



## **Section III:** ***Alternatives to Asylum***

## 1. Withholding of Removal

Another type of protection available to individuals fleeing persecution, though not as beneficial as asylum, is withholding of removal. [INA § 241\(b\)\(3\)](#); 8 USC § 1231(b)(3). Unlike asylum, withholding is not subject to a one-year filing deadline. In addition, withholding is a mandatory form of relief; not discretionary like asylum. Withholding is usually sought in the following situations: the client filed after the one year deadline and does not have legally sufficient reasons for doing so, *or* the client has committed an aggravated felony, making him or her ineligible for asylum; *or* there are negative factors in the client's past such as a criminal history that is not felonious but which makes a discretionary grant of asylum questionable; *or* the client is ineligible for asylum due to other factors.

**Tip!** Withholding of removal should always be sought in the alternative when filing for asylum.

The benefits under withholding are limited. An individual who is granted withholding cannot be removed from the United States to the country from which he or she was fleeing persecution, but can be removed to a third country if one is available. The individual may not adjust his or her status to legal permanent residency, but can obtain work authorization. The individual is also not eligible for family reunification. Further, those granted withholding of removal only are not eligible for a refugee travel document or provided with permission to re-enter the United States without securing advance parole – effectively requiring the person to remain in the United States to maintain status.

A grant of withholding of removal is country specific, and requires the Judge to enter an order of removal if that is the only relief granted. [Matter of I-S- & C-S-](#), 24 I&N 432 (BIA 2008). Therefore the order frequently is "Client is ordered removed to any country other than X (country of citizenship/nationality)." If the client in fact has status or is able to be removed to another country, that removal order can be executed. Withholding simply protects the client from removal to the country where he or she fears persecution.

### Test for Withholding of Removal

In order to satisfy the test for withholding of removal, an individual must show a clear probability of persecution by the government or a group the government cannot control on account of one of the protected grounds. [INS v. Stevic](#), 467 U.S. 407 (1984). This is a more difficult burden (greater than 50% chance of persecution) to meet than that for asylum. As in asylum, however, if the individual can show that she suffered persecution in the past, then that individual will receive the benefit of a presumption of a well-founded fear of future persecution. Further, withholding of removal is mandatory if the individual meets the above clear probability test and establishes that he or she is not barred from eligibility.

### Bars to Eligibility for Withholding of Removal

An individual is not eligible for withholding of removal if he or she:

1. Is a *persecutor*; or
2. Has been convicted of a *particularly* serious crime. [Matter of Y-L, A-G-, R-S-R-](#), 23 I&N Dec. 270. (A.G. 2002). An aggravated felony conviction does not automatically bar an applicant from withholding of removal unless he received a sentence of five or more years, imposed or suspended. An aggravated felony is presumed to be "particularly serious." See [INA § 241 \(b\)\(3\)\(B\)](#). Again, other crimes not rising to the level of an

aggravated felony may also bar an individual from withholding of removal if found to be particularly serious. In determining whether a crime is particularly serious, the court will consider:

- a. The nature of the crime, i.e. was it against a person or property;
- b. The circumstances surrounding the crime; and
- c. The length of the sentence.

**Tip!** Increasingly, Withholding of Removal is being offered by the counsel for the government (Office of Chief Counsel) in certain asylum cases as a sort-of “plea bargain.” It is important to discuss the benefits and drawbacks of withholding with your client in removal proceedings prior to the final hearing so that he or she understands the difference between withholding and asylum. Particularly where the client has family members overseas that he or she may wish to petition to bring to the U.S., withholding is a less attractive option and may not benefit the client. Furthermore, clients granted withholding of removal are now regularly referred to the Detention and Removal section of Immigration and Customs Enforcement for a “custody review” which may result in the client being placed on an electronic monitoring program or being required to comply with monthly in-person check-ins, or other requirements, including applying for a passport from third countries.

## 2. Convention Against Torture/Deferral of Removal

The United Nations [Convention against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment \(CAT\)](#)<sup>1</sup> prohibits the return of a person to a country where substantial grounds exist for believing that he or she would be in danger of being subjected to torture. [Matter of Y-L, A-G-, R-S-R-](#), 23 I&N Dec. 270 (A.G. 2002); *See also* [Matter of S-V-](#), 22 I.&N. Dec. 1306 (BIA 2000). The ability to raise a claim for relief from removal under the CAT was incorporated into U.S. domestic immigration law. *See* [8 U.S.C. § 1231](#). A CAT claim may be raised even after a final order of removal/deportation has been issued.

**Tip!** The advantage to CAT is that there are no bars to eligibility. Therefore, since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, an applicant is not required to establish his or her fear if torture is on account of race, religion, nationality, political opinion, or membership in a social group.

There are two separate types of protection under CAT. *See* [8 C.F.R. § 208.16 - 17](#). The first type of protection is a form of withholding under CAT. Withholding under CAT prohibits the return of an individual to his or her home country. It can only be terminated if the individual's case is reopened and the DHS establishes that the individual is no longer likely to be tortured in his or her home country. The second type of protection is called deferral of removal under CAT.

Deferral of removal under CAT is a more temporary form of relief. Deferral of removal under CAT is appropriate for individuals who would likely be subject to torture, but who are ineligible for withholding of removal, such as persecutors, terrorists, and certain criminals. It is terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to his or her home country. Additionally, if an individual were granted deferral of removal under CAT, the DHS would still be able to detain an individual already subject to detention.

Like withholding of removal, the benefits to CAT are limited. An individual with a successful CAT claim cannot be removed from the United States to the country from which he or she fled persecution, but can be removed to a third country if one is available. The individual may not adjust his or her status to legal permanent residency, but can obtain work authorization. Further, a person granted relief under CAT has no opportunity for family reunification or travel outside the United States.

### Definition of Torture

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

<sup>1</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

official capacity. CAT, Art. 1., [8 C.F.R. § 208.18](#). The Board of Immigration Appeals interpreted the definition of torture as “an extreme form of cruel and inhuman punishment and [that] does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment.” [Matter of J-E-](#), 23 I&N Dec. 291 (BIA 2002). The Board also found that indefinite detention, without further proof of torture, does not constitute torture under this definition. *Id.*

The standard of proof under CAT is higher than the standard for asylum. Here, the alien must prove that it is “more likely than not” that he or she would be tortured if forced to return. [Matter of G-A-](#), 23 I&N Dec. 366 (BIA 2002). The evidentiary proof for torture is very similar to the proof for asylum or withholding claims. All relevant considerations are to be taken into account, including, where applicable, the existence in the state concerned of a “consistent pattern of gross, flagrant or mass violations of human rights.”

### Procedure for Raising CAT Claims

Individuals seeking relief under the CAT must bring their claim before an Immigration Judge. The procedure for filing a claim under the CAT will differ depending on certain factors, including the status of an individual’s case. If your client is filing for asylum, he or she would request relief under withholding of removal and CAT in his or her [I-589](#) asylum application and should include the following information:

**Tip!** Remember that relief under the Convention Against Torture is not as beneficial as asylum. Thus, we recommend that you include a CAT claim in the alternative while seeking asylum. If you believe that your client has a potential CAT claim, please contact The Advocates for further information.

- The type of torture he or she is likely to experience if forced to return to his or her country;
- Any past instances of torture that he or she has experienced;
- Any past instances of torture experienced by close family members and associates; and
- Documentary support showing related human rights abuses by the government of his or her country, such as the U.S. State Department’s Human Rights Country Reports, Amnesty International Reports, Human Rights Watch reports, and reports from other human rights monitoring groups.

If your client has already filed an [I-589](#), but did not mention withholding of removal and CAT, she should supplement the application with the above information.

### 3. Voluntary Departure

Individuals who do not qualify for any of the aforementioned forms of relief may qualify for voluntary departure. [INA § 240B](#). Voluntary departure permits an individual, who is otherwise removable, to depart from the U.S. at his or her own expense within a designated amount of time in order to avoid a final order of departure. However, voluntary departure is not available in all cases. [INA § 240B\(c\)](#).

Voluntary departure may be preferable to a final removal order for a number of reasons. If an individual is issued a removal order he or she may be barred from reentering the U.S. for up to twenty years and may be subject to civil and criminal penalties if he or she enters without proper authorization. If the individual voluntarily departs within the time ordered by the court, he or she will not be barred for legally reentering in the future. In addition, an individual with a final

**Caution!** If your client is granted voluntary departure in lieu of removal from the United States and appeals the Immigration Judge's denial of asylum, the voluntary departure period will be stayed until the Board of Immigration Appeals issues a decision. If your client petitions for review to a federal court, the voluntary departure period is not automatically stayed and could expire, affecting your client's ability to obtain other immigration benefits in the United States. Please discuss with your consulting attorney or The Advocates, if this is or may be your client's situation.

removal order is barred from applying for ten years for cancellation of removal, adjustment of status and other immigration benefits.

It is important to exercise caution in agreeing to voluntary departure. If the individual fails to depart, he or she will be barred from applying for adjustment of status, cancellation of removal, voluntary departure, change of status and any other benefits for a period of ten years and can be subject to monetary fines up to \$5000.00. [INA § 240B\(d\)](#). In the past, voluntary departure was applied for in almost any case in which the applicant was eligible. However, now that appeals are longer and more protracted, voluntary departure may result in more harm to the client's options.

Particularly in cases where a client may be considering alternative immigration options, such as a petition by a spouse or family member, the penalties for overstaying the voluntary departure order will detrimentally affect his or her ability to acquire status through the other options.

An individual may apply for voluntary departure either prior to the Master Calendar hearing or at the conclusion of proceedings, provided that the individual meets the necessary requirements.

#### Voluntary Departure through Withdrawal of Asylum Application

If the application for voluntary departure is made prior to, or at the Master Calendar hearing, the individual must show that he or she:

- Waives or withdraws all other requests for relief;
- Concedes removability;
- Waives appeal of all issues;
- Has not been convicted of an aggravated felony and is not a security risk; and
- Shows clear and convincing evidence that he or she intends and has the financial ability to depart

If the individual is able to meet these requirements, then the Immigration Judge may grant a voluntary departure period of up to 120 days at the time of the Master Calendar hearing. See [INA §240 B \(a\)](#), [8 C.F.R. §240.25](#). The Judge may not grant voluntary departure under [8 C.F.R. §240.26\(b\)\(E\)\(ii\)](#) beyond 30 days after the Master Calendar at which the case is initially scheduled, except pursuant to a final stipulation.

### Voluntary Departure as an Alternative to a Removal Order

An individual may also apply for voluntary departure after the conclusion of proceedings, provided that the individual meets the following requirements:

- Shows physical presence for one year prior to the date the Notice to Appear was issued;
- Shows clear and convincing evidence that he or she intends and has the financial ability to depart;
- Pays a bond of \$500-\$2000 within 5 calendar days of the judge's decision;
- Shows good moral character for five years prior to the application; and
- Presents to the DHS a valid passport or other travel document sufficient to show lawful entry into his or her country, unless such document is already in the possession of the DHS or is not needed in order to return to his or her country.

**Tip!** Clients will be required to present a valid, unexpired passport and clear and convincing evidence of eligibility to enter a third country to qualify for voluntary departure.

If the client meets these requirements, the Immigration Judge may grant voluntary departure for a period of up to 60 days. See [INA § 240B\(b\)](#); [8 C.F.R. § 240.11\(b\)](#).

## 4. Temporary Protected Status

Temporary Protected Status (TPS) is available to individuals whose home countries have been designated by the Attorney General as unable to handle the return of their nationals. In order to receive TPS, an individual must prove that he or she:

- Is a citizen or national of the designated country
- Was in the United States on or before the date of the designation
- Has been residing continuously in the United States since the designation.

Individuals with TPS are permitted to work and may not be deported during the period of protection. Those who qualify for TPS must register with the government every year in order to receive and maintain TPS status. The government can deny TPS status to anyone failing to register in a timely manner.

Asylum applicants who qualify for TPS should consider filing and maintaining TPS. There is no conflict between the two applications, and should asylum be denied, TPS would allow the individual to remain and work in the United States so long as TPS is designated for their country. The Attorney General designates the amount of time, usually 6 to 18 months, during which time individuals from particular countries will be afforded protection. The Attorney General may renew TPS designation for a particular country if he or she is convinced that unsafe conditions in the country persist. When TPS expires, the applicant may receive a Notice to Appear and be placed in removal proceedings. The attorney and client must therefore weigh the risks and benefits to applying for TPS.

Because TPS is granted for short periods of time, you should consult the [DOJ TPS Website](#) to verify which countries are currently designated for TPS. As of March, 2010, the following countries were designated for TPS: El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan. Also, Liberians can take advantage of [Deferred Enforced Departure](#) until September 30, 2011. If you have a client from any of these named countries, check the USCIS website for eligibility requirements.

### Applying for TPS or a Renewal of TPS

**Tip!** Please review the instructions on the USCIS website and form carefully if you are assisting a client with TPS as changes occur from year to year.

To file for TPS for the first time or for a renewal, [Form I-821](#), Application for Temporary Protected Status and [Form I-765](#), Application for Employment Authorization must be submitted. The I-765 is used for information gathering purposes, and must accompany the TPS application, regardless of whether work authorization is actually sought.

If work authorization is not sought, or if employment has already been authorized, no fee is required for the employment authorization form. If work authorization is sought, then the fee (or fee waiver request with affidavit in accordance with [8 C.F.R. § 244.20](#)) must be submitted with the [I-765](#). The Advocates is available to assist clients with the filing of their TPS applications, as are a number of free walk-in clinics. Please also note that someone who did not file when TPS was originally designated may still be qualify for a late filing exception.

## 5. “T” Visas for Victims of Trafficking

In October 2000, Congress signed into law the [Victims of Trafficking and Violence Protection Act of 2000](#). This law created a new visa, the “T” visa, which intends to protect victims of “severe forms of trafficking.” This includes victims of sex trafficking, who were recruited, harbored or transported for the purpose of commercial sex acts such as prostitution. It may also include individuals who were recruited, harbored or transported for labor services, involuntary servitude, slavery or debt bondage through the use of force, fraud or coercion. To be eligible for a “T” visa the applicant must show the following:

- The applicant is or has been a victim of a severe form of trafficking;
- The applicant is present in the United States on account of such trafficking;
- The applicant has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or has not attained 18 years of age; and
- The applicant would suffer extreme hardship involving unusual and severe harm if removed from the United States.

The Act provides for 5000 “T” visas to be awarded each year. The law also provides that victims of trafficking who are detained should be housed in appropriate facilities, not in correctional facilities. It also mandates that DHS provide the necessary medical care and protection from the traffickers. Victims of severe forms of trafficking need not have obtained a “T” visa to be eligible for certain public benefits. However, the Office of Refugee Resettlement must certify them as “victims of a severe form of trafficking.”

**Tip!** Please contact The Advocates if you believe your client is a victim of trafficking. The Advocates is able to provide appropriate referrals.

## 6. “U” Visas for Victims of Criminal Activity

The [Victims of Trafficking and Violence Protection Act of 2000](#) also created the “U” visa, for immigrant victims of certain criminal activity who assist law enforcement in the investigation or prosecution of the crime. Potential applicants must meet the following criteria:

- Suffer substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity;
- Be in possession of information about the criminal activity of which he or she was a victim;
- Be of assistance to a Federal, State or local law enforcement agency or prosecutor or a Federal or State Judge or the Department of Homeland Security or other Federal, State or local authority investigating or prosecuting criminal activity; and
- The criminal activity must have violated U.S. law or occurred in the U.S.

**Tip!** Please contact The Advocates if you believe your client is a victim of a crime and may qualify for a U visa. The Advocates is able to provide appropriate referrals.

See [INA § 101\(a\)\(15\)\(U\)\(i\)](#). The particular crimes that qualify under the U visa regulations are listed at [INA § 101\(a\)\(15\)\(U\)\(iii\)](#).

## 7. Violence Against Women Act (VAWA) Relief

In 2005, Congress reauthorized the [Violence Against Women Act](#). The law grants immigration exemptions to abused immigrant women and children. The Act gives women a chance to petition for exemptions to INA § 245(c), which prohibits immigrants who accept “unauthorized employment prior to filing an application for adjustment of status.” To be eligible for this exemption, women must show that they were victims of domestic violence in the United States by showing that:

- “The marriage or the intent to marry the U.S. citizen was entered into in good faith” by the petitioner; and
- During the relationship the petitioner or child of the petitioner was battered or was “the subject of extreme cruelty perpetrated by the [petitioner’s] spouse.”

Second preference immigration status is given to petitioners married to lawful permanent residents. This applies to women who:

- Are “the spouse of a lawful permanent resident of the United States; or”
- Believed that he or she married a lawful permanent resident of the United States, where the marriage was illegitimate because of bigamy; or
- Are the spouse of a lawful permanent resident of the United States whose status ended within the past two years due to domestic violence; or
- “Demonstrates a connection between the legal termination of the marriage within the past [two] years and battering or extreme cruelty by the lawful permanent resident spouse.”

The period of continuous physical presence does not end for VAWA petitioners when USCIS notifies them that they are being placed in removal proceedings. The period of continuous presence also does not end if the petitioner was absent from the U.S. as a result of domestic violence.

