HIV-positive or have AIDS, the fact that you cannot receive proper medical treatment in your home country generally is not enough to establish eligibility for asylum.
- **Generally, harassment and discrimination based on your LGBT status will not constitute persecution.** If you suffered only a few isolated incidents where people verbally harassed you because you are LGBT, this will not rise to the level of persecution, unless you can show there is a high likelihood you will face more severe persecution if you are returned to your home country.

¹ *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

² *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (citing *Sagermark v. INS*, 767 F.2d 645, 650 (9th Cir. 1985)).

ESTABLISHING A WELL-FOUNDED FEAR OF PERSECUTION

- **You must show that you suffered harm in the past or will be harmed in the future—but you do not have to show both.**

You may be granted asylum based on past persecution alone. Or, if you have not suffered harm in the past, you may be eligible for asylum if you can demonstrate that, because of your LGBT identity or HIV-positive status, you have a well-founded fear that you will be harmed if you return to your home country.

- **You do not need to show that threats of future harm are currently being directed toward you specifically, if you believe that would people would harm in the future, if they knew that you are LGBT or HIV-positive.**

“Pattern or Practice”

Persecution against a group of individuals, such as people who are LGBT or HIV-positive, must be systematic, pervasive, or organized in order to amount to a pattern or practice sufficient for establishing a well-founded fear of persecution.

Evidence that will help your case:

- Any evidence that you can obtain that shows that you suffered persecution in your country because of your LGBT identity is invaluable to your case. Evidence could include: medical reports, police reports, photographs or letters from people who witnessed your abuse.
- To prove that you have a well-founded fear of future persecution, you need to provide documentation from reputable sources in order to show that a pattern of mistreatment of LGBT individuals exists in your country. These could be reports from the United States State Department, Amnesty International or Human Rights Watch. You could also use affidavits written by individuals such as professors or human rights workers to support your case.
- Your candid, credible and sincere testimony will establish your genuine fear of persecution. You should write out a description of the experiences you have had. Include as many dates and details as possible. Be prepared to explain your story verbally to the immigration judge at court.
- An essential component of your asylum application will be proving that you are gay. You may include testimony or documentation of past partners or friends who know that you are gay.

FILING YOUR ASYLUM APPLICATION

Asylum seekers who are detained must file applications for asylum, withholding of removal and/or relief under the Convention Against Torture in immigration court.

- Make sure the immigration judge knows you wish to submit an application.
- The court should give you an application to complete and give you instructions about when you must file the completed application.
- Be sure to ask the judge if you have any questions about when your application is due.

**You must file your asylum application within one year
after the date you entered the United States.**

If you do not file your application within one year, you cannot apply for asylum unless you can show that there are “changed or extraordinary circumstances” that caused the delay in filing your application. In order for you to be eligible for an exception to the one-year rule, you must file your application within a reasonable period of time after the changed or extraordinary circumstances occur. Please see the following page for more information about what constitutes “changed or extraordinary circumstances.”

The one-year deadline applies only to asylum applications and not withholding of removal or relief under the Convention Against Torture.

Changed and Extraordinary Circumstances

Changed circumstances means that you did not fear returning to your home country when you first arrived in the United States, but conditions have changed and you now fear returning.

Examples of changed circumstances in your home country include:

- Criminalization of same-sex relations
- People in your country discovering that you are gay and threatening you
- Change to a homophobic government.

Examples of changed circumstances that you may experience after coming to the United States include:

- You have come out as gay or lesbian
- You received an HIV diagnosis
- You underwent medical steps to transition from male to female or female to male.

Extraordinary circumstances means that something prevented you from filing the application within the one-year deadline. You must show that you did not create the circumstances through your own action or inaction.

Extraordinary circumstances include:

- Serious illness or mental or physical disability. For example, you may have suffered from post-traumatic stress disorder as a result of the harm you suffered in your country because you are LGBT, or you may have experienced major depression because you have had difficulty coming to terms with your sexuality because homosexuality is greatly stigmatized in your country.
- Legal disability. For example, you are under 18 years of age and are without a parent or legal guardian in the U.S.
- Ineffective assistance of legal counsel. For example, if your lawyer never informed you about the possibility of applying for asylum based on sexual orientation, gender identity or HIV status.
- Maintenance of lawful status. For example, you came on a student visa and you “came out” while you were studying in the United States, or you found out you were HIV positive while working or studying in the United States. You must submit your asylum application within at least six months of your lawful status expiring.
- Improperly filed application within the one-year period. For example, you filed an application for asylum within one year, but it was rejected because it was not properly filed.
- Death or serious illness of a legal representative or family member.

OTHER FORMS OF IMMIGRATION RELIEF FOR LGBT OR HIV-POSTIVE INDIVIDUALS

Family-Based Immigration: U.S. Law and Gay & Transsexual Marriage

U.S. immigration law is governed exclusively by federal law, and current federal law defines marriage as “a legal union between one man and one woman as husband and wife.” If you married your same-sex partner in a state that allows gay marriage, or in another country where gay marriage is recognized, you will *not* receive any immigration benefits in the United States.

If you married in the United States and your spouse is transgender or transsexual, immigration officials should look to the law of the U.S. state where the marriage took place. If your marriage was considered legally valid there, it should be valid for immigration purposes.³ *As long as the state considers your marriage to be a valid opposite-sex marriage, you may qualify for immigration benefits through your spouse.*

If you are married to someone of the opposite sex who is a United States citizen or a lawful permanent resident, your spouse may be able to file immigration papers for you. You should speak with an attorney immediately. You may also qualify for immigration benefits if your parents are lawful permanent residents or U.S. citizens, if you have a child over the age of 21 who is a U.S. citizen, or if you have a sibling over the age of 21 who is a U.S. citizen who filed an application on your behalf long ago.

³ *Matter of Lovo-Lara*, 23 I. & N. Dec. 746 (BIA 2005).

U-Visa Relief

U-Visas are visas that allow individuals who have been victims of certain crimes to remain in the United States if the head of a law enforcement agency certifies that the individual has been or could be of assistance in the investigation or prosecution of the crime. If you have been a victim of certain crimes, you may qualify for a U-Visa. If you are granted a U-Visa, you are eligible to work and remain legally in the U.S. for up to 4 years. After 3 years of continuous residence in the U.S. under a U-Visa, you may apply for lawful permanent residence (green card).

The U-Visa is especially important for LGBT individuals who have been victims of domestic violence and do not qualify for other immigration relief because same-sex marriage is not legally recognized under United States immigration law.

To qualify for a U-Visa, you must show:

Crimes that may qualify for a U-Visa

| | |
|---------------------------|---|
| Rape | Slave Trade |
| Torture | Kidnapping |
| Trafficking | Abduction |
| Incest | False Imprisonment |
| Domestic Violence | Obstruction of Justice |
| Sexual Assault | Perjury |
| Prostitution | Attempt, conspiracy or solicitation to commit any of these crimes, or any |
| Sexual Exploitation | “similar activity” |
| Female Genital Mutilation | |
| Being Held Hostage | |
| Peonage | |
| Involuntary Servitude | |

- 1) You suffered substantial mental or physical harm as a victim of certain criminal activity;
- 2) You possess information concerning that criminal activity;
- 3) You have been helpful, are being helpful, or are likely to be helpful to federal, state or local law enforcement in investigating or prosecuting the criminal activity; and
- 4) The criminal activity occurred in the United States or violated U.S. law.

Cooperation with law enforcement is crucial to obtaining a U-Visa. You may be required to provide statements and/or testify against the offender to qualify for a U-Visa.

TREATMENT IN DETENTION

As an individual detained by the United States government, you have numerous constitutional and other rights, **regardless of your immigration status**. The government should issue a document called the “National Detainee Handbook.” If you have not received this handbook, please request it. Your rights include:

- The right to medical treatment (including mental health services). Among other things, you must be provided with medication if needed and must be able to see a doctor if you wish.
- The right to contact your attorney or to find an attorney. You can request that the facility allow you to fax or mail documents, and should be able to access phones for making collect or prepaid calls.
- The right to be free from discrimination due to LGBT identity or HIV status, or any other religious, political, or ethnic discrimination.

A fuller discussion of your rights is contained in the National Detainee Handbook. If you believe your rights have been violated, you can file a complaint with your local jail, with your deportation officer, or can contact NAPSM.

CONTACT US

If you have questions about your case, contact the National Asylum Partnership on Sexual Minorities at the National Immigrant Justice Center at (312) 263-0901. You may call collect if you are detained. You may also send your questions by mail to:

National Asylum Partnership on Sexual Minorities (or NAPSM)
c/o National Immigrant Justice Center
208 S. LaSalle Street, Suite 1818
Chicago, IL 60604

If you are in need of country conditions documentation to support your claim for asylum based on your sexual orientation, gender identity or HIV status, contact our San Francisco office at:

National Asylum Partnership on Sexual Minorities (or NAPSM)
Asylum Documentation Project
P.O. Box 558
San Francisco, CA 94104-0558
Tel: (415) 398-2759